

Missouri Attorney General's Opinions - 1938

Opinion	Date	Topic	Summary
1-38	Feb 24	BUILDING AND LOAN.	Fund for withdrawal must be divided pro rata among all shareholder. The "receipts" used in Section 5604 means net receipts. Pro rata share determined from amount actually due.
1-38	May 25	Mr. H. D. Allison	WITHDRAWN
1-38	July 18	ELECTIONS.	Person not qualified elector unless registered.
1-38	July 21	ELECTION.	Supplemental opinion on election opinion dated July 18, 1938.
1-38	Aug 10	Mr. H. D. Allison	WITHDRAWN
1-38	Aug 19	ELECTIONS.	A voter registered in a precinct cannot vote therein after moving permanently to another precinct.
1-38	Sept 21	FEES.	Constable is not entitled to a fee for attending court in a criminal case on a misdemeanor before a justice of the peace.
1-38	Dec 23	COUNTY CLERKS.	Section 11811, as amended, Laws of Missouri, 1933, page 370, does not provide for a definite stated salary for each deputy or assistant county clerk.
3-38	Feb 5	SHERIFF.	Sheriff not entitled to fees for mileage in making investigations.
3-38	June 14	DEPOSITORIES. COUNTY DEPOSITORIES. BANKS AND BANKING.	County depositories required under Laws of Mo., 1937, p. 502, to pledge designated assets to secure public funds, and giving of personal security eliminated.
3-38	June 24	CRIMINAL COSTS.	State, county or prosecuting attorney not liable for costs of dismissal of a felony charge in a preliminary either by prosecuting attorney or justice of the peace.
3-38	Aug 8	TAXATION.	Newspaper publishing list of delinquent lands entitled to only one fee for each description regardless of number of years' taxes due against said land.
3-38	Aug 23	COURTHOUSE BONDS.	By cooperation with Federal Government County Court may build courthouse and provide jail therein, under a courthouse bond issue.
3-38	Oct 5	PROBATE COURT.	Records may be photostated and bound in book. Judge entitled to fee.
3-38	Oct 24	INHERITANCE TAX.	Where a legatee is to receive his legacy tax free, the inheritance tax should be computed upon the total of the legacy and the tax, then deducted therefrom as the tax is to be considered as an interest in

			property.
3-38	Oct 25	Mr. E. J. Arnett	WITHDRAWN
4-38	May 13	UNEMPLOYMENT COMPENSATION COMMISSION.	Where can headquarters be legally located?
5-38	June 20	ADVERTISING.	Construction of Section 4308 R. S. Missouri 1929.
5-38	July 13	DEPUTY COUNTY COLLECTOR.	Need not be twenty one years of age.
5-38	Sept 1	Mr. J. Robert Barton	WITHDRAWN
5-38	Sept 21	ELECTIONS.	Pertaining to amounts a representative may spend for election under Section 10481 R.S. Missouri 1929.
6-38	Apr 7	SHERIFFS. SALARIES AND FEES. DUTIES. BOARD OF EQUALIZATION.	Sheriff or his deputy must be in attendance of the court for which he claims a fee of \$3.00 per day. Sheriffs in counties not under township organization are not required to open board of equalization, and are not entitled to receive three dollars per day while board is in session.
6-38	Apr 9	ROADS & BRIDGES.	County Court may not draw warrant in favor of overseer of districts under Section 7868, until his account is presented and audited by Court.
6-38	May 10	SCHOOLS. TEACHERS. RENEWAL OF CERTIFICATE.	Teachers' certificates maybe renewed. When?
7-38	Jan 28	Hon. Nat W. Benton	WITHDRAWN
7-38	Jan 31	COUNTIES. MATERIAL RELIEF.	Contracts of a county beyond statutory powers are void.
7-38	Mar 23	Mr. Nat W. Benton	WITHDRAWN
8-38	June 3	CRIMINAL PROCEDURE. RECOGNIZANCE OF WITNESS. JUSTICE OF THE PEACE.	Recognizance of witnesses taken by justice of the peace in a felony case should be for appearance of witness in circuit court and in case such witness refuses to give such recognizance and is committed, he should only be held under such order of commitment of the justice until the day he is required to appear in circuit court after which time the recognizance for appearance should be required by the circuit court.
9-38	May 4	STATE PURCHASING AGENT.	No authority to sign contract for architectural services for construction of Missouri Building at 1939 New York World's Fair.

9-38	June 16	STATE PURCHASING AGENT. PURCHASE OF SUPPLIES ON OPEN MARKET. APPROVAL OF GOVERNOR.	Purchasing agent should have the approval of the Governor before purchasing supplies on the open market and such approval should be had for each and every transaction.
9-38	June 30	STATE PURCHASING AGENT.	Right to dispose of property owned by the State or any department thereof.
9-38	Aug 16	Hon. George Blowers	WITHDRAWN
9-38	Nov 28	CRIMINAL LAW. OBSCENE PUBLICATIONS.	Section 4266 R.S. Missouri 1929 includes publications about all persons whether real or imaginary.
10-38	Jan 17	INTOXICATING LIQUOR.	Place may be partitioned so as to constitute two premises, thereby permitting the sale of intoxicating liquor in original package on one premises and beer by the drink on the other, under certain conditions.
10-38	Jan 19	INTOXICATING LIQUOR.	Supervisor may disregard corporate fiction and refuse license to president and principal holder of stock, when corporation's license had been previously revoked.
10-38	Jan 25	INTOXICATING LIQUOR.	No one can sell intoxicating liquor without first having obtained a license.
10-38	Feb 2	PARK BOARD. APPROPRIATIONS.	Personal services may be paid out of appropriations for labor, maintenance and repairs.
10-38	Feb 7	SCHOOLS.	May consolidated school district extend boundaries to take in part of consolidated district in another county.
10-38	Mar 2	Hon. F.C. Bollow	WITHDRAWN
10-38	Mar 18	PROSECUTING ATTORNEYS. COUNTY COURTS.	Prosecuting Attorney, and --- the County Court, controls county litigation.
10-38	June 2	APPROPRIATION. BOARD OF PHARMACY. INVESTIGATING COMMITTEE. EXPENSES OF, HOW PAID.	Expenses of investigating committee of board of pharmacy should be paid out of appropriation to the Governor for that purpose under Laws of Missouri, 1927, found at page 17.
10-38	June 21	CONSERVATION COMMISSION.	Authorized to spend purchase money on Big Oak Tree State Park.

10-38	July 8	TAXATION AND REVENUE.	(1) Park superintendents who operate concessions in state parks with permission of the State Park Board must collect sales tax. (2) State Park Board charging camp fees in state parks for reimbursement of wood used by campers is not liable for sale tax.
10-38	July 8	Hon. I. T. Bode	WITHDRAWN
10-38	Sept 14	DEAD AMINALS-REMOVAL OF.	A trucker is not liable for the hauling of swine which are dead of disease under Sec. 12786, R. S. Mo. 1929.
10-38	Sept 15	STATE PARK BOARD.	State Park Board must deposit fees and other income in the State Treasurer's Office and cannot disburse money that has not been appropriated to that department.
10-38	Oct 21	CRIMINAL COSTS.	Criminal Clerk should issue execution at the end of the term against parolee who is not protected by the insolvency act.
10-38	Nov 19	Mr. Wallace I. Bowers	WITHDRAWN
10-38	Nov 21	LIQUOR CONTROL.	Corporation composed of retail dealers may not act as purchasing agent on behalf of its members. Liquor traffic can only be engaged in, in the manner provided by law.
10-38	Dec 20	COUNTY BUDGET ACT.	(1) Classes should be paid in order of their priority; (2) Section 12140, R. S. 1929, should be considered in payment of warrants; (3) Constitutionality of the Budget Law.
11-38	Feb 4	LOTTERIES-DRAWINGS.	
11-38	May 5	TAXATION.	Definition of Taxpayer.
11-38	May 13	OPTOMETRY.	Restoration of expired license must be made when statutory fee for same be tendered.
11-38	July 19	OFFICERS.	Committee appointed by the Governor to supervise mixing and distribution of poison bait for insects are not officers or agents of the state and hence not immune from liability for tort.
11-38	Sept 28	ELECTIONS.	Residence is a matter of intention.
12-38	Jan 8	BALLOT TITLES.	For constitutional amendments to be submitted November Election 1938, for Senate Joint and Concurrent Resolutions (1) No. 3 - Compensation of members of General Assembly; (2) No. 6 – Reelection of State Treasurer as own successor; (3) No. 7 – special tax for support of county hospitals.
12-38	Jan 14	BALLOT TITLES.	For Constitutional Amendment of Article IV, Section 47 for Joint and Concurrent Resolutions Nos. 2 and 3, pertaining to pensions or assistance to persons over sixty-five years of age, to be submitted at

			November Election, 1938.
12-38	Jan 21	COUNTY COURTS.	May take possession of rooms vacated by prosecuting attorney and may require personal property of county to be returned to the courthouse.
12-38	Feb 7	NEWSPAPERS.	If newspaper moves from one town to another in a different county, in order to qualify for public advertisements, it must be published regularly for a period of three years or more at its last location.
12-38	Feb 21	NOTARY PUBLIC. NOTARY PUBLIC MAY HOLD ONE COMMISSION AT A TIME.	Only one notary public commission may be issued to a person during any one four-year period.
12-38	July 8	CONSTITUTIONAL AMENDMENT.	Ballot title.
12-38	July 11	BALLOT TITLE.	For Constitutional Amendment to Article X, Constitution, providing plan of assessment, valuation and taxation; appropriating bond money; prohibiting local property tax on motor vehicles; providing State maintained school system.
12-38	July 12	BALLOT TITLE.	For constitutional amendment repealing Section 10, Article IX, of Constitution, and enacting new section in lieu thereof, providing Sheriffs and Coroners may be eligible to succeed themselves in office.
12-38	Aug 19	BALLOT TITLE.	For Constitutional Amendment amending Article IV by addition of Section 44aa.
12-38	Nov 21	COUNTY OFFICES.	Tenure of office of persons appointed to fill various offices; tenure when elected to fill unexpired term.
12-38	Dec 21	MOTOR VEHICLES.	Municipal courts are not required to report violations of city ordinances in reference to motor vehicles to the Commissioner of Motor Vehicles.
12-38	Dec 30	SCHOOLS.	(1) In district having average daily attendance of less than 10, Board of Education has authority to provide for transportation of pupils to another district; (2) such closing of school and transportation of pupils to another district does not cause a forfeiture of the district's corporate existence.
13-38	Mar 7	TAXATION AND REVENUE.	1. Interpretation of Section 9950, Senate Bill #94, as to compromise of taxes. 2. Redemption. Resale.
13-38	Mar 14	TAXATION. COUNTY COURT. REFUNDING ILLEGAL	Moneys collected from illegal taxes levied may be refunded by the county court only when such tax money is either in the county treasury or under the control of the county court.

		LEVIES.	
13-38	Mar 23	TAXATION.	Redemption resale made to highest bidder. Sale thereunder extinguishes the tax lien for all taxes for which the third sale was enforced.
13-38	Aug 17	LIQUOR CONTROL ACT. BUILDINGS USED AS PLACES OF RELIGIOUS WORSHIP.	Buildings used by various religious denominations for religious worship which denominations do not have managing boards to manage such buildings, are not buildings regularly used as places of religious worship, as provided in Sec. 44-a-14, Laws of Mo. 1935, p. 285.
13-38	Dec 21	SCHOOL.	Debts contracted in excess of anticipated revenue are void; revenue for one year cannot be used to pay debts of subsequent year and treasurer is liable if he pays warrant of prior year out of subsequent years revenue.
14-38	Sep 19	COUNTY COURTS.	County court must pay publication of county financial report when compiled according to law.
14-38	Sep 28	TAXATION. REDEMPTION – PARTIAL. REDEMPTION PRORATED BY COUNTY COLLECTOR.	County collector proportions the part of tax that shall be paid in redeeming part of land sold for taxes.
14-38	Dec 9	OFFICERS.	The office of mayor of the city of the fourth class and the office of presiding judge of the county court may not at the same time be held by one person. The acceptance of the latter office will forfeit the former.
15-38	Jan 6	CRIMINAL LAW. MASTER AND SERVANT. MOTOR TRUCK LAW VIOLATIONS.	Owner of motor buses liable to punishment for violation of criminal laws by drivers when such act is done under the employer's command and within the scope of his employment and done for the employer by his knowledge and consent.
15-38	Apr 20	MOTOR VEHICLES.	"Homemade" trailers must obtain a distinguishing number from the Secretary of State in compliance with Section 7781, R.S. Mo. 1929.
15-38	July 07	B.M. Casteel	WITHDRAWN
15-38	Sep 2	CITIES.	May not erect buildings with the primary object of renting same when completed.
15-38	Sep 20	MOTOR VEHICLES.	Finance company, under chattel mortgage with provision of power for sale, can repossess without filing suit.
15-38	Nov 18	COUNTY TREASURER.	Treasurer appointed under Section 12130, Laws of Mo. 1937, p. 425,

			will hold office until January 1, 1939, or until his successor is elected and qualified.
16-38	Feb 7	SCHOOLS.	Notice to change school district boundaries and persons qualified to vote.
16-38	Feb 10	TAXATION.	County liable under Section 9952b, Laws of Missouri 1935, p. 403, for the expenses of printing delinquent lists of lands and lots even though they fail to sell at the collector's sale in November.
16-38	Mar 15	CITIES OF THIRD AND FOURTH CLASS.	City may convey park property to a school district without a vote of the people providing the park property is not conveyed to the city by dedication.
16-38	Mar 30	FISH AND GAME. GIGGING.	When and what specie of fish may be gigged, speared, etc.
16-38	Apr 6	LOTTERY.	"Pay Nights" and similar schemes of awarding money in envelopes handed to customers of theaters.
16-38	Apr 21	COUNTY CLERK.	Clerk's duty to total columns of taxable property on Assessor's books under Sections 9800-9805, R.S. Missouri, 1929.
16-38	Apr 23	SCHOOLS.	District may not pay bonus to teacher when said bonus is not provided by contract.
16-38	May 12	SCHOOLS.	Meaning of the word "majority" in electing School Directors or voting on propositions.
16-38	May 18	TAXATION.	County court must make a levy under Section 7890, R. S. Mo. 1929. Moneys derived from levy under said section should not be placed in the budget but should be disbursed according to the terms of the statute.
16-38	July 1	HEALTH.	Persons violating rules promulgated in accordance with provisions of Art. I, Chap. 52, R. S. Mo. 1929, relating to the public health are guilty of a misdemeanor.
16-38	Aug 20	TAXATION. BANKS AND BANKING. FRANCHISE TAX PREFERRED STOCK HELD BY RFC.	Preferred stock of a bank owned by the Reconstruction Finance Corporation constitutes a part of the capital structure of such bank upon which the franchise tax may be based.
16-38	Sep 20	TAXATION. DELINQUENT LANDS. ADVERTISEMENT.	Delinquent lands may not be sold for taxes to the highest bidder at the third time they are offered for sale unless they have been properly advertised at the first and second sales in which they are offered.
16-38	Oct 3	TAXATION.	County collector, by mandamus, can be compelled to accept a warrant

			for taxes for the same year.
16-38	Oct 12	CRIMINAL COSTS.	State not liable for cost of hospitalization of persons committing crimes.
16-38	Dec 22	PROSECUTING ATTORNEYS. SALES TAX LAWS.	Prosecuting attorney, under Sales Tax Act, not entitled to fee for instituting and prosecuting suits for collection of delinquent sales tax.
18-38	May 2	PENAL INSTITUTIONS.	A boy convicted while under 17 years of age cannot be transferred to Alcoa, and if a fugitive, sheriff is entitled to fees for returning to the Missouri Training School for Boys.
18-38	Aug 25	ELECTIONS. PROXIES. COUNTY COMMITTEES.	Proxies can be voted in county committee meeting. Majority of committee members necessary to constitute quorum to transact business.
19-38	Feb 11	Mr. Roy Coyne	WITHDRAWN
19-38	Feb 24	ELECTIONS.	Four questions on registration and elections in cities of 30,000 to 80,000 population (Joplin).
19-38	Aug 8	ELECTIONS. PRIMARY.	Party representatives appointed under Section 10270, R. S. 1929, not entitled to be paid as election judges out of the county treasury.
19-38	Aug 12	TAXATION.	County Board of Equalization or State Tax Commission may raise the assessment on the valuation of real property.
19-38	Oct 13	TAXATION.	City property to use of hospital is taxable, but hospital property used for charity is tax exempt in limited acreage.
20-38	Jan 25	LABOR.	Commissioner of Labor and Industrial Inspection without authority to make inspection of schools conducting manual training courses by the use of machinery.
20-38	Feb 17	LABOR COMMISSIONER.	(1) City sanitariums, city hospitals etc., classed as public institutions within meaning of Section 13210, R.S. 1929; (2) Commissioner has no jurisdiction to make inspection of female employees in federal, state, city, county offices or on election boards.
20-38	Feb 24	LABOR COMMISSIONER.	Section 13218, R. S. Mo. 1929, does not give Commissioner authorization to make inspections of radio broadcasting stations.
20-38	Mar 4	LABOR DEPARTMENT.	License required of furniture manufacturers making, remaking or renovating bedding when designed for sleeping or reclining purposes.
20-38	Mar 4	AGRICULTURE. TIME.	The time within which an act is to be done is computed by excluding the first day and including the last.
20-38	Mar 15	LABOR.	Sale of products produced by persons under 18 years of age when

			employed by parent or guardian, are exempt from the provisions of the Laws of Missouri, 1937, page 196.
20-38	Apr 7	DEPARTMENT OF AGRICULTURE.	Proclamation made by Governor Caulfield on March 4th, 1932 in reference to rules and regulations of shipment of hogs within the state of Missouri, is no longer in effect.
20-38	Apr 19	SCHOOLS. DIRECTORS. QUALIFICATIONS. TAXPAYERS.	The person who is qualified to vote at a school meeting may be elected as a director of the school board of such district provided he has paid taxes, real and personal, in any county in the State of Missouri within the previous year.
20-38	Apr 26	TAXATION. SALES TAX. JURISDICTION OF STATE OF MISSOURI OVER GOVERNMENT PROPERTY.	State of Missouri has no jurisdiction over sales of tangible personal property belonging to the United States.
20-38	May 6	COUNTY CLERKS. FEES.	Clerk not entitled to charge fee for certifying under seal document not required by statute to be certified. Clerk receives no compensation for making "personal delinquent list" into "back tax book".
20-38	Aug 13	CORONER'S INQUEST.	Jury must be summoned by constable in the township where the body is found, unless constable is unable to perform the duty.
20-38	Sep 21	BOARD OF AGRICULTURE.	State Veterinarian may make rules and regulations for the prevention of spreading of contagious and infectious diseases among cattle, horses and hogs.
20-38	Dec 15	PROBATE CLERKS.	A probate clerk may not act as an attorney in fact for surety companies and sell bonds to representatives of persons and estates which are in his court.
21-38	Feb 1	ATHLETIC COMMISSION.	Shall collect 5% of all the gross receipts of every boxing, sparring or wrestling exhibition held.
21-38	Feb 12	ESCHEAT.	When proceedings may be instituted to escheat property to the State of Missouri.
21-38	Feb 25	TOWNSHIP ORGANIZATION.	Annual statement required to be made by Section 8170 should cover preceding fiscal year.
21-38	Feb 26	LIQUOR CONTROL.	City may not suppress or prohibit the sale of intoxicating liquor within its limits. Applicant otherwise qualified cannot be denied city permit merely because city does not desire liquor sold.
21-38	Mar 18	AGRICULTURE.	Validity of Regulation "C", Missouri Insect Pest and Plant Disease Law.
21-38	Apr 12	SCHOOL DISTRICTS.	Has the Board of Directors of a Consolidated District the solo power to

			select school sites and can such power be exercised arbitrarily.
21-38	May 18	CORONERS. JUSTICES OF THE PEACE.	In the absence of the coroner, any justice of the peace or judge or justice of some court of the proper county may perform all duties enjoined on coroner.
21-38	Aug 5	CRIMINAL PROCEDURE. JUSTICES OF THE PEACE. APPEALS.	Justice of the Peace may not quash information. State may not appeal from ruling of Justice of the Peace, but may by writ of certiorari to the Circuit Court have such record quashed.
21-38	Aug 10	CRIMINAL PROCEDURE. COMPLAINING WITNESS.	Any person who is competent to testify as a witness against the defendant may sign a complaint upon which information may be filed.
21-38	Oct 3	SCHOOLS TRANSPORTATION.	School bus of Public school district may pick up school children in any rural districts thru which the bus route passes.
21-38	Dec 7	CONSERVATION COMMISSION. FISH AND GAME.	Prosecution for violation of commission regulations, when misdemeanor, must be in township where offense was committed.
22-38	Aug 23	TOWNSHIP OFFICES. CANDIDATES. ELECTIONS.	Candidates for township offices and committeemen and committeewomen not required to pay fee for filing declaration papers.
23-38	Jan 20	JURY SCRIP. SCRIP RECEIVED IN PAYMENT OF TAXES WHEN.	Jury scrips are not receivable in payment of taxes for any year other than that for which same are issued. Jury scrip payable out of the funds of the year of issuance.
23-38	Feb 12	COUNTY BUDGET.	Bills for county for 1937, may now be paid out of funds of 1937 revenue, in accordance with priority of classes as budgeted by county for year 1937.
23-38	Aug 20	ELECTIONS.	Defeated candidates in primary elections must file statements of expenses in accordance with Section 10482, R.S. 1929. Successful candidates in primary must also file statements within 30 days after primary.
23-38	Aug 23	SCHOOLS.	School district does not lose building on land formerly used for school purposes by the mere fact of nonuser, and same does not revert with the land to the original owner.
24-38	Apr 18	INSURANCE. MAKING AND CAUSING TO BE	The statement that the "State of Missouri guarantees insurance" is untrue and persons making and causing to be published such statements violates the provisions of Section 4308, R.S. Mo. 1929, and

		PUBLISHED UNTRUE STATEMENTS.	is liable for the penalties imposed therein.
24-38	Apr 27	CITIES OF FIRST CLASS.	Construction of word "revenue" in Sec. 6369, R. S. Mo. 1929.
24-38	July 29	COUNTY TREASURER. BONDS.	If County Treasurer elects to give surety bonds and County Court accepts same, the premiums are to be paid by the County Court.
25-38	Mar 7	COUNTY OFFICERS.	Prosecuting Attorney may tender resignation to the Governor.
26-38	Mar 25	CONTRACTS. STATE OFFICE BUILDING.	Contract may be amended to permit a retention of 10% on payments to the contractor on monthly estimates.
26-38	Mar 25	POLL TAX.	What poll tax may be levied and collected in counties under township organization.
26-38	Oct 3	PENITENTIARY.	Measure of punishment upon conviction as habitual criminal.
26-38	Oct 24	CITIZENSHIP.	A defendant does not lose his citizenship even though convicted of a felony, if the punishment is a jail sentence or fine; if the court paroles him he is restored to citizenship rights under Section 3820, R. S. 1929.
26-38	Nov 2	ROADS AND BRIDGES.	Special road district cannot make claim and receive funds on a general levy of fifty cents on the \$100.00 valuation unless the levy is made under Section 7890 R.S. Mo. 1929.
27-38	Jan 4	CIRCUIT CLERK AND EX-OFFICIO RECORDER.	Cannot retain fees set out in Section 3248 R.S. Missouri, 1929, in addition to salary.
27-38	Mar 3	STATE BUDGET DEPARTMENT.	Charles F. Carter not entitled to back pay for services as Chief Clerk.
27-38	Apr 1	TAXATION.	Trustees must pay the annual corporation franchise tax to this state when such receivers or trustees are operating the business of the corporation which is undergoing a reorganization under the provisions of the Bankruptcy Act.
27-38	May 26	COUNTY CLERK. DUTY OF DRAWING WARRANTS ON ILLEGAL DEMANDS. COUNTY COURTS NUNC PRO TUNC ENTRIES.	County clerk should not draw warrant on claim illegally allowed by county court, providing he has knowledge of such illegal allowance. County court not authorized to make nunc pro tunc entries unless there is some record upon which to base such order.
27-38	July 11	INTOXICATING LIQUOR.	Interpretation of Section 44-a-9, page 283, Laws of Missouri, 1935.

27-38	July 23	TAXATION.	Freight depot of a Railroad not used by the Railroad Company but leased to private company should be assessed locally for taxes.
27-38	July 29	Hon. Melvin Englehart	WITHDRAWN
27-38	Oct 15	Clarence Evans	WITHDRAWN
27-38	Dec 5	SCHOOLS.	The entire fund of a school district which has been placed in a "general fund" if any surplus remains at the close of the year, should be distributed according to the original amounts which should have been placed in the various funds under Section 9312, R. S. Mo. 1929.
27-38	Dec 16	TAXATION. COSTS OF SALE FOR DELINQUENT TAXES.	Under the delinquent tax laws prior to the Jones-Munger Act, a county court is not authorized to pay for the costs of publication of lands sold for delinquent taxes.
27-38	Dec 29	SCHOOLS.	(1) Annual school meeting under Section 9283, R. S. 1929, may be extended until six o'clock on the day of the election to enable all patrons of district to participate therein; (2) Under Section 9289, R. S. 1929, no member of the board shall receive any compensation for performing duties of a director.
28-38	June 21	BANKS & BANKING. LIQUIDATIONS.	Court orders in sales of real estate of banks in liquidation, need not be recorded in counties where liquidation is being had.
28-38	Sep 6	SCHOOLS AND WARRANTS.	School warrants may be issued up to the amount of the anticipated revenue for the year in which such warrant is issued and not in excess thereof.
29-38	Feb 21	APPROPRIATIONS. STATE CANCER. HOSPITALS.	State Cancer Commission may expend funds to establish hospitalization for Cancer patients prior to construction of State Cancer Hospital.
29-38	Apr 12	CITIES.	No person under the age of twenty-five years may be elected to the council of a city of a third class.
29-38	Sep 13	SCHOOLS. AUTHORITY OF DIRECTORS TO ISSUE COMMERCIAL PAPER.	School directors are only authorized to issue warrants as provided by statute and are not authorized to issue commercial paper for payment of erection of school buildings. Directors are not authorized to issue warrants in anticipation of revenue for any year except the current year.
29-38	Oct 13	CERTIFIED PUBLIC ACCOUNTANT.	Styling himself C.P.A. is a personal privilege granted under Chapter 110, R.S. Mo. 1929, and cannot be used to style non-resident partners or non-resident firms or individuals.
30-38	Jan 24	Elbert L. Ford	WITHDRAWN
30-38	Apr 27	FISH AND GAME.	Game fish taken from waters of another State can be sold in Missouri

			(Section 8275)
30-38	Sep 9	PUBLIC SERVICE COMMISSION. MOTOR VEHICLES.	Motor vehicles transporting cotton and cotton seed from gin to original market or warehouse which is still the property of the producer are exempt from registering with the P.S.C. as contract haulers under Section 5265.
30-38	Sep 28	MOVIE QUIZ CONTEST. LOTTERY.	Movie quiz contest constitutes a lottery.
30-38	Dec 29	CHIROPRACTIC.	Right to revoke licenses by the State Board.
32-38	Feb 21	LIQUOR CONTROL.	Club holding 3.2 percent. Members thereof may not store intoxicating liquor in lockers on premises.
32-38	May 7	CORONER.	It is the duty of the coroner to have witnesses subscribe to transcript of testimony given in a coroner's inquest.
33-38	Jan 11	MOTOR VEHICLES.	Power of St. Louis Police to make arrests for displaying illegal tags on motor vehicles and changing number on motor block.
33-38	Jan 21	HABEAS CORPUS. CERTIORARI.	Certiorari will not lie to review the circuit court's order granting bail in habeas corpus matters, there being no jurisdictional question involved.
33-38	Feb 18	MOTOR VEHICLES.	Finance companies have the right to hold certificate of title belonging to dealers and individuals and dealers are compelled to have certificate of title in possession.
33-38	Aug 30	INSURANCE. WORKMEN'S COMPENSATION. COMMISSION.	Policies written by companies writing policies known as excess aggregate policies, catastrophe excess policies and stop loss policies, under supervision and control of the Insurance Department and Workmen's Compensation Commission.
33-38	Oct 4	WORKMEN'S COMPENSATION COMMISSION.	Commission has no authority under the statute to destroy permanent records in its office.
34-38	May 31	INSURANCE.	Stipulated premium company may not amend charter as burial society by resolution.
35-38	Feb 8	ELECTIONS. ABSENTEE BALLOTS. BALLOTS. COUNTY CLERK. DEPUTY COUNTY CLERK.	County clerk has authority to appoint deputy county clerk to issue absentee ballots only at county clerk's office at county seat.
35-38	Feb 8	ASSAULT.	Mere words or solicitation not sufficient to constitute assault with intent to rape.

35-38	Feb 17	G. Derk Green	WITHDRAWN
35-38	Mar 15	ELECTIONS.	1. Section 10313 interpreted to include persons uninstructed who request aid in marking their ballots as well as persons who cannot read and write and are physically unable to cast their ballot. 2. Persons making the oath provided for in Section 10313 can inform election judges in any manner he chooses how he wants his ballot prepared.
35-38	Mar 19	ELECTIONS.	Section 10313, R.S. 1929, construed. The words "declare under oath" do not require the elector to sign an oath. He may take it orally.
35-38	Apr 13	LOTTERIES.	Money Quest Nite.
35-38	Apr 20	NARCOTICS. STATE BOARD OF HEALTH.	A physician administering and dispensing narcotic drugs shall keep a record as is required by the Federal Narcotic Law, otherwise such physician violates state law.
35-38	Apr 29	LOTTERIES.	Money Quest Nite.
35-38	Apr 30	TAXATION AND REVENUE.	1. Proper officer of City of St. Louis may not reinstate a delinquent tax bill which has been voluntarily paid, where such payment was shown to have been made by the record. 2. Such officer should not accept payment of delinquent taxes on lot on which such taxes have been duly paid. But when another payment for taxes on the same lot was voluntarily made said officer cannot make a refund therefor.
35-38	May 20	TAXATION.	Persons living within a city are subject to a city tax on the personal property on his farm which is outside of the city limits. Persons living outside of the city limits are not subject to a city tax on the personal property portion of his business such as ice boxes, etc.
35-38	June 15	SCHOOL BOARDS.	Right of board of directors to control use of school building.
35-38	Aug 16	DEPARTMENT OF AGRICULTURE.	No authority to borrow money from the R.F.C.
35-38	Aug 24	BENEVOLENT CORPORATIONS.	A vigilant society or association is not a benevolent organization.
35-38	Sep 8	MUNICIPAL CORPORATIONS. FOURTH CLASS CITIES.	Ordinances may be passed without being read three times. Does not require unanimous vote to suspend the rules.
35-38	Sep 13	LOTTERY.	Distribution of chances by merchants.
35-38	Oct 4	MOTOR VEHICLES.	Lessee for more than ten days required to obtain certificate of registration and license plates even though car had been leased before.

35-38	Oct 31	PAROLES.	Paroled persons who have received final discharge are eligible for public office.
35-38	Dec 29	TAXATION. FIXING THE LEVY BY THE COUNTY COURT.	The levy for taxes made by the county court should only be in an amount sufficient to raise the desired funds. Any levy in excess of that amount is void to the extent in which it is excessive.
36-38	Jan 11	COUNTY COLLECTOR.	Cannot accept payment of general taxes and exclude district water tax.
36-38	July 25	ELECTIONS.	1.Candidate for office of county clerk need not be a taxpayer. 2. Candidate eligible for township office even though kept partially at county expense in private home. 3. Inmates of Tubercular Hospital at Mount Vernon, Missouri entitled to vote absentee ballot.
37-38	Jan 21	COUNTY COURT. ROADS AND BRIDGES.	County Court has authority to transfer surplus funds remaining at the end of the year to road and bridge fund, and the same may be used for the erection of bridges in special road districts.
37-38	Mar 22	INSURANCE.	3 questions relating to Burial Society incorporating as a stipulated premium company.
37-38	Apr 27	PROBATION. PAROLE.	Information received by probation and parole officers privileged.
37-38	Apr 28	NOTARY PUBLIC.	1. Must state date commission expires on certificate. 2. Must have person before him in taking acknowledgment.
37-38	May 5	CONVICT.	No loss of civil rights of citizenship prior to judgment and sentence.
37-38	May 6	PARDON.	Time when pardon is available in preventing punishment for crime.
37-38	May 16	TAXATION. COUNTY COLLECTOR. ADVERTISING DELINQUENT LANDS. COUNTY BUDGET ACT.	Tax collector in letting contracts for publication of delinquent lands should follow the provisions of Section 19 of the County Budget Act, page 350, Laws of Missouri, 1933.
37-38	June 25	PENAL INSTITUTIONS.	Intermediate Reformatory inmates entitled to parole hearing after serving seven-twelfths of sentence orderly and peacefully.
37-38	July 5	PENAL INSTITUTIONS.	Parole Board may investigate and recommend for a parole at any time after sentence is pronounced and before sentence is finally completed.
37-38	July 28	ELECTIONS.	Voters may write in on their ballot names of a committeeman and committeewoman and may designate the election district for which such a committeeman and committeewoman are being selected even though there is no space left on the ballot for such offices.
37-38	Sep 16	ELECTIONS.	Temporary absence with continuous intention to return will not deprive

			persons of their residence even though they have no particular spot which they call "home."
37-38	Nov 3	ELECTIONS.	Judges of election in Jackson County can change address of registered voters on election day when such voter moves to another address in same precinct.
37-38	Dec 22	OFFICERS. SALARIES AND FEES.	Salaries of clerks of circuit courts and ex-officio recorder of deeds in certain counties.
38-38	Jan 21	SOCIAL SECURITY ACT.	Interpretation of money payment in the Federal Social Security Law, Title 1, Section 6.
38-38	Feb 10	PENSIONS.	Social Security Commission may appoint someone to preside at hearings.
38-38	Mar 25	APPROPRIATION.	Social Security Commission does not provide paying insurance premiums on Children's Home at Carrollton.
38-38	July 26	CANCER COMMISSION.	Definition of the terms "legal residents" and "indigent patients" as used in Section 7 of the Laws of Missouri, 1937, page 497.
38-38	July 28	CANCER COMMISSION.	County courts may be billed for patients at cancer clinics at State Hospitals Nos. 1 and 2 and said funds when allowed by county courts must be paid to the State Treasurer.
38-38	Aug 6	Hon. Frank W. Hayes	WITHDRAWN
38-38	Sep 10	ST. LOUIS BOARD OF ELECTION COMMISSIONERS.	No authority to provide meals for employees during overtime work.
38-38	Sep 26	APPROPRIATION ACT. CANCER COMMISSION. NEW YORK WORLD'S FAIR.	Term "operation" does not authorize expenditures for World's Fair exhibit.
38-38	Oct 4	COUNTY COURTS.	Contributions by counties to State Social Security Commission.
38-38	Dec 22	CANCER COMMISSION.	County Courts should transmit payment for indigent patients to the State Treasurer, where it becomes a part of the General Revenue Fund.
39-38	Jan 20	INSURANCE DEPARTMENT.	State not liable for fees of special counsel not employed as provided by statute.
39-38	Feb 3	INSURANCE.	Compensation that may be paid insurance examiners for examination of foreign and domestic companies doing business in this state and method of accounting.
39-38	Feb 14	LIQUOR CONTROL.	(1) Counties not authorized to issue licenses, but should give dealer

			<p>something as evidence or proof that he had paid county fee.</p> <p>(2) Person not paying county fee is subject to prosecution and his state liquor license may be revoked.</p> <p>(3) County Court may not pay salary of employee of Liquor Department.</p>
39-38	Mar 18	COLLECTORS.	Collector's compensation for deputy hire and expense of office.
39-38	Mar 28	INSURANCE.	Marsh & McLennan-Case, Thomas & Marsh Incorporated may not engage in the insurance business in Missouri under their charter.
39-38	June 10	CITIES, TOWNS AND VILLAGES. MUNICIPAL PLANTS.	City officers may purchase securities with customers' deposit funds.
39-38	July 11	JUSTICE OF THE PEACE.	Number to be elected annually.
39-38	Oct 10	INSURANCE DEPARTMENT.	Approval as to the form and sufficiency of the papers submitted in connection with the increase of capital stock of the St. Louis Fire and Marine Insurance Company.
39-38	Oct 20	INSURANCE DEPARTMENT.	Approval of Articles of Incorporation of the United States Health and Accident Company, proposed to be formed under Art. 4, Chap. 37, R. S. 1929.
39-38	Dec 15	TAXATION.	County road and bridge tax is a part of the levy for county purposes.
41-38	Jan 12	PROBATE COURTS.	Administration of Inheritance Tax Laws.
41-38	Feb 4	BANKS & BANKING.	Circuit Court has no authority to appoint auditor to audit the accounts of liquidation and order same paid out of trust estate.
41-38	Mar 10	BANKS & BANKING.	State banks and trust companies, members of Federal Reserve System, not exempt from paying contributions under Unemployment Compensation Law.
41-38	June 21	BOND. COMMISSIONER OF FINANCE.	Approval as to form of rider to be attached to Bond No. 39104-07-290-37 (T. Mahan Smith).
41-38	Aug 9	TAXATION AND REVENUE. SALES TAX.	Construction of the words "successor" and "purchaser" Section 23, 1934 Extra Session Acts and Section 28 of the Session Acts of Mo. For 1935 relating to Sales Tax.
42-38	Apr 4	COLLECTOR TOWNSHIP.	Income taxes collected by said officer should be included with other state and county taxes collected by him, and this total sum used as a basis for arriving at compensation.
42-38	May 19	MUNICIPALITIES.	Mayor may cast deciding vote, in cases of tie vote of council in cities of Third Class.

42-38	Sep 28	TAXATION.	Certificate of purchase from county superior to certificate from city under Jones-Munger Act.
43-38	Jan 11	COUNTY BUDGET ACT.	County court may pay additional salary of deputy circuit clerks if there remains a surplus at the close of the fiscal year.
43-38	May 6	SCHOOLS.	Directors of school district are not liable criminally for transferring funds indirectly from the teachers' fund to the building fund. The action is irregular but in the absence of any embezzlement or other crime directors are not liable.
43-38	May 7	FISH AND GAME. TRAMMEL NETS.	Session of trammel nets in violation of the game and fish laws.
43-38	June 8	SHERIFFS FEES.	Mileage—how determined.
43-38	Aug 10	SALARIES AND FEES. TOWNSHIP TRUSTEE.	1. Township trustee's commissions based on total amount received and disbursed during each year. 2. Township trustee only entitled to commissions on disbursements made for expenses of the township as set out in Sec. 12303, R. S. Mo. 1929.
43-38	Aug 24	SCHOOLS.	County Court cannot discount or compromise a loan made out of the school funds.
43-38	Sep 1	TAXATION. SALE FOR TAXES EXTINGUISHES ALL PRIOR LIENS.	Deed issued by Collectors for lands sold for delinquent taxes supersedes and extinguishes lien of a deed of trust which was on such lands prior to such sale.
44-38	Feb 14	MISSOURI SCHOOL FOR THE DEAF. BOND.	Against public policy for Board to pay for bond supplied by Steward for himself and written by himself as agent for the Insurance Company, unless complete disclosure of all the facts has been made and approved by the Company.
44-38	Mar 4	COMPTROLLER OF THE CITY OF SAINT LOUIS.	Acts in the capacity of county court in receiving application to enter the school as set out in Section 9697 R.S. Mo. 1929.
44-38	July 20	TAXATION. POLL TAXES. TAXATION. MUNICIPALITIES. AUTOMOBILE TAXES.	Incorporated villages can levy and collect a poll tax. Incorporated villages may, by ordinance, levy and collect automobile license tax.
45-38	Jan 21	ELEEMOSYNARY BOARD. INSPECTION OF CITY HOSPITALS.	Board of Managers of Eleemosynary Institutions, or the President of the Board, may inspect St. Louis City Sanitarium when it deems advisable for verifying claim of such institutions for state aid. The Board has no legal responsibility either for the conduct of patients in

		RESPONSIBILITY OF ELEEMOSYNARY FOR PATIENTS IN ST. LOUIS CITY HOSPITAL.	such institution or for inspection and investigation of the sanitarium as a subsidiary.
45-38	Jan 27	INSANE PERSONS.	Should be committed by county court if paupers; by guardian or relatives if pay patient; and eleven other questions.
45-38	Jan 31	Honorable A. Lamkin James	WITHDRAWN
45-38	Feb 14	ELEEMOSYNARY INSTITUTIONS. APPROPRIATIONS.	Appropriation for Mt. Vernon Sanatorium for personal services only for those specifically mentioned.
45-38	May 6	TAXATION.	Personal property used exclusively for charitable purposes not exempt from taxation.
45-38	June 22	CRIMINAL COSTS.	Fees of sheriff in summoning a standing jury is audited by the county, but fees for summoning a special venire is audited by the State Auditor and not by county.
45-38	Aug 31	PUBLIC SERVICE COMMISSION.	Hauler under irregular route permit may pick up property at a point on a regular route and discharge property along a regular route so long as it is not a point described in a regular route permit.
45-38	Dec 16	ROADS.	Road overseers can only be appointed in February after the convening of the new county court.
45-38	Dec 21	COLLECTOR.	Deputies may not be reimbursed for costs expended in procuring bond to protect collector, under provisions of Section 1, Laws of Missouri, 1937, page 190.
45-38	Dec 22	ELEEMOSYNARY BOARD.	Purchase of real estate should be made through the purchasing agent.
45-38	Dec 30	APPROPRIATIONS.	Construction of Appropriation Act, Laws of Missouri 1937, page 52.
46-38	Feb 10	Mr. W. D. Jones	WITHDRAWN
46-38	Feb 16	BONDS.	Premium of surety bonds of circuit clerk if consented to by the governing body in accordance with Section 1, page 190, Session Laws of 1937, must be paid by the county court direct and not allowed under the County Budget Act of 1933.
46-38	June 23	SALARIES AND FEES. CONSTABLES. INQUESTS.	Constables may charge a fee of one dollar for summoning a jury for a coroner's inquest.
46-38	Nov 28	TAXATION AND REVENUE.	Property sold for general taxes under Senate Bill No. 94 vest title in the certificate holder upon the delivery of a deed unless parties in interest

			have exercised their right of redemption within the statutory period. Certificate holder must pay all subsequent and prior unpaid taxes.
46-38	Dec 28	PROBATE COURT.	Probate Judge cannot require security for costs in an insanity hearing.
47-38	Jan 10	WEEKLY DRAWINGS.	Lotteries
47-38	Feb 18	MOTOR VEHICLES.	Exemption of the operation of a school bus from control and regulation by the Public Service Commission.
47-38	Apr 7	SPECIAL ROAD DISTRICT. COUNTY COURTS.	County court cannot levy different rates in different special road districts for special road and bridge tax.
47-38	Aug 15	LIQUOR CONTROL.	What may be displayed in show windows and supplement.
47-38	Sep 20	ELECTIONS.	Timely application for absentee ballot must be made.
47-38	Oct 8	Hon. O. A. Kamp	WITHDRAWN
48-38	Sep 15	ELECTIONS.	County committee may certify nominations to fill vacancies on ticket not later than ten days before election.
49-38	Mar 18	SCHOOLS.	Board of Education need not print the names of candidates for directors on the ballot, but if names are printed all known candidates should have their names on the ballots.
49-38	Mar 29	HEALTH. COSMETOLOGY AND HAIRDRESSING. QUALIFICATIONS FOR EXAMINATION.	Persons who have had one year training under registered operator of business of cosmetology and hairdressing and who possess the other qualifications prescribed by the statute, may take the examination for registered operators.
49-38	June 15	SCHOOLS.	If board members withdraw their resignations before the county superintendent accepts or fills the same, the withdrawals are legal and no vacancies exist.
49-38	Sep 27	SCHOOLS. BUILDING AID.	Building aid, as provided by Sec. 19, Laws of Mo. 1931, page 346, is payable only to consolidated or enlarged school districts.
49-38	Oct 1	ELECTIONS.	Registrars in cities of 10,000 to 30,000 population should be elected every two years.
51-38	Feb 2	PENAL INSTITUTIONS.	Sufficiency of formal account in demands for expenses of Reformatory inmates.
51-38	Feb 4	Hon. Charles F. Lamkin, Jr.	WITHDRAWN
51-38	Feb 14	TAXATION.	The lien for State and County taxes, in Missouri, attaches on the first day of June of the year preceding the year in which said taxes become payable, and the Federal Government, when purchasing lands after

			said lien has attached, should pay said lien, notwithstanding an opinion of the Dept. of Justice at Washington to the contrary. Supplementary to opinion #90. Wm. H. Tandy 6-19-35.
51-38	May 7	SCHOOLS.	School board acting on own initiative, without ratification of qualified voters (Sec. 9195, R. S. 1929), cannot issue warrants for tuition and cost of transporting pupils.
51-38	May 17	SCHOOLS.	Two directors cannot function legally without proper notice to the third director. Injunction is the proper remedy to prevent two members from acting illegally.
51-38	Sep 29	ELECTIONS. COUNTY BUDGET.	If petition under Section 12805, election on restraining of animals should be held even though costs exceed the estimate for elections in budget.
51-38	Oct 19	RAILROADS. RATES FOR SPECIAL ROAD DISTRICTS.	Railroads may make special rates for hauling road materials for special road districts.
51-38	Nov 16	COUNTIES.	Judgment on a warrant gives no preference, outstanding warrants paid out of surplus in the order of their presentation and registration.
52-38	June 27	STATE HIGHWAY PATROL.	Witnesses' fees earned by members may be retained except in state criminal cases. Where retained expenses are not reimbursed by State.
53-38	May 18	ELECTIONS. OFFICERS.	An officer may not be elected to another office during the term of his office, and if he is elected and enters upon the duties of such other office, a vacancy exists in the office held and an appointment to fill the vacancy is in order.
54-38	Jan 27	TAXATION AND REVENUE.	A deed delivered under and by virtue of Section 9957a of Senate Bill 94 extinguishes the liens of city sewerage districts insofar as such liens apply to the period prior to the issuing of the certificate of purchase.
54-38	June 8	ELECTIONS.	Declaration which fails to state township in which candidate for J.P. desires to run in primary is insufficient.
54-38	July 5	CITIES.	Cities of the fourth class must publish financial statement in legal publication.
54-38	Sep 9	SHERIFFS.	Section 11791 R.S. Missouri 1929, construes as to when a person is in custody of sheriff undergoing examination preparatory to his commitment; Sheriff entitled to \$1.25 per day for his services and \$1.25 per day for the board of such persons, provided the number of days shall exceed one.
54-38	Sep 16	COUNTY COURTS. COUNTY FAIRS – PURCHASE OF LANDS,	County Court may purchase lands, erect buildings and appropriate public funds to county fair associations by following the procedure set out in Section 12490, RSMo 1929, and Sections 12508 and 12509, Laws

		ERECTION OF BUILDINGS AND APPROPRIATIONS OF MONEY FOR.	of Missouri 1931, page 133.
54-38	Oct 10	COUNTY COURTS. SCHOOL FUNDS. MANAGEMENT OF LANDS PURCHASED UNDER FORECLOSURE.	County courts may lease, rent, or manage lands purchased under foreclosure of school fund mortgages and shall sell the same at earliest date practicable.
54-38	Oct 26	INFORMATION.	Form of for lottery.
54-38	Oct 28	TAXATION.	When owner must reimburse purchaser of property at sale for delinquent taxes, for improvements.
54-38	Nov 2	HIGHWAY PATROL. PARKING CARS ON SHOULDERS OF THE HIGHWAY.	Highway patrolmen in performing their duties in regulating movement of traffic may prohibit parking on shoulders of highways, and persons so parking may be prosecuted for obstructing the highway, under Sec. 7932, R.S. Mo. 1929.
54-38	Nov 18	TAXATION.	Damages on dog tax must be paid as proved from March first until March first.
54-38	Nov 23	LOTTERY.	"Job Day"
54-38	Nov 28	RECORDER.	If instrument is a recordable one under Section 11543 and is properly acknowledged recorder must record same regardless of other defects.
54-38	Dec 22	ASSESSORS. TAXATION.	Personal property which assessor has failed to assess cannot be assessed after books have been turned over to collector.
55-38	Dec 29	LOTTERIES.	"Somebody's Night"
55-38	June 7	ELECTIONS. PRIMARY.	Last day for candidates to file for August Primary – June 3, 1938.
56-38	Mar 24	BANKS & BANKING. LIQUIDATIONS.	Court orders in sales of real estate of banks in liquidation need not be recorded in counties where liquidation is being had.
56-38	June 3	BANKS & BANKING. CORPORATIONS. SAFE DEPOSIT COMPANIES.	Safe Deposit Companies may be incorporated under the provisions of Article 7, Chapter 32, R. S. Mo. 1929.
56-38	June 22	CRIMINAL PROCEEDINGS.	Prosecution of an Indian, ward of Federal government as any other citizen.
56-38	July 22	CRIMINAL LAW. FALSE PRETENSES.	The statute applying to obtaining property, etc., by false pretenses is not violated by obtaining such property by promises.

56-38	Sep 9	ELECTIONS. PROSECUTING ATTORNEY.	Must have resided in county twelve months prior to general election before name can be placed on ballot.
57-38	Jan 8	PROBATE COURTS.	Statute does not authorize a fee to the Probate Court for finding no tax due in an estate.
57-38	Jan 27	PENAL INSTITUTIONS. MISSOURI TRAINING SCHOOL FOR BOYS. AGE LIMIT.	Only male persons under seventeen years of age at the time of committance of act for which they are sentenced may be received at the Missouri Training School for Boys.
57-38	Feb 12	CARRYING CONCEALED WEAPONS.	A violation of Section 4029 R. S. Mo. 1929. Pistol carried in cab of truck.
57-38	Feb 15	MISSOURI TRAINING SCHOOL. DELINQUENT.	Costs of transportation of boys to be paid by state or county; Costs of transportation to reformatory paid by county.
57-38	Feb 17	PENAL INSTITUTIONS. MISSOURI TRAINING SCHOOL FOR BOYS. WHEN MALE PERSON BETWEEN 17 & 21 YRS. MAY BE COMMITTED.	Boys from 17 & 21 charged, tried & convicted as delinquents in Section 14159 R.S. Mo. 1929 may be sent to Missouri Training School for Boys.
57-38	Feb 21	SHERIFF.	Sheriff is entitled to payment for board of prisoners fixed by his local county court where he has charge of prisoners coming from another county that has no jail.
57-38	Mar 14	Mr. G. Logan Marr	WITHDRAWN
57-38	Mar 22	JURISDICTION.	Right of trial court to entertain the setting aside of the verdict after case has been appealed.
57-38	Apr 2	PROSECUTING ATTORNEY.	Can bring civil suit for county or state without order from county court.
57-38	Apr 14	MOTOR VEHICLES.	Kansas resident with previous year's license may be prosecuted in Missouri after February 1st.
57-38	May 11	SCHOOLS.	A teacher may be employed who before teaching school under her contract will become legally qualified by the proper certificate although at time of employment was not legally qualified.
57-38	June 4	COUNTY COURTS.	Cannot pay check charge on checks given in payment of taxes.
57-38	June 7	POTATO INSPECTION.	Meaning of term "shipper".

57-38	June 9	PAROLES.	Time remaining to be served under a parole where there is a second conviction during such time.
57-38	June 30	FISH AND GAME.	Commercial fishing in the Osage River at points formed by the Lake of the Ozarks.
57-38	July 8	COUNTY COURTS. OFFICERS.	The County Court is not authorized to pay attorney fees for defending the Collector in a civil suit charging official wrongdoing of the Collector. The defense of the suit is a personal matter and the County is not concerned.
57-38	July 14	GAME AND FISH.	Drum fish are not perch.
57-38	July 27	CONTRACTS.	Construction of contract for water softener at Intermediate Reformatory, Algoa.
57-38	July 28	LIQUOR CONTROL ACT.	A householder cannot brew in his own home for home use or have in his possession by transporting in his car for his guests and himself, any intoxicating liquor, which includes home brew of alcoholic content of more than 3.2 per cent, as it violates terms of Sec. 8, Laws of 1933-34, Extra Session, p. 80.
57-38	Aug 17	CRIMINAL LAW.	Justice Courts have no jurisdiction to sentence defendants on graded felonies, but Prosecuting Attorney may file a lesser charge on his own information and belief.
57-38	Aug 25	PENAL BOARD.	No statutory reward payable for the recovery of escaped convicts who are found dead.
57-38	Sep 24	ELECTIONS.	Certificate of nomination which is not acknowledged is faulty and should not be accepted by the county clerk.
57-38	Oct 18	TAXATION. DELINQUENT SALES.	Holder of second certificate of purchase of delinquent lands sold for taxes must immediately pay amount provided by statute in order to retain his rights of priority over the holder of the first certificate of purchase, and failure to do so forfeits such rights to the holder of the first certificate.
57-38	Nov 30	ANIMALS. TAX ON DOGS.	License tax on dogs must be paid on or before February 1st.
57-38	Dec 5	SHERIFF.	Sheriff is prohibited from transporting or committing females to the State Industrial Home for Girls or the State Industrial Home for Negro Girls.
57-38	Dec 16	COUNTY COURT.	The County court may place the county jail in the basement of the courthouse.
57-38	Dec 22	PROSECUTING ATTORNEYS.	Basis for determining salary.

57-38	Dec 29	CRIMES & PUNISHMENT.	Where statute of limitations runs and when suspended, on felonies and misdemeanors. State must have consent of U.S. Attorney General to obtain Federal Prisoner for trial in State court.
58-38	June 1	BUILDING AND LOAN.	Five shares required of directors may be full paid or installment shares. Directors having loans before Section 5593 went into effect do not have to liquidate same.
58-38	Aug 15	CRIMINAL COSTS.	Witness fees uncalled for in the county treasurer's office should be held one year from the time of the receipt of same before returning to state treasurer or county revenue fund.
58-38	Sep 21	BUILDING AND LOAN.	Board of directors may set up "participating reserve fund" if permitted by by-laws. Shares must be distributed pro rata.
58-38	Nov 29	TAXATION AND REVENUE.	Lands sold under Senate Bill No. 94 for the taxes of several years should be sold at one time for all the taxes charged against the land, which are delinquent, at the time of such sale.
58-38	Dec 1	BUILDING AND LOAN.	Sewer district trustees are not "trustees of trust funds" so that excess money may be invested in building and loan shares.
58-38	Dec 1	BUILDING AND LOAN.	Supervisor does not have right to remove officers of associations because of inefficiency or incompetency, nor the right to force a merger.
58-38	Dec 22	BUILDING AND LOAN.	Association may not purchase Class "B" shares. Officer of association may purchase shares through broker providing broker does not mislead seller.
59-38	Mar 19	ELECTIONS.	In counties of 200,000 to 400,000 population, clerk of Board of Election Commissioners cannot hold office of treasurer of municipality.
59-38	Mar 30	LABOR DEPARTMENT.	Appropriation for Department of Labor and Industrial Inspection not limited to \$65,000 for biennium.
59-38	May 4	Board of Election Commissioners	WITHDRAWN
59-38	May 7	LIQUOR CONTROL.	Supervisor cannot reopen, set aside or change decision in closed case.
59-38	May 23	LIQUOR CONTROL.	Intoxicating beer must be inspected and the inspection fee paid while the beer is in hands of brewer. If distributor desires to bottle bulk shipment of beer, he must procure proper label and affix on said bottles or containers.
59-38	July 26	COURTS.	Where Judge of Circuit Court dies, Judge of another Circuit Court cannot hold term of court in circuit where vacancy is.
59-38	Aug 18	PEDDLERS.	What constitutes selling as a peddler so as to require license as such.

59-38	Aug 20	Colonel E. J. McMahon	WITHDRAWN
59-38	Sep 24	ELECTIONS.	Must have resided in county 12 months prior to general election before name can be placed on ballot for Prosecuting Attorney.
59-38	Oct 13	LIQUOR CONTROL.	Supervisor does not have the power, when license is revoked, to refuse to issue to another person a license covering the same premises.
59-38	Oct 24	Honorable E.J. McMahon	WITHDRAWN
59-38	Nov 14	Honorable E.J. McMahon	WITHDRAWN
59-38	Dec 8	INTOXICATING LIQUORS. STUDENTS.	Section 11558, R. S. Mo. 1919, prohibiting sale of intoxicating liquors to students stands repealed.
59-38	Dec 31	INTOXICATING LIQUOR.	Conviction for violation of laws other than liquor laws does not result in automatic revocation of liquor license.
60-38	Jan 4	ARMORIES.	State Board of Education can accept titles to property for the state subject to restrictions.
60-38	Jan 22	SOLDIERS' BONUS.	Wife of deceased soldier may claim his bonus.
60-38	Jan 28	THE CHATTEL MORTGAGE.	A chattel mortgage cannot be released, which was filed by the mortgagee with an assignment in blank attached without presenting chattel mortgage and note in accordance with Section 3099 Laws of Missouri 1935, page 209.
60-38	Feb 3	SCHOOLS.	Method of Changing site of school location in consolidated districts.
60-38	Feb 4	SCHOOLS.	Apportionment of railroad taxes received by school districts should be divided according to levies made by the school district for the various funds.
60-38	Feb 8	CONSTABLE.	Jurisdiction in an adjoining township.
60-38	Feb 17	SOLDIERS' BONUS.	Deceased soldiers' bonus is payable to widow, when.
60-38	Mar 21	BONUS.	Payable only on basis of actual service.
60-38	Mar 24	HOSPITALS.	When a benevolent institution, and when engaged in the practice of medicine.
60-38	May 3	NATIONAL GUARD. MILITARY COUNCIL. MEDALS.	Awards and medals may be granted only to those prescribed in Laws of Missouri, 1931, page 262.
60-38	May 17	Mr. Emory C. Medlin	WITHDRAWN

60-38	June 15	SOLDIERS' BONUS.	S.A.T.C. (Student Army Training Corps) not disqualified from receiving Missouri State Soldiers' Bonus.
60-38	July 16	ARMORY.	Missouri National Guard may spend armory appropriation on 99-year lease.
60-38	Dec 1	SOLDIERS' BONUS.	Residence for twelve months prior to April 6, 1917, should predicate all claims for Missouri bonuses.
60-38	Dec 3	NEPOTISM.	Under the Civil Rule, the degree of relationship of a third cousin is not such as is prohibited by Section 13, Article XIV, Const. of Missouri.
61-38	May 19	OFFICERS. MUNICIPAL CORPORATIONS. DE FACTO AND DE JURE OFFICERS. ACTS OF.	The official acts of municipal officers whether they are acting as de jure or de facto officers have the same force and effect upon the third persons and the public.
61-38	May 26	TAXATION.	Failure of Board of Aldermen and City Collector to follow statute pertaining to accounting between board and collector does not affect validity of city tax.
62-38	Jan 12	SHERIFF.	Fee for attending county court, when court meets with Board of Equalization, Drainage and Levee District Boards.
62-38	Jan 20	COUNTY COURT. SCHOOL FUND LOAN.	County Court may not abandon compound interest thereon and accept simple interest in lieu thereof.
62-38	Feb 23	LOTTERY. SHO-BONUS.	The plan "Sho-Bonus" is a lottery.
62-38	Mar 17	COUNTY COURT.	Must turn over proceeds of bond issue for poor relief to Social Welfare Board under Section 12938 R.S. Missouri 1929.
62-38	Mar 21	TAXATION.	An annual franchise tax is required to be paid by every corporation organized and existing under the laws of this state in each year.
62-38	Dec 28	PEDDLERS. LICENSE.	(1) Merchant who takes merchandise from one farm sale to another to sell at auction must have peddler's license. (2) Auctioneer's license necessary, if facts warrant, under Chapter 111, R.S. 1929.
63-38	Mar 9	SCHOOLS.	The notice of election to vote on bond issue should contain the time the polls open and also the time they close.
63-38	July 11	LIQUOR CONTROL.	County court not authorized to return fee paid county by applicant when applicant's application for state license is afterwards refused.
63-38	Dec 3	TAXATION. SCHOOLS.	(1) How collector may be relieved of illegal taxes on his books. (2) Money illegally collected for one district cannot be credited to

			<p>district where it rightfully belongs, but must be credited as indicated.</p> <p>(3) Error in extension of school tax may be corrected in supplemental tax book.</p> <p>(4) Taxpayer not entitled to credit for what he paid by reason defective tax book unless the same was credited to district where it actually belongs.</p> <p>(5) Tax so collected cannot be refunded.</p>
64-38	Feb 21	TAXATION.	Authority of a county to levy a tax, in addition to the constitutional maximum, to pay outstanding warrants.
64-38	Mar 22	SCHOOL FUND MORTGAGE. SALES OF FORECLOSURE.	Sales under foreclosure of school fund mortgages can only be had on some day during the term of the circuit court.
64-38	Apr 14	MORTGAGES.	Mortgages of a Building and Loan Association are not taxable.
64-38	May 26	SPECIAL ROAD DISTRICTS.	Tax may not be levied on property subsequent to date of levy.
64-38	June 2	COUNTY ROAD AND BRIDGE FUND.	Where county has no highway engineer and county surveyor has not been designated by county court to supervise or substitute for engineer, road and bridge funds shall be placed in one general road fund under Section 7890, R. S. 1929, but must be apportioned to the various road districts under Section 7891, R. S. 1929.
64-38	Aug 5	ROADS.	Territory embracing only part of a town cannot be incorporated under Section 8024, R.S. 1929.
64-38	Oct 28	POLITICAL PARTY COMMITTEE.	Action of individual members of committee not taken at a committee meeting is invalid.
64-38	Dec 6	ROADS.	The proper remedy to question the validity of the organization of a special road district under Section 8024, R. S. Mo. 1929, is quo warranto by the prosecuting attorney of the county.
64-38	Dec 15	COUNTY BUDGET ACT.	County Treasurer cannot pay unregistered warrants out of Class 2 when there are registered warrants outstanding payable out of Class 1.
65-38	Jan 10	ELECTIONS. OFFICERS. WOMEN HOLDING OFFICE OF TRUSTEE IN VILLAGES.	Women may be elected to the office of trustee in towns and villages.
65-38	Feb 17	MOTOR VEHICLES.	Section 7774 is to be treated as a criminal statute.
65-38	Feb 23	LICENSE TAX.	A village cannot subdivide merchants as a class and levy an unequal tax on a subdivided class.

65-38	Mar 21	CIRCUIT CLERKS.	Circuit clerks and recorders in counties of more than 20,000 and less than 200,000 cannot be separated by another election under Section 11538.
65-38	Mar 24	ELECTIONS. PRIMARY.	Last day for candidates to file for August Primary, June 3, 1938.
65-38	Apr 21	ELECTIONS.	Clerk of election who was not a legal voter at such election does not invalidate the election.
65-38	Apr 26	CITIES, TOWNS AND VILLAGES. BOARDS OF PUBLIC WORKS.	Powers and Duties of Board of Public Works in Cities, Towns and Villages.
65-38	May 23	CRIMINAL COSTS.	Complaining witness in a misdemeanor before a justice of the peace on a charge of careless and reckless driving is not liable under Section 3444, R. S. Mo. 1929 for costs where defendant is acquitted but costs must be paid by the county.
65-38	May 24	COURT COSTS.	In a proceeding to preserve the peace, either the complainant or defendant may be adjudged to pay the costs and in no event shall the county be liable for costs. Prosecuting attorney need not appear for complainant in such cases.
65-38	June 10	OFFICERS.	One person may hold both the office of Justice of the Peace and Township Committeeman.
65-38	June 30	MUNICIPAL CORPORATIONS. ELECTRICITY.	City owning electric light plant may sell surplus electrical energy to persons outside corporate limits, under certain conditions.
65-38	July 8	ELECTIONS. PRIMARY.	Candidates for Representative in Congress may withdraw even though his name has been certified out to the several County Clerks. Pederson permitted to withdraw as candidate for Congress.
65-38	July 22	CRIMINAL LAW. PRELIMINARY EXAMINATION.	If defendant is discharged by justice at the preliminary examination prosecuting attorney may file complaint before any other justice in the county.
65-38	Aug 12	GAME AND FISH.	Provision for election by counties on question of closed season for shooting quail not repealed by Amendment No. 4, Laws of Missouri, 1937, page 614.
65-38	Aug 22	CRIMINAL COSTS.	State Highway Patrol Officer not liable for costs in a misdemeanor where the defendant is acquitted by a jury, without judgment of malicious prosecution, or is not liable for costs for arrest and conviction on a vagrancy charge, or acquittal in an arrest in a felony case before a jury.

65-38	Dec 23	OFFICERS. ELECTIONS.	Any officer-elect may assume the duties of office on Sunday, January 1, 1939, if he has taken the oath of office prior thereto.
66-38	Feb 4	ASSESSORS.	It is the duty of the County Assessor to compile a land list or real estate book for assessment purposes, and the County cannot necessarily be required to pay the Assessor therefor. Supplemental opinion to #59-8-24-37.
66-38	Feb 16	TAXATION.	Under Jones-Munger law an occupant or any interested party, as well as the owner, may redeem from tax sale.
68-38	Jan 5	ROADS AND BRIDGES. TAXATION. SPECIAL ROAD DISTRICTS. COUNTY COURTS. COUNTY HIGHWAY COMMISSION.	Taxes levied and collected on properties in special road districts, for the road and bridge fund shall be turned over to such special road district and county court may use such taxes that it receives on account of the road and bridge fund tax for improvement of roads of the county highway system.
68-38	Mar 14	CARTOON CONTEST.	Lottery.
68-38	Aug 8	ELECTION EXPENSES. MUNICIPAL CORPORATIONS.	Lawful obligations of a municipality payable from general funds unless law specifically provides otherwise.
68-38	Nov 10	POLL TAXES.	Poll taxes in towns and villages not repealed by Laws of 1937, page 440.
68-38	Dec 12	ELECTIONS. JUSTICES OF THE PEACE.	Justices of the Peace can only be elected at "off-year" election. Error on ballot must be objected to before election.
68-38	Dec 28	CONTRACTS.	Manner of signing Cooperative Agreements with federal government by Missouri State School for the Deaf.
69-38	Jan 14	HEALTH. HOTELS. INSPECTION OF ROOMS. NUMBER OF ROOMS. HOW DETERMINED.	Inspectors of State Board of Health are authorized to inspect all rooms of hotel to determine whether or not the provisions of article 7, chapter 93 R.S. Mo. 1929 are being complied with. Number of rooms for living purposes as ascertained by number assignable to guests.
69-38	June 28	INSPECTION OF BEVERAGES.	Right to inspect and collect fee therefor.
69-38	July 29	PHYSICIANS AND SURGEONS.	The practice of Physio-Therapy; Swedish Massage, Hydro-Therapy, Electro-Therapy and Naturopathy is a practice of medicine and surgery and within the provisions of the law requiring a license therefor.
69-38	Nov 12	FUNERAL DIRECTORS.	Municipal license requirements to operate.

69-38	Dec 28	CHICORY.	May not be used in coffee as it constitutes an adulteration of food.
70-38	Jan 28	PROSECUTING ATTORNEY.	In a county containing a population of 11,764, the county court cannot grant an extra fee to the prosecuting attorney for an opinion rendered to the county court and the Federal Government.
70-38	June 16	ELECTIONS.	In Jackson County outside of Kansas City, Board of Election Commissioners should publish notice of election.
70-38	June 24	NEPOTISM.	Judge of Probate Court receiving personal service from relative within fourth degree does not violate Sec. 13 Art. XIV where such relative is not appointed to an official position.
70-38	Aug 26	INTOXICATING LIQUOR.	Unlawful to supply habitual drunkard with intoxicating liquor.
70-38	Oct 27	Hon. James. H. Pettijohn	WITHDRAWN
70-38	Dec 22	ASSESSORS.	Township assessors entitled to be paid for taking list containing only real estate in view of Laws of 1937, p. 570.
71-38	Jan 3	COSTS. HABEAS CORPUS.	Costs cannot be taxed against any party to a habeas corpus proceeding.
71-38	Jan 8	COUNTY TREASURER.	If warrant is presented when no funds are available to pay the same, County Treasurer should follow the provisions of Section 12171, R. S. 1929.
71-38	Feb 8	Honorable Leo A. Politte	WITHDRAWN
71-38	Mar 8	CONSERVATION COMMISSION ACT. SCHOOLS.	Fines collected for violation of the Game and Fish Laws go to the county public school fund and not to the Conservation Commission.
71-38	Apr 5	FISH AND GAME.	Prosecutions under chapter 43 Revised Statutes of Missouri, 1929, must be commenced within one year from date of violation.
71-38	Apr 22	MOTOR VEHICLES. SCHOOL BUS.	School bus privately owned must be registered and obtain license plates.
71-38	July 14	TAXATION AND REVENUE.	Expense of printing lists of delinquent lands under the Jones-Munger Law shall be paid out of the county treasury.
73-38	Aug 5	COSTS.	Sheriff entitled to fees, as set out in Section 11791, for duties performed under Section 3791, Session Laws 1937, page 222.
74-38	Feb 26	LOTTERIES.	Weekly drawings.
74-38	Apr 12	JURIES. PETIT AND	Regular panel of petit jurors summoned at each regular term of the circuit court for which sheriff receives \$8.40 and mileage; alternate

		ALTERNATE. SHERIFF'S FEE FOR SUMMONING.	jurors only summoned when regular juror does not appear and when ordered by court.
74-38	May 4	SCHOOLS.	Section 9284, R. S. 1929, governs the length of term of the school. The county superintendent cannot compel rural districts to hold more than eight months term.
74-38	June 24	LOTTERIES.	Give-Away-Night.
74-38	Nov 25	CRIMINAL LAW. VENUE.	A person receiving or holding stolen property may be informed against in any county in which he receives or holds such property.
75-38	Jan 17	SPECIAL ROAD DISTRICTS.	Commissioners of special road districts organized under Article 9, Chapter 42, R. S. Mo. 1929, cannot levy tax for maintenance purposes, nor can they divert money raised for payment of interest and bonds to maintenance fund.
75-38	Oct 14	ELECTIONS.	Signer of petition may withdraw names any time before sufficiency of petition is determined.
76-38	Jan 31	HEALTH. DEFINITION OF PUBLIC HEALTH NURSE.	Public health nurse is one who is licensed and registered as a nurse in Missouri and who aids in the promotion of wholesome, sanitary condition of community at large and who is paid compensation out of the public funds.
76-38	Feb 3	INSURANCE DEPARTMENT.	Approval of Affidavit of Change in Number of Directors of Postal Life & Casualty Insurance Company.
76-38	Feb 8	PROBATION OFFICER.	(1a) Social Security Act does not repeal authority of county courts under Section 14182 R.S. Mo. 1929 to appoint county superintendent of public welfare. (1b) County Court may not appoint County Supt. Under Sec. 14182 as probation officer only. (2) Circuit Court has no authority to appoint probation officer under Sec. 14171 R.S. Mo. 1929 when County Court appoints county superintendent of public welfare. (3) Circuit Court may with approval of county court pay salary to probation officer under Sec. 14174 R.S. Mo. 1929.
76-38	Feb 23	INSURANCE DEPARTMENT.	Approval of instruments changing name of the Trans-Mississippi Life Insurance Company to National Security Life Insurance Company.
76-38	Mar 15	INSURANCE DEPARTMENT.	Approval of Articles of Association of the Atlas Life Society, amended for change to a stipulated premium life insurance company under Article 4, Chapter 37, R. S. 1929.
76-38	Apr 16	INSURANCE. CORPORATIONS.	The foreign insurance corporations' right to license is dependent not on charter powers, but on rights granted by license.
76-38	May 23	INSURANCE	Approval of papers in connection with the decrease of the capital stock

		DEPARTMENT.	of the National Security Life Insurance Company, a corporation. Art. 4, Chap. 37, R. S. Mo. 1929.
76-38	June 4	INSURANCE DEPARTMENT.	Approval of papers, as to form and sufficiency, submitted in connection with increase of capital stock of Postal Life and Casualty Insurance Company under Art. 4, Chap. 37, R. S. 1929.
76-38	June 10	INSURANCE DEPARTMENT.	Approval of papers submitted in connection with organization of Mutual Standard Casualty Company, Kansas City, Missouri, under Article 7, Chapter 37, R. S. Mo. 1929.
76-38	June 21	INSURANCE DEPARTMENT.	Approval of form and sufficiency of papers submitted in connection with the Postal Life and Casualty Company, under Article 2, Chapter 37, Section 5776, R. S. 1929.
76-38	Aug 15	SHERIFFS.	Must attend courts of record or criminal courts when in session whether his services be required or not.
76-38	Sep 2	WEAPONS.	Owners of weapons are not required to register possession by the State of Missouri as is required under the National Fire Arms Act.
76-38	Sep 9	TAXATION. SPECIAL ROAD DISTRICTS. COLLECTION OF DELINQUENT TAXES.	The County Collector is the proper party to sell lands for delinquent taxes due special road districts.
76-38	Nov 3	INSURANCE DEPARTMENT.	Approval of papers submitted in connection with increasing of capital stock and amending Article Fourth of the Articles of Incorporation of Utilities Insurance Company.
77-38	Jan 31	INSURANCE.	Section 5768, Article IV, Chapter 37, R. S. Missouri 1929, requires policies issued under stipulated premium plan to specify sum of money payable upon happening of contingency insured against.
77-38	May 3	INSURANCE.	Inter-indemnity or reciprocal insurance companies may write health and accident policies in this state and are required to comply with Senate Bill No. 126.
77-38	May 13	INSURANCE.	Life insurance companies may provide a funeral benefit for natural death indemnity in health and accident policy.
77-38	May 24	ELECTIONS.	Last Federal Decennial Census only bases for determining population.
78-38	Jan 14	SCHOOLS.	(1) The Board cannot transfer teachers fund to the incidental fund; (2) Board is not liable personally for balance due teacher if contract is made within the anticipated revenue from every source; (3) Treasurer cannot pay warrants of 1936 out of 1937 funds.
78-38	Feb 10	WARRANT.	Issued out of justice court in one county, how served in another.

78-38	Feb 24	FEES.	Execution fee of One hundred twenty-five dollars provided for in Section 11791 R. S. Missouri 1929, not payable to warden of penitentiary.
79-38	Jan 26	ASSESSORS.	Compensation in counties of 40,000 or less in view of Section 9756, R.S. Missouri, 1929, as amended in Laws of 1937, page 570.
79-38	Oct 29	ELECTIONS.	Hotel keeper convicted of refusal to furnish list of tenants to election commissioner is not considered a crime connected with the exercise of right of suffrage.
80-38	Jan 6	RECORDER OF DEEDS.	May purchase new abstract and index to trust deeds and be reimbursed by county court.
80-38	Dec 5	TAXES.	Distribution of Private Car Tax.
81-38	Jan 4	RECORDER OF DEEDS.	Cities of 600,000 or more and counties 200,000 to 400,000. Trustee's Deeds. Recorders in cities of 600,000 or over and counties of 200,000 to 400,000 shall require that the unpaid obligations securing deeds of trust or mortgages be presented to him before recording Trustee's Deeds under foreclosure for such mortgages.
82-38	July 8	COURT HOUSE REMOVAL.	Sufficiency of Petition.
82-38	July 11	LOTTERIES.	Shar-Sho Night is a lottery.
82-38	Aug 22	CIRCUIT CLERK.	Circuit Clerk cannot appoint deputy without approval of the Circuit Judge.
82-38	Oct 26	TAXATION AND REVENUE.	Certificate holder under Senate Bill 94 failing to pay subsequent taxes forfeits priority when said land is sold for same. Limitation of redemption begins to run on date of issuance of second certificate.
82-38	Oct 31	NEPOTISM.	Sister-in-law of County Clerk, acting without official appointment and merely assisting clerk, without compensation, does not violate Art. XIV, Sec. 13, Mo. Constitution; but if sister-in-law is officially appointed deputy clerk, with or without salary, then it appears to be violation of the amendment.
82-38	Dec 8	RECORDER OF DEEDS.	Recorder should not release a mortgage or deed of trust when a copy of the original note is used.
83-38	Jan 7	COUNTY COURT.	Under Section 11794 R.S. Mo. 1929 County Court is not authorized to make an order for sheriff to receive a different amount for boarding prisoners charged with felony than the amount for prisoners charged with misdemeanor.
83-38	Jan 22	COUNTY BUDGET ACT.	In counties of less than 50,000 inhabitants not necessary for officer to call for bids, by advertising or otherwise, for purchase of supplies.

83-38	Feb 2	COUNTY TREASURER.	Should refuse to pay criminal costs due Sheriff when sheriff is indebted to county for amount greater than such costs. May pay such costs when county court makes finding sheriff is not indebted to county.
83-38	Feb 5	SPECIAL ROAD DISTRICTS.	Interpretation of proviso in Section 8026, Revised Statutes Missouri 1929.
83-38	Feb 21	SCHOOLS.	Necessity for voting for free transportation annually – who may vote on proposition.
83-38	Feb 23	MILITIA.	Same individual can be Adjutant General and Commander of the National Guard, but there is no salary provided for commanding the National Guard.
83-38	Feb 28	PENAL INSTITUTIONS. PRISONERS. BARBERS.	Prisoners may do barber work for guards and other employees of penal institutions if the commissioners of the department of penal institutions permit it.
83-38	Apr 6	SCHOOLS.	The School Board of the Rural District has the right to pay for the nine months term without the vote of the inhabitants.
83-38	May 4	APPROPRIATIONS.	Persons who care for graves must furnish receipts for expense items over \$1.00.
83-38	May 16	SCHOOLS.	Rural school district may condemn property adjacent to a school for playground purposes.
83-38	May 24	SALARIES AND FEES. COUNTY JUDGES.	Jasper County Judges shall receive five dollars per day as salary as judge of the county court and twelve hundred dollars each per annum as members of the board of road overseers.
83-38	June 6	SCHOOLS.	Rural school districts may condemn property adjacent to a school for playground purposes.
83-38	Aug 4	ARMORIES.	County Courts' authority to furnish sites to the State for armories. County Courts may give or convey lands of the County to the State for armories.
83-38	Aug 16	CIRCUIT CLERKS.	Must hold money paid to them not satisfied of awards for damages in condemnation cases subject to the orders of the circuit court.
83-38	Aug 23	TAXATION. CEMETERIES.	Only lands used for a cemetery or burial grounds are exempt from taxation, and real estate owned by a cemetery association and used for farming and residential purposes is not exempt.
83-38	Aug 24	LOTTERY.	Automobile drawing scheme.
83-38	Aug 30	APPELLATE COURTS. CLERKS.	Must comply with provisions of Section 1, Law Mo. 1933, page 415.
83-38	Sep 2	CRIMINAL COSTS.	The State is only liable for the costs in juvenile trials on conviction

			before a jury, plea of guilty, acquittal, or dismissal under the general criminal law, where the punishment is solely imprisonment in the state penitentiary.
83-38	Oct 21	LIQUOR BONDS. SALES TAX.	Sureties on liquor bonds not liable for payment of sales tax.
83-38	Nov 21	COUNTY BUDGET LAW.	Surpluses may be transferred to take care of deficiencies in other classes at close of fiscal year, or if it can be definitely determined that sufficient funds will remain to take care of all outstanding and future obligations, transfer may be made before the close of the year.
83-38	Nov 21	STATE AUDITOR.	Sales tax returns filed with the State Auditor are privileged communications.
83-38	Nov 30	SHERIFFS.	Entitled to ten cents per mile for serving commitment to jail on a preliminary where the justice court is more than 5 miles from the county jail.
85-38	Jan 3	INTOXICATING LIQUOR.	The operation of a disorderly house constitutes a public nuisance, and the proper procedure to abate a public nuisance is by injunction in a court of equity.
85-38	Jan 4	COUNTY OFFICERS.	Need not devote all of their time to office unless necessary to fully discharge duties. Forfeits office by appointing relative to render service to the State.
85-38	Jan 7	CONSERVATION OF NATURAL RESOURCES.	Board of Curators of the University of Missouri, through Agricultural Extension Service, to cooperate with Federal Government in connection with conservation of natural resources.
85-38	Jan 13	MOTOR VEHICLES.	Courts are not authorized to grant stay of execution on judgment suspending or revoking drivers' licenses.
85-38	Apr 2	SCHOOLS.	It is not permissible for a school board, by a majority vote, to use the \$50.00 deduction to be added to the equalization quota to liquidate indebtedness in the building fund.
85-38	Apr 6	APPROPRIATION. SOLDIERS MONUMENT.	Traveling expenses of persons selected by Governor to "care" for monument and graves may be paid out of appropriation Laws of 1937, page 126.
85-38	July 23	ELECTIONS.	Section 10206, R.S. 1929, construed as meaning one judge of each political party to act as receiving judge and likewise on judge of each political party to act as counting judge to count all the votes of each political party. In the event two additional judges are appointed, as provided in Laws of 1937, p. 234, four judges, two from each political party are to count the votes of all parties.
85-38	July 25	ELECTIONS.	Each candidate for office at primary election may not have challengers

		CHALLENGERS. COUNTY COURT.	or witnesses within the polls but such challengers are selected by the committeeman and committeewoman of such precinct. Instruction of judges of election. County court not required to instruct judges of primary election.
85-38	July 30	ELECTIONS.	1. WPA officials and employees eligible to serve as judges and clerks of elections except in certain places. 2. No penalty for persons serving as judges and clerks who are disqualified by reason of employment. 3. Governor does not have control of election boards and election officials but may properly direct such election officials to execute the laws.
85-38	Aug 3	CITIES. MUNICIPALITIES.	Cities of fourth class can pass and enforce an ordinance requiring dogs to be licensed and immunized against rabies.
85-38	Aug 27	STATE HIGHWAY COMMISSION.	Not liable for maintenance of abandoned roads not part of state highway system.
85-38	Sep 2	TAXES. RECEIVERS.	Duty of receiver to pay taxes; Duty to pay taxes.
85-38	Sep 7	MOTOR VEHICLES.	Motor vehicles shall display to the front and sides of such vehicles white lights. The Commissioner of Motor Vehicles is authorized to determine whether or not lights submitted by manufacturers meet the requirements of the statutes.
85-38	Oct 13	FISH AND GAME DEVICES. UNCLAIMED FEES TO BE TURNED INTO COUNTY TREASURER.	One or more ordinary hooks on a line may be used for catching fish provided they are only used as a lure and not for snagging or snaring fish.
85-38	Nov 18	MOTOR VEHICLES.	If reconditioned motor is placed in car with identification number on frame the symbol "RC" should be placed before number on frame.
85-38	Dec 9	OFFICERS.	The probate judge of a county under 200,000 population may be city clerk of a city under 200,000 population at the same time.
86-38	Jan 6	STATE HIGHWAY PATROL.	Workmen employed on construction of radio patrol stations cannot be paid as employees of the patrol.
86-38	Mar 14	HIGHWAY PATROL.	Section 20 of the State Highway Patrol Act, page 235, Session Laws of 1931, does not authorize maintenance of patrol out of money appropriated to state highway department. Article 4, Section 44a of the Constitution limits appropriation to enforcement of motor vehicle law and traffic violation.
86-38	Apr 14	CLERK OF THE	Is entitled to added compensation as Clerk of the Juvenile Division, and

		HANNIBAL COURT OF COMMON PLEAS.	such compensation should be based upon the population of Marion County.
86-38	May 24	Hon. Walter G. Stillwell	WITHDRAWN
86-38	June 7	HIGHWAYS.	Motor vehicle registration fees and state gasoline taxes are dedicated to State Highway purposes.
86-38	July 1	STATE ROAD FUND.	Money paid to the State by the Federal Government for highway purposes must go into the State Treasury, and can be expended only upon warrants issued pursuant to appropriations.
86-38	July 29	NEPOTISM.	If a candidate for presiding judge is elected and votes for the appointment of his wife's blooded nephew as Superintendent of the Infirmary, he is subject to ouster; if he does not conspire, connive or agree to the appointment and votes against the same, he is not subject to ouster.
86-38	Aug 26	COURT HOUSES.	County court has control over court houses and their use rather than sheriff.
86-38	Sep 7	MOTOR VEHICLES.	Under Section 7759, R.S. Mo. 1929, an owner of an automobile dealing as an independent contractor is not an operator or chauffeur.
86-38	Nov 1	LOTTERY.	Premium coupon books.
88-38	July 13	CANCER COMMISSION.	Scientific research and printing supplies.
89-38	Mar 1	TAXATION. SALES TAX. CONDITIONAL SALES AND CHATTEL MORTGAGES. TAX: WHEN COLLECTED.	Sales tax due and collectible at time title to tangible personal property passes unless the sale is a charge or time sale. If chattel mortgage and note are given for balance of purchase price, tax is to be collected.
89-38	June 17	ELECTIONS.	Committeemen or committeewomen for county committee to be selected from wards of incorporated cities and from territory outside of such cities in the township.
89-38	July 29	MUNICIPALITIES. BOND ISSUE. VALUATION. HOW DETERMINED.	Municipalities in determining the amount for which they may vote bonds shall use the assessment next before the last completed assessment as a basis of such bond issue.
89-38	Sep 21	ELECTIONS.	Public utility company not entitled to have challengers and watchers in polls in a municipal bond election on the question of incurring indebtedness to buy or build municipal utility plant.

90-38	Apr 22	Hon. Sam E. Trimble, President	WITHDRAWN
93-38	Jan 17	COLLECTOR OF ST. LOUIS.	Collector of St. Louis County cannot retain an amount greater than \$10,000.00 under Section 9935 Division 14 as amended by Session Laws of 1937.
93-38	Feb 8	SHERIFFS.	Assistant taking patient to State Hospital allowed \$4.00 per day. County court may furnish siren and red light for sheriffs privately owned car. May appoint deputies with approval of circuit judge.
93-38	Apr 9	DEATH WARRANT.	Form of.
93-38	Sep 6	LIQUOR CONTROL.	City council of third class city cannot delegate power to issue non-intoxicating permits. Duty of mayor to sign license issued is ministerial.
93-38	Sep 26	RECORDER OF DEEDS. PUBLIC RECORDS – INSPECTION BY PUBLIC.	Any person may inspect the records in the office of recorder of deeds and make a memorandum or copy thereof, subject to reasonable rules and regulations made by the recorder.
93-38	Oct 26	TAXATION AND REVENUE.	Clerk of city of the third class cannot legally collect county taxes. He has no duty to keep a record of the collection of such county taxes.
93-38	Dec 1	ELECTIONS. JUSTICES OF THE PEACE. TERMS.	Justices of the Peace who are appointed to fill a vacancy hold office until the next general election for county officers and Justices of the Peace, which is on each quadrennial period after November 1882.
94-38	Jan 11	ROADS AND BRIDGES.	Warrants issued on special levy under Section 7891 bear interest.
94-38	Aug 30	CIRCUIT CLERKS.	Expenses of Circuit Clerk of Jasper County.
95-38	June 7	TAXATION.	Sales of admission tickets, cash admission, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events are subject to sales tax by the City of St. Charles.
95-38	Aug 8	OFFICERS – SALARIES AND FEES – LIMITATIONS.	1. Constable is entitled to 10 cents per mile for serving jury summons for inquest. 2. Officer may make claim for any salary or fee provided the same is unpaid and the statute of limitations has not run.
95-38	Oct 18	COUNTIES.	County court judges cannot borrow money to retire bond issue without assent of 2/3 of the voters.
96-38	Jan 20	ROADS & BRIDGES.	Sections 8012 and 8013 do not give county highway engineer the authority provided therein over the Special Road Districts organized under Articles 9 and 10, Chapter 42, R.S. Missouri 1929.
97-38	Jan 10	TAXATION. CAPITAL STOCK TAX.	Banks to include in returns for assessment of the bank stock for full amount invested in stock of the Federal Reserve Bank.

		STATE BANKS. FEDERAL RESERVE STOCK.	
97-38	Jan 15	TAXATION.	Tenant occupying premises for a term, may, within such term, redeem such premises from a holder of a certificate of purchase, within statutory period.
97-38	Jan 25	COUNTY OFFICER.	Removal of a coroner from one county to another. He can continue to hold office.
97-38	Feb 5	OFFICERS CONSTABLES.	Duties as to making arrests, carrying weapons, etc. deputy constable classed as a peace officer.
97-38	Apr 7	PROSECUTING ATTORNEYS.	Where two or more defendants are jointly charged and convicted, a prosecuting attorney fee should be assessed against each defendant.
97-38	May 16	PROSECUTING ATTORNEY. CIRCUIT CLERK. COUNTY CLERK.	Cannot apply fees collected to salary and assign salary warrant to treasurer in lieu of paying said fees into treasury.
97-38	May 25	TAXATION. NATIONAL MORTGAGE ASSOCIATIONS.	Bonds and/or debentures of National Mortgage Associations exempt from taxation.
97-38	June 3	CRIMINAL COSTS.	Statute of limitations begins to run after conviction and sentence and not from the time of certification of a fee bill.
97-38	Oct 10	COUNTY COURTS.	Mandatory for court to order election to restrain animals when proper petition is presented.
97-38	Nov 23	COUNTY COURTS.	A judgment rendered by the county court can be executed the same as a judgment by the circuit court.
98-38	Feb 4	RECORDER.	Recorder of Deeds is bound to require statutory fees before recording written instruments.
98-38	Feb 24	TAXATION. RAILROADS, TELEPHONE, ETC, LIABLE FOR WHAT TAXES.	Railroads and other utilities similarly taxes owning or holding property on June 1, including property acquired on that date are liable for taxes thereon for the ensuing year.
98-38	May 14	STATE TREASURER.	State auditor cannot surrender original documents, drafts or vouchers, but must be preserved in his office.
98-38	Aug 23	Hon. Conn Withers	WITHDRAWN
98-38	Sep 16	Hon. Conn Withers	WITHDRAWN

98-38	Oct 7	CHARITABLE TRUST.	Eleemosynary Board authorized to accept gift in trust for use of inmates at State Hospital Number 3.
98-38	Oct 14	STATE TREASURER. BANKS & BANKING.	Depository of State funds. State Treasurer without authority to settle and compromise State's claim against failed bank.
98-38	Dec 7	COLLECTORS.	Collectors may retain 2% collected on delinquent taxes in addition to regular fees.
99-38	Feb 4	ELECTION BOARD.	Contract made by old Board for printing is binding on new Board.
99-38	Feb 14	MOTOR VEHICLES.	Exemption of taxicabs from control by Public Service Commission.
99-38	Feb 17	ELECTIONS.	Several questions on registration of voters in St. Louis.
99-38	Mar 8	ELECTION.	Inmates of certain homes and shelters in St. Louis not disqualified to vote; from what address such persons should be registered.
99-38	Mar 9	ELECTIONS.	Board of Election Commissioners of St. Louis have five whole days immediately preceding any election within which to make transfers of registration.
99-38	Mar 9	INTERMEDIATE REFORMATORY.	No provision in law for prosecuting inmates for escaping from this institution; Sec. 3913 not applicable
99-38	Mar 15	LOTTERIES.	Doctor Quizzer is a lottery.
99-38	Apr 28	ELECTIONS.	Secretary of State not required to notify Board of Election Commissioners of St. Louis of candidates for primary who receive their votes solely in the City of St. Louis.
99-38	May 2	Mr. Carl F. Wymore	WITHDRAWN
99-38	May 3	ELECTIONS.	Candidates for unexpired terms should declare and file for the particular unexpired term to which they aspire to be elected.
99-38	May 12	COSTS.	State is not liable for costs where a conviction or acquittal was had on a graded felony.
99-38	May 28	ELECTIONS.	Judges and clerks of election in St. Louis are not employees of the Board of Election Commissioners, and the Board of Election Commissioners cannot, by resolution, designate Judges and Clerks of election as registration officers.
99-38	June 7	ELECTIONS. PRIMARY.	Last day for candidates to file for August Primary – June 3, 1938.
99-38	June 20	ELECTIONS.	Ordinance inconsistent with statutes is void.
99-38	June 21	ELECTIONS.	What constitutes filing of declaration of candidates.

99-38	June 22	ELECTIONS.	Names of candidates of Socialist party must be printed in newspaper notices.
99-38	June 22	MORTGAGES. SCHOOL FUND MORTGAGES. STATUTE OF LIMITATIONS. RENEWALS.	Section 865, R.S. Mo. 1929 applies to school fund mortgages. School fund mortgage which has expired on account of statute of limitation may be renewed by the maker and will be supported by sufficient consideration.
99-38	June 25	ELECTIONS.	Supplemental opinion to St. Louis Board of Election Commissioners.
99-38	July 1	ELECTION.	It is proper in the City of St. Louis to set a date between the 10th and 20th day prior to primary election after which names of candidates cannot be withdrawn or any further changes made in the official ballot.
99-38	July 15	ELECTIONS.	Board of Election Commissioners of City of St. Louis required to print on the official ballot the name of any candidate transmitted to them by the Secretary of State. Candidates have no right to make any change in their names given at the time of filing declaration after their names have been published as required by statute.
99-38	July 23	ELECTIONS.	Board of Election Commissioners should send out absentee ballots immediately upon receipt of the printed ballots.
99-38	Sep 7	ELECTIONS.	Temporary appointees appointed by judge or clerk of elections in St. Louis City to fill vacancies until a judge or clerk is appointed by the Board of Election Commissioners is not entitled to compensation for his services.
99-38	Sep 9	COUNTY COURTS. WIDENING OF ROADS.	The County Court shall follow procedure prescribed by Section 7840, R. S. Mo. 1929, for the widening of the right-of-way of a road.
99-38	Oct 3	Hon. J. E. Woodmansee	WITHDRAWN
99-38	Oct 11	ELECTIONS.	Qualified voter does not lose residence by joining the Navy unless the intention shows otherwise.
99-38	Oct 12	CITY TREASURER.	Is a county or state officer in St. Louis, Missouri.
99-38	Oct 20	CITIZEN.	Person citizen of county in which he permanently resides.
99-38	Nov 1	COUNTIES.	Disputed ownership and possession of swamp and overflow land is contested by suit to quiet title and ejectment proceedings.
99-38	Nov 17	ANIMALS. DOG LAW.	County dog law is constitutional in that it does not violate Section 3, Article X of the Constitution.

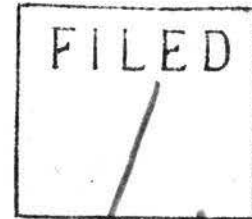
99-38	Dec 22	OFFICERS. ELECTIONS.	County court cannot convene on Sunday, January 1, 1939, and administer oaths of office to newly elected officers whose terms are to commence as of that date.
99-38	Dec 30	Mr. Carl F. Wymore	WITHDRAWN
100-38	July 12	Mr. C. E. Yancey	WITHDRAWN
100-38	Oct 26	Hon. C. E. Yancey	WITHDRAWN
100-38	Nov 4	ELECTIONS.	Names of candidates on primary ballot must be alternated. Cost of such printing is matter of contract.

BUILDING AND LOAN: Fund for withdrawal must be divided pro rata among all shareholder. The "receipts" used in Section 5604 means net receipts. Pro rata share determined from amount actually due.

February 24, 1938.

2-26

Mr. Joe C. Acuff, Chief Clerk
Bureau of Building and Loan Supervision
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"Our Bureau is in receipt of numerous inquiries and complaints regarding the manner in which Building and Loan Associations operating under our jurisdiction are handling withdrawals.

"Section 5604 of the Missouri Statutes provides a safeguard for the association in the event of excessive withdrawal demands. It becomes evident to this department that this section of the Statutes is being interpreted by officers of various associations in a manner most convenient to their plan of operation. Our attention has been called to some of these interpretations with the assertion that the withdrawing shareholders are being discriminated against and are denied their rights under Section 5604.

"In order that this department, as guardian of the shareholders' interests, may be in a position to thoroughly instruct the officers of every association in the proper procedure under Section 5604, I would appreciate an opinion on the following:

"1. Can an association arbitrarily set a specific percentage of the withdrawal value of shares on file for withdrawal as the amount to be paid each month?

"2. Section 5604 states in part as follows:

* * * * * At no time, however, shall more than one-half of the receipts of the corporation for any fiscal month, and, when the corporation is indebted on matured shares of an earlier series, not more than one-third of said receipts, be applicable to the demands of the withdrawing shareholders, * * * * *

"Does the word receipts, as underscored, mean gross receipts, all funds accumulated, or net receipts, thereby making allowance for operating expenses necessary for the future continuance of business as an association? If only a portion of the receipts are applicable to withdrawal payments, then what deductions are allowed for operating and other expenses?

"3. Should the pro rata distribution be made on the basis of the original amount filed for withdrawal, or on the balance reduced by previous payments?

Section 5604, Laws of Missouri, 1937, p. 192, provides as follows:

" 'Section 5604. Any shareholder, or the legal representative of a deceased shareholder, wishing to withdraw from the said corporation, shall, subject to the provisions of the by-laws, and his certificate of stock and the limitations hereinafter mentioned, have power to do so, upon giving one month's written notice of his intention so to do, delivered to the association at or before a stated meeting of the directors, or at such other time as the by-laws may provide. If given before

a stated meeting, the time of such notice shall not be deemed to have commenced to run until the first stated meeting thereafter. The member so withdrawing, or, if deceased, his legal representative, shall, if his stock be withdrawable according to the terms of the certificate and by-laws of the association, be entitled to receive the amount actually withdrawable at the time of making application for withdrawal according to the by-laws of the corporation and the provisions of the certificate of stock. At no time, however, shall more than one-half of the receipts of the corporation for any fiscal month, and, when the corporation is indebted on matured shares of an earlier series, not more than one-third of said receipts, be applicable to the demands of the withdrawing shareholders, or of shareholders whose stock has been forfeited in the manner hereinafter provided, without the consent of the directors; and when the demands of withdrawing shareholders exceed the moneys applicable to their payment, the funds applicable to the payment of the withdrawing shareholders shall be pro-rated among the members who have filed notice of withdrawal upon the following basis: All shares on which notices of withdrawal have been filed for a period of 30 days, shall receive their pro-rata share of the funds available for withdrawal at the end of the preceding fiscal month, based upon the withdrawal value of the shares at the time distribution is made. Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder. The Board of Directors shall have the absolute right in its

discretion to pay an amount not exceeding \$100.00 of any share account or accounts of any shareholder in any one month in any order, regardless of whether or not such shareholder or other shareholders have on file notices of withdrawal.' "

We shall take your questions up in order.

I

The first question presented is whether an association can arbitrarily set a specific percentage to be paid each month, e. g. can an association state that it will pay five per cent of the amount each shareholder has up for withdrawal?

In 9 C. J. p. 938, it is said:

"The right of withdrawal is a fundamental right evidencing a public policy. The right is an absolute one and can not arbitrarily be withheld."

In *Latimer v. Equitable Loan and Investment Company*, 81 Fed. 776, the Circuit Court of Appeals said:

"The right of withdrawal, by the provisions and clear meaning of the statutes of Missouri in question, appertains to all shareholders, whether holders of installment-paying or full-paid stock."

9 Am. Jur. 113, states:

"Moreover, such right (of withdrawal) does not exist except as conferred by or derived from a by-law or statute, and when so conferred is restricted to the terms of the by-law or statute."

Section 5604, *supra*, is clear when it says that "the funds applicable to the payment of the withdrawing shareholders shall be prorated among the members who have filed notice of withdrawal."

Under this provision the entire fund on hand must be divided among the shareholders who have filed notice of withdrawal, and the association can not arbitrarily set a certain per cent on which they will pay off withdrawals.

II.

Your second question deals with whether "receipts" as used in Section 5604, supra, means gross receipts or net receipts. The Supreme Court of Louisiana in *State ex rel Orlando v. Reliance Homestead Ass'n*, 142 So. 146, 174 La. 980, had before it a similar question involving an almost identical statute. The Court said:

"But the term 'receipts' as used in the statute does not mean gross intake or gross collections made by the association.

"It relates rather to net receipts or to those funds coming into the hands of the association which may reasonably be made available for the payment of such claims after paying the primary obligations and necessary expenses of the association. This we think is a sound and reasonable interpretation of the act."

Therefore, "receipts" as used in Section 5604 means net receipts.

III.

The third question in your request is whether the pro rata distribution should be made on the basis of the original amount filed for withdrawal or on the balance remaining after previous payments.

In order to answer this question it must first be determined whether those who have filed notice of withdrawal are entitled to be paid off in full before other shareholders withdrawing subsequently, or are all shareholders who have notices of withdrawal on file entitled to share in the fund on hand.

Section 5604 in the Revised Statutes of Missouri, 1929, provided that the withdrawing shareholders should be paid in the order in which their notices of withdrawal shall have been filed with the association. The entire section was repealed by the laws of 1931, p. 155, and a new section enacted. However, this section was identical with the old section except that part which provided that withdrawing shareholders should be paid in the order in which their notices were filed was changed so as to make all shareholders be paid pro rata. In 1937 Section 5604 was amended by adding that One Hundred Dollars could be paid to any shareholder.

It is a rule of statutory construction that the repeal of a statute and the simultaneous re-enactment with a modification is simply an amendment and is a continuation of the latter as amended. *State v. Bradford* 314 Mo. 684, 285 S. W. 496; *State v. Ward* 40 S. W. 2d. 1074.

59 C. J. p. 1097 states:

"It will be presumed that the legislature in adopting the amendment intended to make some change in the existing law and, therefore, the courts will endeavor to give some effect to the amendment."

When the Legislature repealed that part of the Statute which provided that withdrawing shareholders shall be paid in the order in which their notices were filed, it intended some change in the law and, therefore, when it said "the funds applicable to the payment of the withdrawing shareholders shall be prorated among the members who have filed notice of withdrawal" it meant that all withdrawals then on file should participate in the fund and no priority should be shown.

What then should be the basis for the distribution, the original amount filed for withdrawal or the balance left after payments in preceding months?

Bouvier's Law Dictionary defines "pro rata" as "according to a proportion". However, as pointed out in *State v. Express Co.* 100 M. 278; *Brombacher v. Berking*, 56 N. J. Eq. 251, and other cases, it has no meaning unless referable to some standard. The standard here is obviously the amount actually due the withdrawing shareholder. If he were to be paid on the basis of the original amount without payments being deducted

Mr. Joe C. Acuff

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February 24, 1938.

he would not share proportionately or "pro rata" with the other withdrawing shareholders.

CONCLUSION.

It is, therefore, the opinion of this department that the fund on hand for withdrawal must be divided pro rata among the shareholders who have filed notice of withdrawal, and the association can not arbitrarily set a certain per cent upon which it will pay withdrawals. It is also our opinion that "receipts" as used in Section 5604, Laws of Missouri, 1937, p. 192, means net receipts and not gross receipts.

It is the further opinion of this department that all shareholders who have filed notices of withdrawal participate in the withdrawal fund and that only the amount actually due from the association is to be considered in determining the pro rata share.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

AO'K:H

ELECTIONS: Person not qualified elector unless registered.

July 18, 1938.

7-19



Mr. H. D. Allison
County Clerk
Buchanan County
St. Joseph, Missouri

Dear Mr. Allison:

This Department wishes to acknowledge your letter and enclosure of July 5, 1938. Your letter reads:

"I am enclosing a copy of a letter received from Dr. L. J. Ferguson who is a candidate for committeeman of the fourth ward, questioning the legality of the candidacy of Elliott Marshall for committeeman of the fourth ward.

"The claim stated by Dr. Ferguson is that Mr. Marshall is a resident of Andrew County and that he is not registered under the new registration law which went into effect September 15, 1937. We have verified the fact that Mr. Marshall is not a registered voter in the City of St. Joseph at this time but we are not in a position to verify whether or not Mr. Marshall maintains a residence in St. Joseph.

"At the time Mr. Marshall filed for office he signed a declaration which states that he is a resident and qualified elector of the City of St. Joseph, State of Missouri and gave his address at 319 N. 20th Street which is in the fourth ward. Should the name of Mr. Marshall appear on the ballot or do we have the right to reject it?"

July 18, 1938

And your enclosure is as follows:

"I want to protest against Elliot Marshall's name being allowed to go on the Republican primary ballot in the primary election August 2, 1938. Mr. Marshall lives in Andrew County, is not a registered voter of St. Joseph and did not register at any time since the registration law went into effect.

"I trust you will take this matter up with the proper authority and have his name taken off the ballot."

Section 10278, R. S. Mo. 1929, provides that any qualified elector may have his name printed on the primary ballot as a candidate for committeeman by complying with the provisions of Section 10257, R. S. Mo. 1929. Said Section 10278 provides as follows:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county, or in the case of a city not within the county, of the city of which such voting precinct, or district is a part: Provided, that any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot, or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 10257, R. S. 1929."

July 18, 1938

Section 10257, R. S. Mo. 1929, provides that the name of no candidate shall be printed upon any official ballot at any primary election unless at least sixty days prior to same he file a written declaration stating, among other requirements, that he is a resident and qualified elector as follows:

"I, the undersigned, a resident and qualified elector of the (____) precinct of the town of (____), or (the ____ precinct of the ____ ward of the city of ____), county of ____ and state of Missouri, do announce myself a candidate for the office of ____ on the ____ ticket, to be voted for at the primary election to be held on the first Tuesday in August, ____, and I further declare that if nominated and elected to such office I will qualify.

(Signed) ____."

You state that you "have verified the fact that Mr. Marshall is not a registered voter in the City of St. Joseph at this time." The question arises whether the fact that he is not registered is sufficient to keep his name off the ballot.

In the case of The State ex rel. Woodson v. Brassfield, 67 Mo. 331, 1. c. 336, the court, in determining who were qualified voters, said:

"While the registration law was in force, they only were qualified voters whose names were placed on the registration books. This was the final, qualifying act, and no matter if a citizen possessed every other qualification, if not registered, he was not a qualified voter. It was not the right to register which constituted one a qualified voter, but the fact of being registered as such, was also essential. A qualified voter is one who by law, at an election, is entitled to vote. If, by the law, a person was not

July 18, 1938

entitled to vote, whether in consequence of a disability which deprived him of the right to register, or of his neglect to register with a perfect right to do so, he was equally disqualified."

There are a number of other matters that might be considered which we deem unnecessary in view of the above statement.

From the foregoing we are of the opinion that Mr. Marshall, having failed to register, is not a qualified elector within the meaning of Section 10257, R. S. Mo. 1929, supra, and therefore is not entitled to have his name appear on the primary ballot as a candidate for committeeman.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney-General

MW:EG

ELECTION:

Supplemental opinion on election
opinion dated July 18, 1938.

July 21, 1938

7-21



Mr. H. D. Allison,
County Clerk,
Buchanan County,
St. Joseph, Missouri.

Dear Mr. Allison: .

We hasten to acknowledge your letter of July 21,
1938, as follows:

"I am in receipt of your letter of
July 18th relative to the filing of
Elliott Marshall as a candidate for
committeeman of the Fourth Ward in
this City.

Since writing you the letter on
July 5th, Mr. Marshall registered
as a voter on July 11th, which was
the last date on which a person could
register in order to be eligible to
vote in the coming Primary Election.
Mr. Marshall registered under the
address of 319 N. 20th Street, which
is in the Fourth Ward and he claims
that his mother lives at this address
and that he owns property in the
Fourth Ward.

Does the fact that Mr. Marshall is
now a qualified elector make him
eligible as a candidate and entitle
him to have his name appear on the

July 21, 1938

ballot as a candidate for the office he is seeking?

Our ballots will go to press Saturday, July 23 and we are very anxious to have this matter settled by that time as it will be almost impossible to make any changes in the ballot after Saturday."

In the opinion rendered under date of July 16 this department ruled that:

"Mr. Marshall having failed to register is not a qualified elector within the meaning of Section 10257, R. S. Mo. 1929, supra, and, therefore, is not entitled to have his name appear on the primary ballot as a candidate for committeeman."

We are now advised that Mr. Marshall has registered and the question is whether he is now entitled to have his name appear on the ballot as a candidate for committeeman.

Section 10278, R.S. Mo. 1929 provides in part that any qualified elector may have his name printed on the primary ballot for committeeman by complying with the provisions of Section 10257, R. S. Mo. 1929:

"* * * * * Provided, that any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot, or party ticket on which he or she may desire to become a candidate for committeeman or committee-woman by complying with the provisions of section 10257, R. S. 1929."

Section 10257, R. S. Mo. 1929 provides:

"The name of no candidate shall be printed upon any official ballot at any primary

July 21, 1938

election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

I, the undersigned, a resident and qualified elector of the (____ precinct of the town of ____), or (the ____ precinct of the ____ ward of the city of ____), county of ____ and state of Missouri, do announce myself a candidate for the office of ____ on the ____ ticket, to be voted for at the primary election to be held on the first Tuesday in August, ____, and I further declare that if nominated and elected to such office I will qualify.
(Signed) ____."

The above statutes declare in clear and unambiguous language that the name of no candidate shall be printed upon any official ballot at any primary election unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate declaring, among other things, that he is a "qualified elector."

Can the statutes, in view of the above language, be construed so as to permit a person having made an erroneous statement, intentional or otherwise, to come in at a subsequent date and qualify?

In the case of Columbia Weighing Machine Company v. Rockwell, 38 S.W. (2d) (Mo. App.) 508, l.c. 510, the court, in holding that where the statute is plain and unambiguous there is no room for construction, said:

"* *We cannot do this, as we are not permitted to construe plain and unambiguous language in a statute. Reay

Mr. H. D. Allison

-4-

July 21, 1938

v. Elmira Coal Co. (Mo. App.) 34 S.W.
(2d) 1015."

And the court having held this to be true regardless of the results or wisdom of the law. Thus in the case of Sleyster v. Eugene Donzelot & Son, 25 S.W. (2d) 147, 223 Mo. App. 1166, we find the following statement:

"* * * where the meaning of the language used is plain, it must be given effect by the courts (Betz v. Kansas City Southern Ry. Co., 314 Mo. 390, 284 S.W. 455, loc. cit. 461; Grier v. Railway Co., 286 Mo. loc. cit. 534, 228 S.W. 454, loc. cit. 457) without regard to results of the construction or the wisdom of the law as thus construed (State ex rel. v. Wilder, 206 Mo. 541, 105 S.W. 272."

It may appear harsh to refuse Mr. Marshall a place on the ballot since he has subsequent to his declaration become a qualified elector. However, as stated we cannot by construction construe a legislative intent contrary to that unmistakably expressed in the language of the statute.

From the foregoing we are of the opinion that the fact that Mr. Marshall is now a qualified elector does not make him eligible as a candidate and entitle him to have his name appear on the ballot as a candidate for committeeman.

With reference to the question of whether a person may vote at St. Joseph if he maintains a legal voting residence there but resides outside of the city, we are pleased to enclose a copy of an opinion rendered by this department under date of October 20, 1936, to Mr. George Priest of St. Louis, Missouri, wherein a similar question was ruled on.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney General

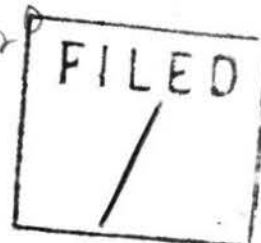
J. W. BUFFINGTON
(Acting) Attorney General

MW:DA

ELECTIONS -A voter registered in a precinct cannot
vote therein after moving permanently
to another precinct

August 19, 1938

Mr. H. D. Allison
County Clerk
Buchanan County
St. Joseph, Missouri



Attention of Mr. H. R. Hargrove
Chief Deputy

Dear Sir:

We have received your letter of July 16, which
reads, in part, as follows:

"I would like to have a legal
opinion on the following ques-
tion.

"If a person has registered
under the permanent registra-
tion system and moves his
residence but fails to come
to this office to make the
proper change of address on
his registration card, may he
be allowed on election day to
go back to the precinct in which
he is registered and vote under
his former address? "

In using the term "moves his residence," we
presume you mean a situation where the person entirely
abandons his former residence from which he is registered
and intends to reside in the future for all purposes in
another precinct.

"Residence" is a matter largely of intention.
The St. Louis Court of Appeals, in determining that a

student had the right to vote in the city where he was attending school, if he had abandoned his former residence, said, in the late case of Chomeau v. Roth, 72 S. W. (2d) 997, 1. c. 999:

"***** an actual residence, coupled with the intention to remain either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, is sufficient to work a change of domicile. Nölker v. Nölker (Mo. Sup.) 257 S. W. 798; Finley v. Finley, (Mo. App.) 6 S. W. (2d) 1006."

It would follow that if a person moved out of a precinct, or a city, or a state, to another place with "the intention to remain either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode," he would no longer be a resident of such precinct, city or state from which he moved. He would have abandoned entirely his former residence. In connection with the question you have asked, he would no longer be a resident of the precinct from which he is registered.

Section 10178, Revised Statutes Missouri 1929, provides, in part, that:

"Each voter shall vote only in the township in which he resides, or if in a town of city, then in the election district therein in which he resides."

As was said in the case of Hall v. Schoenecke, 128 Mo. 661, 1. c. 670:

"Contestant insists that an elector, in voting for a general officer of a city or town, as mayor, is entitled to vote in any election district in

August 19, 1938

such town or city. In answer to the contention we need only say that the statute provides otherwise. A citizen of a town is only qualified as a voter, and entitled to vote, in the election district therein in which he resides. Revised Statutes, sec. 4670."

Furthermore, the laws of Missouri, 1937, pages 278 to 289, contain a new system of registration applicable to the City of St. Joseph as a city of the first class. Section 5 thereof, in prescribing some of the duties of the judges of election, provides that

"The judges of election shall permit no person to vote unless properly identified as a resident of the precinct and registered as such *****."

CONCLUSION

It follows, therefore, that if a person registered under the permanent registration system in a certain precinct moves therefrom to another precinct, permanently or for an indefinite time without any fixed or certain purpose of returning, he is no longer a resident of such first precinct and can no longer vote therein. One must be a resident of and properly registered in a precinct in order to be entitled to vote.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

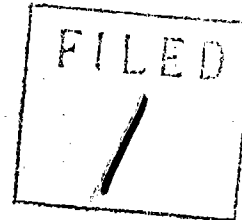
APPROVED

J. E. TAYLOR
(Acting) Attorney General

JFA LC

FEES: Constable is not entitled to a fee for attending court in a criminal case on a misdemeanor before a justice of the peace.

September 21, 1938



Mr. T. C. Again
Constable, Columbia Township
105 Tavern Building
Columbia, Missouri

Dear Sir:

This is to acknowledge receipt of your request for an opinion, which reads as follows:

"In regard to fees from the Justice Courts, where pleas of guilty are entered, where I am not the arresting officer, who is entitled to fees when arrest is made by State Patrol?"

Section 3418, R. S. Mo. 1929, reads as follows:

"Upon the filing of a complaint before a justice of the peace, verified by the oath or affirmation of a person competent to testify against the accused, if the justice be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged, it shall be his duty to forthwith forward such complaint to the prosecuting attorney; and it shall be the duty of the complainant to forthwith inform the prosecuting attorney what facts can be proved against the accused, and by what witnesses, and the residence of such witnesses; and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made,

it shall be his duty to immediately file his information before the justice taking the complaint, and give to said justice a list of the witnesses to be subpoenaed on the part of the state; and upon the filing of the information by the prosecuting attorney, as herein provided, with the justice of the peace, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the justice to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff of the county or constable of the township, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the justice to execute the same, by written indorsement to that effect on such warrant."

It will be noticed that according to the above section the only duty that is to be performed by the prosecuting attorney is to investigate the facts submitted by the complaint which is filed before the justice of the peace, and then in the case of a misdemeanor immediately file his information before the justice of the peace taking the complaint. It then becomes the duty of the justice of the peace to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff of the county or constable of the township. This matter, according to this section, is discretionary with the justice of the peace and is not dependent upon any orders by the prosecuting attorney. The justice of the peace may direct the warrant to the sheriff of the county or to the constable of the township, and in case of a plea of guilty may direct the commitment to the sheriff of the county or the constable of the township.

As to fees of constables in criminal proceedings, Section 11777, R. S. Mo. 1929, provides the following fees:

Sept. 21, 1938

"For summoning each jury before a
justice of the peace..... \$1.00
For taking a criminal to jail..... 1.00
And for every mile traveled in
taking a criminal to jail and
returning therefrom, provided
the distance so traveled be more
than five miles, the sum of, per
mile..... .10
For taking every bond required by
law to be taken..... .50
For subpoenaing a witness..... .50"

As you will notice in the above section, the statute does not provide a fee for the constable attending court in a criminal proceeding.

Criminal costs, as well as civil costs, are solely a creature of the statutory law. Our Supreme Court in *State ex rel. v. Wilder*, 197 Mo. 1. c. 32, said as follows:

"For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows. *Shed v. Railroad*, 67 Mo. 687; *Crouch v. Plummer*, 17 Mo. 420; *State ex rel. v. Hill*, 72 Mo. 512; *Williams v. Chariton*, 85 Mo. 646."

Likewise, in the case of *Ring v. Paint & Glass Co.*, 46 Mo. App. 1. c. 377, the court said:

"It may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other person claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation."

Sept. 21, 1938

Under the above sections, and especially Section 3418, supra, the constable and the sheriff have the same duties and jurisdiction.

Under Section 11518, R. S. Mo. 1929, the duties of the sheriff are described as follows:

"Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by justices of the peace; * * *."

CONCLUSION

In view of the above authorities, it is the opinion of this department that a member of the State Patrol, who is not a constable or deputy constable or a sheriff or deputy sheriff, is not entitled to any fees where a defendant pleads guilty before a justice of the peace on a misdemeanor charge, but that the constable or deputy constable or sheriff or deputy sheriff, when serving a warrant or commitment issued by the justice of the peace, is entitled to the fees notwithstanding the fact that the constable of the township is present in the courtroom. It is further the opinion of this department that a constable is not entitled to a fee for attending court in a criminal case before a justice of the peace.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

COUNTY CLERKS: Section 11811, as amended, Laws of Missouri, 1933, page 370, does not provide for a definite stated salary for each deputy or assistant county clerk.

December 23, 1938.

12-24
FILED

Honorable D. E. Abernathy
Deputy County Clerk
Perryville, Missouri

Dear Sir:

We have received your letter of December 13, 1938, which reads as follows:

"On January 1, 1935, I was appointed Deputy County Clerk of Perry County, Missouri, and, at that time, was paid a salary of \$75.00 per month. This salary was below what was allowed by Statute for counties of the class of Perry County for Deputy County Clerks. I entered protests from time to time, for as far as I could ascertain no other County in the State was paying less than \$1,300.00 per year, the Statutory allowance for counties of that class. I was paid this salary, under protest, until the law putting County Clerks on a salary became effective, when I was allowed a salary on the basis of \$1,300.00 per year.

"In your opinion, can I present a claim for back salary from January 1, 1935, to the date the new law became effective in 1937, the date I began receiving \$1,300.00 per year?

"There is no disagreement with the County Court over the matter and I am of the opinion the Court will be guided by your ruling. I shall appreciate hearing from you at your earliest convenience."

You state that you were appointed deputy county clerk on January 1, 1935, and was paid a salary of \$75.00 per month until the "new law became effective in 1937;" that this salary was "below what was allowed by statute for counties of the class of Perry County for deputy county clerks."

We have not found any statute which sets any particular "salary" for deputy county clerks. At the time you were appointed, Section 11811 as amended and contained in the Laws of Missouri, 1933, page 370, was in force and effect. Since the population of Perry County, as shown by the 1930 decennial census is 13,707, the applicable parts of Section 11811, as amended in 1933, reads as follows:

"The aggregate amount of fees that any clerk of the County Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount herein-after set out. * * * in counties having a population of 12,500 and less than 15,000 persons, the clerks shall be allowed to retain \$1500.00 for themselves, and shall be allowed to pay for deputies and assistants \$1300.00; * * *"

It will be observed that the county clerks were allowed to pay \$1300.00 "for deputies and assistants." The words "deputies" and "assistants" were used in the plural. The statute does not say that any particular deputy or any particular assistant shall receive \$1300.00 or any other specific sum annually. The statute also does not say that if there should be only one deputy or assistant, such deputy or assistant should receive \$1300.00 annually. If the county clerk should have had more than one assistant or more than one deputy, it would have been impossible to give each of them an annual salary of \$1300.00 out of the fees he was allowed to retain by statute for such purpose, since that is the total amount the clerk was authorized to retain and pay for all of his deputies and assistants.

As stated by the Supreme Court in the case of Ward v. Christian County, 111 S. W. (2d) 182, 183, the court said:

"It is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed.' State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655, 656."

Whether Section 11811, as amended in the year 1933, be strictly or liberally construed, we cannot read it to the effect that any deputy or assistant of the county clerk is entitled to a definite and stated salary. Any such deputy might have been paid the maximum amount allowed by law for such purpose, but the statute did not set the salary at any given amount.

We have confined ourselves in this opinion to the effect of Section 11811, as amended by the 1933 Legislature, and we have made no attempt to construe the meaning and effect of the same act as passed by the Legislature in the year 1937. We take it from your letter that your difficulty arises solely in connection with the effect of the 1933 law.

CONCLUSION

Under the terms of Section 11811, as amended by the Laws of Missouri, 1933, page 370, deputy county clerks are not entitled to a definite stated salary. In connection with Perry County, Missouri, the county clerk was allowed "to pay for deputies and assistants \$1300.00." This amount, however, appears to be the total amount to be

Hon. D. E. Abernathy

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Dec. 23, 1938

paid to all deputies and assistants which the county clerk might have, and that no particular deputy or assistant could claim that he was entitled to such entire sum as a matter of law.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

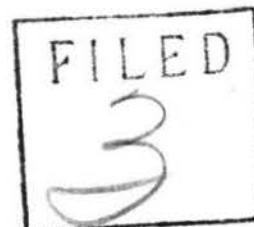
JFA:HR

SHERIFF:

Sheriff not entitled to fees for mileage in making investigations.

February 5, 1938.

3-8



Honorable Ben W. Ausman,
Clerk of County Court,
Maysville, Missouri.

Dear Sir:

This will acknowledge receipt of your request of January 31, 1938, which reads as follows:

"By request of the County Court I am writing you in regard to the fees paid by the County Court to the sheriff.

"The Court has been under the impression that no fees are to be allowed to the sheriff only where an arrest occurs. They have been under criticism by certain individuals for not paying the sheriff mileage on investigations.

"Will you please advise us as to their exact position regarding these fees?"

We understand your question to be, "Can the County Court allow the sheriff of your county fees for mileage in making criminal investigations?"

Article 9, Section 12, Constitution of Missouri, reads as follows:

"The General Assembly shall, by a law uniform in its operation, provide for and regulate the fees of all county officers, and for this purpose may classify the counties by population."

The fees provided for the sheriff in criminal cases are set forth in Sections 11791 and 11792, R. S. Mo. 1929. Section 11792 refers to fees for mileage, and reads as follows:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: Provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

Section 11793, R. S. Mo. 1929, provides as follows:

"No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

It will be seen from the last quoted section (11793), that the sheriff cannot be allowed fees in criminal cases unless those fees are enumerated in Sections 11791 and 11792, *supra*. Mileage for investigations is not enumerated therein, and hence same cannot be allowed.

Furthermore, the Supreme Court has definitely laid down the following rule on the question of allowance of fees to public officers:

"It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is

2/5/38

entitled to none for services he may perform as such officer, unless the statute gives it. State ex rel. v. Adams, 172 Mo. 1-7; Jackson County v. Stone, 168 Mo. 577; State ex rel. v. Walbridge, 153 Mo. 194; State ex rel. v. Brown, 146 Mo. 401; State ex rel. v. Wofford, 116 Mo. 220; Givens v. Daviess Co., 107 Mo. 603; Williams v. Chariton Co., 85 Mo. 645; Gammon v. Lafayette Co., 76 Mo. 675." (Sanderson v. Pike County, 195 Mo. 1. c. 605.)

It is true that the sheriff often goes to much expense and trouble in making investigations, but if the Legislature has not provided compensation for such expense and services, then none can be allowed. As was said in State ex rel. v. Hackmann, 305 Mo. 1. c. 351:

"The argument of hardship and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty."

CONCLUSION.

It is, therefore, the opinion of this office that the County Court of your county cannot allow the sheriff mileage fees for making investigations as to violations of the law or in making any other investigations incident to a criminal case, his fees being limited in such cases to those enumerated in Sections 11791 and 11792, R. S. Mo. 1929.

Yours very truly,

APPROVED:

HARRY H. KAY,
Assistant Attorney General.

J. E. TAYLOR,
(Acting) Attorney General.

HHK:HR

DEPOSITORIES:) County depositories required under Laws of
COUNTY DEPOSITORIES:) Mo., 1937, p. 502, to pledge designated assets
BANKS AND BANKING:) to secure public funds, and giving of personal
security eliminated.

June 14, 1938

6-15



Honorable Richard C. Ashby
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of June 10th, in which you request the opinion of this Department. Your letter of request is as follows:

"I would like an opinion from you concerning the right of county depositories to give personal bonds to qualify for protection of funds of the county, that is to say, under Section One and Three of the Laws of 1937, page 502, I believe the right of county depositories to give personal bonds has been eliminated."

You request our opinion as to whether or not Laws of Missouri, 1937, and found at page 502 et seq., relative to the pledging of assets for the safekeeping of public funds, supersedes the personal bond that may be given to secure public funds as provided by Section 12187, R. S. Mo. 1929, as amended by Laws of Missouri, 1935, pages 316 and 372.

By Laws of Missouri, 1937, page 502, it is provided by Section 1 thereof as follows:

"Notwithstanding any provisions of law of this State or of any political

Hon. Richard C. Ashby

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June 14, 1938

subdivision thereof, the public funds of every county, township, city, town village * * (and certain designated institutions of the State), which shall now or hereafter be deposited in any banking institution acting as a legal depository of such funds under the provisions of the statutes of Missouri requiring the letting and deposit of the same and the furnishing of security therefore, shall be secured by the said legal depository making deposit, as hereinafter provided, of securities of the same character as are required by Section 11469 and all amendments thereto for the security of funds deposited by the State Treasurer under the provisions of Article 1 and 2 of Chapter 72 of the Revised Statutes of Missouri, 1929, and all amendments thereto."

Said section further provides that the securities shall at the option of the depository banking institution be delivered either to the fiscal officer or the governing body of the municipal corporation or other depository of said funds, or by depositing such securities with such disinterested banking institution or safe depository as trustee, as may be satisfactory to both parties to the depository agreement. The section further provides that the rights and duties of the several parties to the depository contract shall be the same as those of the State and the depository banking institution respectively, under Section 11469, supra, and amendments thereto.

It is, therefore, our opinion that since the effective date of this Act, namely, September 6, 1937, the county court of your county shall require the selected depository or depositories in the manner provided by Laws of Missouri, 1937, page 502, to pledge the designated securities mentioned in Section 11469 as amended by Laws

Hon. Richard C. Ashby

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June 14, 1938

of Missouri, 1937, at page 521, to safeguard and protect the public funds deposited in said depositories. It is our opinion that it is no longer permissible for the county court to accept and the designated depositories to give the personal security as provided by Section 12187, supra.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

CRIMINAL COSTS:

State, county or prosecuting attorney not liable for costs of dismissal of a felony charge in a preliminary either by prosecuting attorney or justice of the peace.

June 24, 1938

6-25
FILED
3

Mr. Richard C. Ashby,
Prosecuting Attorney,
Livingston County,
Chillicothe, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated June 21 for an official opinion from this department which request is as follows:

"I would appreciate your construction of the Sections under Article 19 of Chapter 29, pertaining to the costs of criminal cases in the following circumstances:

Upon a case being filed by myself, as prosecuting attorney, and a warrant issued thereon, and thereafter, the defendant is discharged, either by a nolle or by the justice at the preliminary hearing, who is liable for the costs? It is understood in the above premises that the charges filed was a felony charge and punishment solely by imprisonment in the penitentiary."

In this request you refer to the sections under Article XIX of chapter 29 of the Revised Statutes of Missouri, 1929, and I believe that you are only interested in Sections 3828 and 3830. Section 3828, R.S. Mo. 1929

reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Section 3830, R.S. Mo. 1929 reads as follows:

"When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

In construing the statutes one must read the sections that are *pari materia* and in reading Section 3826, R.S. Mo. 1929, the section refers to the following:

"In all capital cases in which the defendant shall be convicted,"* * * *

Also in Section 3827, R.S. Mo. 1929 in reference to when the county should pay the costs, it reads as follows:

"* * * in which the indictment was found or information filed"* * *

Also in Section 3828, *supra*, it sets out:

"* * * and in all other trials on indictments or information,"* * *

Under these sections it shows on its face that it applies only to specific trials on informations or indictments and does not mention anything concerning preliminary hearings.

Of course, as a matter of fact if the defendant should be bound over to the criminal court in a preliminary hearing, the costs of the hearing would run with the case and be taxed as costs in other criminal proceedings.

Section 3830, supra, in reference to when the county shall pay, provides as follows:

"When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

This section applies only as to prosecutions commenced under the preceding section which is Section 3829 R.S. Mo. 1929. All of the sections in Article XIX, chapter 29 of Revised Statutes of Missouri, 1929, only refer to costs in which a trial is had in the circuit court and not to trials or preliminaries in the justice courts.

Section 3832, R.S. Mo. 1929 specifically states the method of assessing costs in preliminary hearings. This section reads as follows:

"If a person, charged with a felony, shall be discharged by the officer taking his examination, the costs shall be paid by the prosecutor or person on whose oath the prosecution

June 24, 1938

was instituted, and the officer taking such examination shall enter judgment against such person for the same, and issue execution therefor immediately; and in no such case shall the state or county pay the costs."

As stated in your request you only refer to preliminaries had where you personally file the complaint and it is not filed by an individual. Your request also inquires only as to the method of payment of costs in a preliminary where you have filed a nolle or the justice has found insufficient grounds to bind the defendant over to the circuit court for trial. Section 3832, supra, provides that the prosecuting witness shall pay the costs on a discharge of the defendant in the preliminary, but under Section 3444, R.S. Mo. 1929 and Section 3510, R.S. Mo. 1929, both sections provide:

"* * * but in no case shall the prosecuting attorney be liable for costs."* * * * *

and

"* * * but the prosecuting attorney shall not be liable for costs in any case."

Section 3444, R.S. Mo. 1929 reads as follows:

"When the proceedings are prosecuted before any justice of the peace, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall

be entered by the justice on his docket as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the prosecuting attorney be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint."

Section 3510, R.S. Mo. 1929 reads as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3505, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from

any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

Sections of the statute regarding to fees and costs should be strictly construed and in the case of State ex rel. v. Wilder, 197 Mo. 27, l.c. 32, the court said:

"For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows."

Also in the case of City of Greenville v. Farmer, 195 Mo. App. 209, l.c. 211 (1917) the court held:

"It is the well settled law of this State and the country at large that the right to tax costs is purely made by statute; no such right existed at common law; and unless there is a statute authorizing the taxing of costs against the plaintiff, the order of the circuit court is erroneous."* * * *

CONCLUSION

In view of the above authorities, it is the opinion of this office that the sections under Article XIX of chapter 29, Revised Statutes of Missouri, 1929, apply only to costs in a case where a trial, plea or dismissal was had in the criminal court.

It is also the opinion of this department that

Mr. Richard C. Ashby

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June 24, 1938

where a prosecuting attorney files a complaint upon his own information on a felony upon the conviction of which the penalty is solely imprisonment in the state penitentiary and the case is dismissed or the justice of the peace does not find sufficient evidence to bind the defendant over to the circuit court, neither the state, the county nor the prosecuting attorney is liable for the costs.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB DA

TAXATION: Newspaper publishing list of delinquent lands entitled to only one fee for each description regardless of number of years' taxes due against said land.

August 8, 1938

Hon. Richard C. Ashby
Prosecuting Attorney
Livingston County
Chillicothe, Missouri



Dear Sir:

This will acknowledge receipt of your inquiry of recent date which reads as follows:

"The County Treasurer has asked me to write for an opinion from your office concerning interpretation of the following clause of Sec. 9952B as amended by the section acts of 1935 in words and figures as follows:

'The expense of such printing shall be paid out of the County Treasury, and shall not exceed the rate fixed in the County printing contract, if any, and in no event to exceed one dollar (\$1.00) for each description, and cost of printing paid by the County shall be taxed as part of the costs of the sale of any land or lot contained in such lists.'

It is customary for the Treasurer, in preparing the advertisement, to incorporate the taxes for several years in each description. He contends, and I think correctly, that the newspaper is entitled to one dollar for each description, even though there be several years taxes incorporated in that description. The newspaper is demanding one dollar for each year taxes published in that particular description. That is to say, in the description of one particular lot, if there be taxes for 1933,

August 8, 1938

1934, 1935 and 1936 due, they demand four dollars (\$4.00) for the publication of such description, because as they say, each year is a separate description and under that section is entitled to four dollars."

The method of enforcing the lien for taxes against lands has been changed in recent years, and there are no court decisions construing many of the details of the present method. We must, therefore, take the statutes applicable to the question set forth in your letter and try to give them a reasonable interpretation.

Section 9952, Laws of 1933, page 429, reads as follows:

"Between the first of January and the first of July in the year 1934 and annually thereafter, and immediately upon the effective date of this act, the county collector shall make out and record, in a book to be provided for that purpose, a list of lands and lots returned and remaining delinquent for taxes, including therein the delinquent taxes of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state returned delinquent to the county collector, separately stated, describing such lands or lots as the same are described in the tax books and said delinquent returns, as corrected under sections 9938 and 9942, and charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceding year and an additional annual ten per centum on taxes for each year prior to the preceding year, and shall certify to the correctness thereof, with the date when the same was recorded, and sign the same by himself, or deputy, officially; * * * * *

The foregoing section requires a list to be made of the various tracts of land and lots upon which taxes are delinquent. It provides that the list shall describe such lands or lots by the same description used in the tax books and delinquent returns, and then provides that they, the delinquent lands or lots as listed by such descriptions, shall be charged with the amount of delinquent taxes, naming the years delinquent separately. It seems clear that this statute contemplates that in making these lists, the land shall be described, and that opposite such description shall be entered all delinquent taxes against such land, separately stated by years. This is the practical way to make such list, for in checking the record of the delinquent taxes on any land, when the particular tract is located in the list, you would have before you all the delinquent taxes against that particular land. It would be a useless thing to require the land to be described for each year taxes were delinquent against it, and we must assume that the Legislature did not intend to require the doing of useless labor in this connection,

Section 9952b, Laws of 1935, page 403, reads in part as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.; * * * * *

The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

August 8, 1938

The lists required to be published by Section 9952b, supra, are the lists provided for in Section 9952. Even had Section 9952b merely required publication of the lists provided for in Section 9952, we think such publication would have only required a description of a tract of land with the amount of all delinquent taxes against it separately stated by years. However, Section 9952b goes further and definitely says "it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated". "Due thereon" means due on that particular tract of land. "Aggregate amount of taxes, penalty, interest and cost due thereon" would mean taxes, penalties, interest and costs for all years due on said described land. The last sentence of said latter section provides that the expense of such publication shall not exceed one dollar (\$1.00) for each description.

CONCLUSION

It is, therefore, the opinion of this office that in publishing lists of delinquent lands under Section 9952b, Laws of 1935, page 403, newspapers can charge only one fee for each tract of land listed, regardless of how many years' taxes are delinquent against said tract.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

COURTHOUSE BONDS: By cooperation with Federal Government
County Court may build courthouse and provide
jail therein, under a courthouse bond issue.

August 23, 1938



Mr. Ben W. Ausman
Clerk of the County Court
DeKalb County
Maysville, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this Department on the question therein submitted. A copy of your letter is herein set forth and your question is stated therein, as follows:

"I have been requested by the County Court to write you regarding the privilege of the Court in spending money on a court house and jail building. The proposition as voted was as follows:

"Public Notice is hereby given that pursuant to an order of the County Court of DeKalb County, Missouri, made and entered of record on the 6th day of July, 1938, an election will be held at the Regular Primary Election, at the regular polling places in said county, and in conjunction with said General Primary Election, on

TUESDAY, AUGUST 2nd, 1938.

to vote on a proposition to authorize said county court to issue bonds on said county to the amount of Fifty Five Thousand (\$55,000.00) Dollars, for the purpose of building and equipping a new Court house in said County.

"Notice is further given that at said bond election, the polls will be open at six o'clock in the forenoon and

Aug. 23, 1938

remain open until seven o'clock in the evening, unless the sun shall set after 7 o'clock, then the polls shall be kept open until sunset, and that said election will be conducted in conjunction with said primary election and in the same manner and at the same places as are general elections for State and County Officers.

"Done by the order of the Court, this 6th day of July, 1938.

"Witness my hand and the seal of the Court.

Ben W. Ausman
Clerk of the County
Court of DeKalb County,
Missouri.

"Can the Court build a jail which is a part of the court house with the funds which were voted by the proposition? I would appreciate very much an immediate reply, as the plans for the building are being held up awaiting this decision."

DeKalb County voted bonds at the Primary Election held Tuesday, August 2, 1938, in the amount of \$55,000 for the purpose of building and equipping a new courthouse in said county. The purposes for which the bonds were voted are stated in the notice, a copy of which you sent us. The election was held under the provisions of Article 5, Chapter 14, Revised Statutes of Missouri, 1929. We set forth that part of Section 2905 pertinent to the question asked in your letter, as follows:

"Whenever it may become necessary for any county in this state to incur an indebtedness in excess of the income and revenue provided for in one year, for the purpose of building a court house or jail,* *

it shall be lawful for any number not less than one hundred of the qualified voters of such county who are taxpayers therein to present to the county court of such county a petition in writing setting forth the object and purpose for which the indebtedness is desired to be incurred, and whether it is desired to issue bonds in evidence of such indebtedness, or to pay the same in a given number of years, to be stated in the petition, by the direct levy of taxes at a rate over and above the amount limited in section 11 of article 10 of the Constitution of the state of Missouri, and asking that an election be held to authorize the incurring of such indebtedness or the levying of such taxes. Upon the presentation of such petition it shall be the duty of the county court of such county at any term thereof to order that an election be held for the purpose set forth in the petition, which order shall, among other things, specify the time, place and purpose of the election. Such an election may be a special election, or it may be held on the day of any primary or general election authorized to be held by the laws of this state; provided, that the amount of indebtedness that may be incurred for the purpose of building, repairing or rebuilding a court house or jail shall not exceed an amount, including existing indebtedness, in the aggregate exceeding ten per centum of the value of the taxable property in such county, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness."

We assume that the petition filed with the County Court by more than one hundred taxpayers of such county and the orders preceding the election agree with the notice sent to us, namely, "for the purpose of building and equipping a new courthouse in said county."

Since you submitted your written request for an opinion, you advised us orally that your county was to receive the sum of \$45,000 from the Federal Government as a P. W. A. grant for the purpose of building and equipping a courthouse and jail. With that information, and as a practical proposition and to carry out the wishes of the electors of your county, we will restate your question:

Can the County Court build a jail, which is an integral part of the courthouse, with the funds which were voted by the people as aforesaid, using in its construction the \$45,000 P. W. A. grant to build a combined courthouse and jail?

It will be noted that Section 2905, supra, uses the terms "for the purpose of building a courthouse or jail, or for the purpose of repairing or building a courthouse or jail * * *." The above statute is so worded that a proposition may be submitted to the people to build a courthouse, or a proposition may be submitted to build a jail, or, as is the usual practice where a jail is to be constructed within a courthouse, the proposition should be stated thus: "For the purpose of building a combined courthouse and jail."

We have consulted the transcripts of bond issues for building courthouses in various counties in the State and find that invariably the proposition has been stated as above, namely, "for the purpose of building a combined courthouse and jail," in cases where a jail is to be a part of the courthouse.

It is a question that there may be a difference of opinion among lawyers as to whether the county court may include jail facilities in the courthouse structure under a

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bond issue voted for the purpose of building a courthouse or whether the county court should strictly follow the mandate of the people and use the money for a courthouse only. All doubt on the question would have been eliminated by the use of the word "combined" before "courthouse" and the use of the words "and jail" after "courthouse" in the petition, notice and order. Under the published notice as given, the bonds should be issued as courthouse bonds and not as courthouse and jail bonds.

Since the people of DeKalb County, by more than a two-third's majority as required by law, have indicated their desire to have a new courthouse and the Federal Government has agreed to grant \$45,000 for the purpose of building a courthouse and jail, as a practical and workable proposition we think that the bonds could be issued for the exact purpose as specified in the election proceedings, namely, for the purpose of building and equipping a new courthouse in said county, and then by cooperation with the Federal Government construct a building that would include a jail in the courthouse. It could then be well said that all of the bond issue authorized by the voters will be spent on the courthouse alone, and the major portion of the Federal grant for the courthouse and the remaining part of the Federal grant for jail facilities. This, we think, would satisfy the mandate of the people under the bond issue and could be legally accomplished.

Conclusion.

It is, therefore, our opinion that under the above circumstances, considering the bonds voted by the people together with the Federal grant, the County Court could then make a finding and determine that it was necessary that the jail facilities should be provided for and made an integral part of the courthouse, and thereby build a combined courthouse and jail, using such portion of the Federal grant as may be necessary to provide the jail facilities.

Very truly yours

APPROVED:

COVELL R. HEWITT
Assistant Attorney-General

J. E. TAYLOR
(Acting) Attorney-General
CRH:EG

PROBATE COURT:

Records may be photostated and bound
in book. Judge entitled to fee.

October 5, 1938



Honorable Glendy B. Arnold
Judge of the Probate Court
St. Louis, Missouri

Dear Sir:

This department is in receipt of your request for
an official opinion which reads as follows:

"I should like to have the opinion of
your office upon the following question:

"Under the statutes we are required to
make a copy, to be a permanent record,
of all wills, inventories, settlements
and proofs of publication of notices
which are filed in this Court in the
progress of the administration of
estates. This requirement is laid
down by Sections 71, 77, 213 and 545
of the 1929 Revised Statutes of Missouri.
Certain fees are charged for the making
of these permanent records in accord-
ance with Section 11782 of the Revised
Statutes.

"The convenience and efficiency of this
office would be greatly served in the
event that we could make photographic
copies of these instruments and bind
them in book form as the permanent
record. We desire to know if this
procedure would comply with the require-
ments of the above Sections and whether
we would be entitled to charge the fees
provided for by Section 11782 if this
method of recording was adopted."

Section 71, R. S. Mo. 1929, provides as follows:

"The inventory, appraisement and affidavits shall be filed in the office of the clerk of the probate court within thirty days after letters granted, which shall be duly recorded by the clerk in a well-bound book to be kept by him for that purpose."

Section 77, R. S. Mo. 1929, provides as follows:

"The clerk of said court shall carefully file and preserve such affidavits in his office, and shall record the same in a book to be kept by him for that purpose."

Section 213, R. S. Mo. 1929, reads as follows:

"The clerk of the probate court shall provide well-bound books, and enter therein the accounts and settlements of all executors and administrators made in said court, in such manner as to form a complete record of all such accounts settled in that court."

Section 545, R. S. Mo. 1929, states that:

"All wills shall be recorded by the clerk of the probate court, in a book kept for that purpose, within thirty days after probate, and the originals shall be carefully filed in his office."

The propriety of photographic recording has never been passed upon by the courts of Missouri although we have a statute which provides that when books or records are required to be rebound or transcribed into new books that photographic copies shall be deemed transcribing. However, the question has been before the courts of other jurisdiction.

The practice of filing photostatic copies of wills in probate courts has been approved in the Irish Free State.

In Lennon v. Gray, 1931 Irish Reports, page 374, the High Court of Ireland states:

"Speaking on behalf of the Principal Registry in the Irish Free State, we believe that the system is satisfactory, so far as we are concerned, if it is carried out properly from the photostatic point of view."

In People ex rel. Armknecht v. Haas, 311 Ill. 164, 142 N. E. 549, it appeared that the Supreme Court of Illinois had before it a statute which provided as follows:

"Every recorder shall, as soon as practicable after the filing of any instrument in writing in his office, entitled to be recorded, record the same at length in the order of time of its reception, in well-bound books to be provided for that purpose."

The petitioners sought a mandamus to compel the recorder of deeds to copy a deed in writing in a well-bound book. It was alleged that the deed had been presented to the recorder, who made a photographic copy of it, added it to other similar copies, and then bound them in book form. The court held that the photographic record complied with the provisions of the statute. We quote at length from the opinion because of the similarity of the two cases:

"To record means to transcribe; to write an authentic account of; to preserve the memory of, by written or other characters; to enter in a book for the purpose of preserving

authentic and correct evidence of the thing recorded. Whatever the method used for recording, it is a record of the things recorded as long as it is a true and correct copy. The object of recording a deed is to give it perpetuity and publicity, and the two main requirements of a public record is that it shall be accurate and durable. * * * * *

While the language used in sections 9 and 17 indicates that the legislature had in mind that the books would be bound before the instrument was copied, there is nothing in the statute which forbids the copying of the instruments on separate sheets and then binding these sheets into book form. Whatever method is used, it all comes to this: The record of the instrument from the time it is filed until it is recorded in a well-bound book is the entry book and the original instrument; after it is recorded in a well-bound book, and the book and page where the instrument is recorded are known, and the certificate of the recorder has been indorsed on the original instrument, the record is the page or pages in the book bearing the copy of the instrument. The recorder of deeds of Cook county is a county officer named in the Constitution. Every such officer not only has the authority, but is required by law, to exercise an intelligent discretion in the performance of his official duties. The law requires him to record certain instruments in a well-bound book, but it does not require him to record them by any particular method. As long as the method adopted by him is accurate and durable, he has performed his duty. While the courts can compel him to record instruments entitled to be recorded in well-bound books, they have

no right to compel him to record them in any particular way. No argument is needed to demonstrate that photography is a much more accurate process of making a copy of an instrument than any other known method. It will show the instrument exactly as it is. The requirement of accuracy is fully complied with by this method. The record shows that prints properly made are as permanent as the paper on which they are made, and so the requirement of permanency is met. We are satisfied that no other known method of recording instruments is as accurate as the photographic method, that no practicable method excels it in permanency, and that in counties where the volume of instruments recorded is large, as it is in Cook county, no other method is as speedy and inexpensive. There being nothing in the law forbidding the recording of instruments by the photographic process, we hold that the recorder of deeds of Cook county has not abused the discretion with which he is clothed in recording the deed of petitioners as he has recorded it. This act complies with the requirements of the statute, and the instrument is legally recorded."

In Bennington v. Booth, 140 Atl. 157, the Vermont Supreme Court had before it the question of the propriety of photostatic recording under a statute which provided that the clerk should "record at length in books to be furnished by the town."

The court held at page 158:

"* * * The statute does not require the use of any particular method of recording. Gen. Laws, section 3951. Any method, not otherwise unlawful, whereby

a record is produced which has all the characteristics required by law, may be used. New times have brought new methods, and, with the above limitation, the choice of the process is but the 'choice of the pen'-- a detail with which we will not attempt to interfere. See People ex rel. Armknecht v. Haas, 311 Ill. 164, 142 N. E. 549.

"The case shows that the photostatic copies are all legible. That some are more easily read than others has no effect upon their validity. Records made with pen and ink are well known to differ in that respect. They have perpetuity Not, to be sure, in the absolute sense of the word, for no one can believe that any of our paper records will last forever. But they have that attribute no less than it is possessed by records kept by a town clerk in handwriting or typewriting. * * * * *

"* * * If, within the meaning of the statute, the photostatic records are books, they lack nothing required by Gen. Laws, Section 3951. That they are books after they are bound is perfectly apparent. Before this has been done they are like the records considered in Munford v. Wardwell, 6 Wall. 423, 18 L. ed. 756. There it was held that the law requiring grants of lands to be registered or recorded in some book of record was complied with so far as the 'book' was concerned when the records were made on loose sheets, although those sheets were not actually bound into volumes until some later date. There can be no doubt that when the statute,

which is now Gen. Laws, section 3951, was enacted, the Legislature contemplated the use of a blank book into which records could be copied. No other way was then known. The object of this statute, however, was to provide for the making of records; not for the use of some particular kind of book. It would, we think, be placing the emphasis on a comparatively inconsequential matter to hold that these photostatic records are invalid because they are made on sheets which are destined to be bound rather than on sheets which are already bound. While they are accumulating until numerous enough to be bound the sheets of photostatic records, within the meaning of our statute, constitute the current book of records."

While we may have seemed prolix in our quotations still the facts are so apposite and the reasoning so cogent that we have felt that the entire matter should be included.

The only thing that might militate against the legality of photostatic recording is Section 3260, R. S. Mo. 1929, which provides as follows:

"Wherever the statute authorizes books or records to be rebound, or their contents transcribed into new books, or new indexes to be made, the making of photographic copies of said books, records or indexes shall be deemed transcribing and the binding together of such photographic copies shall be deemed rebinding of such records within the meaning of this chapter."

It might be argued that since the Legislature in this statute provided that photostatic copies would be sufficient transcription when it was necessary to transcribe or rebind records that when they omitted such provision

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from the statutes dealing with recording in the first instance that they intended that the copies should be placed in the records in pen and ink or on the typewriter.

Section 3260, supra, is in pari materia with Sections 71, 77, 213 and 545, supra, because they are consistent statutes relating to the same subject matter. Sales v. Barber Asphalt Paving Company, 66 S. W. 979, 166 Mo. 671. It is a rule of statutory construction that where two acts in pari materia are construed together and one contains provisions omitted from the other, the omitted provision will be applied in the proceeding under the act not containing such provisions, where not inconsistent with the purposes of the act. 59 C. J. 1050; People v. Cowen, 119 N. E. 335, 283 Ill. 308.

Therefore, the fact that Section 3260, supra, allows photostats to be made of records strengthens the holding that photostatic recordings are proper and legal.

CONCLUSION

It is, therefore, the opinion of this department that the records required to be kept by the Probate Court by Sections 71, 77, 213 and 545, R. S. Mo. 1929, may be photostatic copies which may be bound into books and the fees allowed by Section 11782, R. S. Mo. 1929, may be claimed.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

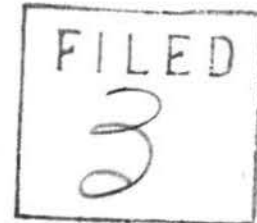
J. E. TAYLOR
(Acting) Attorney General

AO:DA

INHERITANCE TAX: Where a legatee is to receive his legacy tax free, the inheritance tax should be computed upon the total of the legacy and the tax, then deducted therefrom as the tax is to be considered as an interest in property.

October 24, 1938

Mr. E. J. Arnett, Supervisor
Inheritance Tax Department
Jefferson City, Missouri



Dear Mr. Arnett:

This is to acknowledge receipt of your recent request for an opinion based upon a letter received from the Clerk of the St. Louis City Probate Court under date of September 28th. This letter reads as follows:

"A certain will here provides that all inheritance taxes shall be paid out of the residue of the estate. In the case at hand the appraiser determined the tax due on certain specific bequests and then in determining the amount of taxable residue deducted the amount of these taxes. In this manner the estate procured the benefit of a deduction of an amount paid for inheritance taxes which seems to me to be contrary to the intent of the act.

"What is the opinion of your office as to the way this should be handled? It seems to me each legatee besides the amount of his bequest has, under this will, been granted a further amount, namely, the amount of the tax upon his bequest. Should not his inheritance be taxed upon the basis of the larger amount? In that way the

estate would not receive the benefit of a deduction for inheritance tax paid."

This very question which now concerns the Clerk of the Probate Court of the City of St. Louis was decided in the case of In Re Levalley's Estate, 210 N. W. 941 by the Supreme Court of the State of Washington. In that case, the will of the testator provided that the inheritance tax was to be paid out of the residuary estate. In the State of Wisconsin, the inheritance tax statute imposes a tax upon the transfer of property or any interest therein and is identical with our statutes insofar as it relates to the question with which we are concerned. This case reveals that when the county court determined the amount of inheritance tax due on the various bequests the amount which each beneficiary was to receive was increased by the amount of the tax. The court illustrated this increase at page 941 as follows:

"In the case of a \$50,000 bequest, the court instead of computing the tax upon \$50,000 (in accordance with the claim of the executors) as follows:

Legatee	Relation- ship	Share	Exemp- tion	Net Taxable Legacy
Mrs. Louise Stranger		\$50,000		
D. Edwards			\$150	\$49,850.00
			(Rate of Tax)	
\$24,850.00		x	.08	1,988.00
\$25,000.00		x	.16	4,000.00
				<u>\$5,988.00</u>

computed it upon \$57,879 as follows:

\$150.00	Exempt	
\$24,850.00	8%	\$1,988.00
\$25,000.00	16%	4,000.00
\$7,879.00	24%	1,891.00
<u>\$57,879.00</u>	total interest	<u>\$7,879.00</u> Total tax
7,879.00	tax subtracted	
<u>\$50,000.00</u>	net legacy."	

In deciding the case, the court held:

"Under the terms of the will, the legatee in the illustration has a right to have applied upon the payment of the tax on account of her legacy a sum sufficient to leave her the net amount of \$50,000. This is a right which the courts recognize and which they will enforce against the executors. The right of the legatee to compel the application of a sum sufficient to pay the tax which would otherwise be assessable upon her legacy is certainly an interest in the transfer of property. It is a right recognized in law and enforced in practice, but it is argued that, if the statute be so construed, it results in a payment of a tax upon a tax. This is not strictly true. While it is true in the supposed case that \$7,879 goes to the state and not to the legatee, it is equally true that a tax is reckoned upon the whole amount of a legacy, including that part of it necessary to pay the tax when the tax is not payable from the residue and is deducted from the legacy."

In the case of *In Re Bowlin's Estate*, 248 N. W. 741, the Supreme Court of Minnesota had before it for consideration the question as to whether or not the inheritance tax might be deducted where there was a testamentary declaration that the tax should be paid from the residue of the estate. In this case, the inheritance taxes were on forty bequests aggregating Five Thousand Two Hundred Eighty Eight Dollars and Eighty Nine Cents (\$5,288.89) and the probate court included this sum along with the appraised value of the personal property for taxation. In passing upon the question as to whether the amount of the tax should have been added to the bequests, the court said at page 742:

"When a bequest like those made to the forty beneficiaries first above

mentioned is accompanied by a direction that inheritance taxes be paid out of the residue of the estate, it is in effect a bequest in the stated sum plus an amount sufficient to pay the tax properly chargeable to the entire bequest when so calculated. When the tax is computed upon the sum so arrived at and deducted therefrom, the remainder is the amount of the legacy which, by the terms of the will, is to be received by the legatee free from the tax."

In support of this decision, the court cited the In Re Levalley's Estate, supra, and observed at page 742:

"Applying the Wisconsin rule to the case at bar would increase the amount of the tax on the forty bequests, but the tax would not be included in the aggregate of the rest and residue of the estate, the tax upon which has been included as a charge against the relators. We think the logic of the rule is sound and should be adopted in computing the inheritance tax in this state in like cases."

In the case of Textor et al vs. Textor 183 Atlantic 247, the Court of Appeals in Maryland also followed the rule as announced by the Supreme Court of Wisconsin in the Levalley's Estate that if a testator direct that inheritance tax be paid out of his estate, he thereby increases his gift to the extent of the tax.

In the case of In Re Henry's Estate, 66 Pacific (2nd) 350, the Supreme Court of the State of Washington had before it for consideration a will which provided that all of the inheritance taxes which might be charged to any of the legatees under the will were to be paid out of the estate and that the legacies were not to be reduced by any such taxes. The question arose as to how the tax was to be computed. The appellant contended that while it was to be paid by the estate, it should be figured upon the amount

October 24, 1938

of the specified legacy, while the respondent said the tax should be figured upon the sum which, when added to the specified legacy and the tax deducted therefrom would leave a balance which should be the amount of the legacy provided for under the terms of the will. The court in passing upon these contentions rejected the appellant's theory and decided the case upon the rule as was announced in the cases of *Bowlin* and *Levalley*, *supra*, above noticed.

A review of these authorities clearly indicates that any legatee, under the provisions of any will which has a testamentary declaration to the effect that taxes levied upon the legacies are to be borne out of a residuary estate are to receive such legacies or bequests tax free, on the theory that the tax given the legatees is an interest in property transferred to them. Therefore, the inheritance tax should be added to the legacies or bequests in arriving at the amount of tax to be paid, then deducted therefrom in arriving at the net legacy, as provided for in the *In Re Levalley Estate* above noticed.

CONCLUSION

In view of the above, it is the opinion of this department that any testator may provide for the payment of inheritance taxes out of the residuary estate. Inasmuch as a legatee receives his legacy tax free by reason of the testamentary declaration to the effect that such taxes are to be paid out of the residuary estate, the inheritance taxes due this state should be computed upon the legacy and the tax. This is because the tax bequeathed is an interest in property and being so said tax must be computed upon the sum of the legacy and tax.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
RCS:RT

UNEMPLOYMENT COMPENSATION COMMISSION -- Where can headquarters be
legally located?

May 13, 1938.

5-24



Honorable Julian H. Bagby
Mayor of Sedalia
Sedalia, Missouri

Dear Sir:

We acknowledge your request for an opinion dated
May 9, 1938, which request reads as follows:

"I am writing you this letter as Mayor
of the City of Sedalia first to advise
you, if you have not already learned
so, that Sedalia has made a written
proposal and bid for the removal and
housing of the Unemployment Compensation
Commission of Missouri, which is com-
pelled to find new quarters immediately
according to our understanding of the
situation.

"We are, and intend to continue to make
a strenuous effort to locate this Com-
mission in Sedalia and naturally there
are certain questions which arise that
must be answered; one of which has come
to our mind and which we desire your
opinion on, as follows, to-wit: Is
there any legal reason why; or any legal
existing obstacle in the Laws of the
State of Missouri that would prevent
the removal or location of the office
of the Unemployment Compensation Com-
mission of Missouri in Sedalia, Pettis
County, Missouri, and outside of and
away from Jefferson City, Cole County,
Missouri?

May 13, 1938

"Your immediate attention and answer to this letter will be highly appreciated as it is our intention to further contact proper parties and authorities to present our case, and we feel confident that this probably may be one of the questions, asked, and we desire to be in a position to speak thereon with authority from your office."

The Unemployment Compensation Act of Missouri, found in Laws Mo. 1937, page 574, and the supporting appropriation act of Missouri, found in Laws Mo. 1937, page 104, are silent as to any statutory location and situs of the administration headquarters of said Commission.

In the case of *Bush vs. State Highway Commission*, 46 S. W. (2d) 854, l.c. 858; 329 Mo. 843, it was held that the Missouri State Highway Commission is a subordinate branch of the executive department of this State, and the court said:

"Created by legislative enactment, and clothed with powers therein defined, through the appointment of the Governor, under all recognized rules of construction it is, when properly classified, a subordinate branch of the executive department."

By the same logic, it is reasonable for us to conclude that the Missouri Compensation Commission is a subordinate branch of the executive department, and subject to any general constitutional provisions and statutes regulating subordinate branches of the executive department.

Article V, Section 1 of the Missouri Constitution provides:

"The executive department shall consist of a Governor, Lieutenant-Governor, Secretary of State, State Auditor, State

Treasurer, Attorney-General and Superintendent of Public Schools, all of whom, except the Lieutenant-Governor, shall reside at the seat of government during their term of office, and keep the public records, books and papers there, and shall perform such duties as may be prescribed by law."

In the case of Hannibal and St. Joseph Railway Company vs. State Board of Equalization, 64 Mo. 294, it was held that no legislation is necessary to make the executive department consist of the officers mentioned in the Constitution, supra.

As to the executive officers mentioned in the Constitution, supra, there can be no doubt that they personally must live at the seat of government and keep their public records, books and papers there. Is this constitutional provision to be construed so that subordinate branches of the executive department must find headquarter offices at the seat of government, and must, at all events, keep their public records, book and papers there? We believe that such a construction reads into the Constitution a requirement not apparent in its language, and not reasonably intended. We believe that the language of the Constitution restrains the residence and headquarters, administration offices, records, books and papers at Jefferson City, Missouri only for the executive officers specifically named in the Constitution.

If the constitutional restrictions were intended for subordinate branches of the executive department, the records, books and papers of the Missouri Blind Commission in St. Louis, and the Warehouse Commissioner's records, books and papers in Kansas City, as now located, have had an unconstitutional situs for a long season. Such a construction of this constitutional provision is unreasonable and not practical. We believe the people, by the Constitution, intended the situs of subordinate executive headquarter offices in Missouri to be located at such places as the Legislature has provided, either specifically or by implication.

Article V, Section 4 of the Missouri Constitution provides:

"The supreme executive power shall be vested in a chief magistrate, who shall be styled 'The Governor of the State of Missouri'."

Section 11406, R. S. Mo. 1929 provides:

"Every employe or official of the state of Missouri, who is on a regular salary or per diem, shall have a designated place as headquarters and no such official or employe shall be entitled to, or receive, any compensation or reimbursement for any subsistence expense, (meals or lodging) while at headquarters. Provided, that the heads of all departments in charge of statewide activities shall have headquarters at Jefferson City, unless otherwise provided by general laws, or unless, in the opinion of the governor, or the elective officer appointing the official or employe, the public interest will best be served by having the headquarters at some other place, to be designated by the governor, or the elective officer appointing such official or employe. Provided further, that the state auditor shall not audit any account for the expense of any official or employe for subsistence while at headquarters. Provided, however, that this section shall not apply to the members of boards or commissions whose duties are supervisory and whose services are occasional. Provided further, this section shall not apply to inspectors and examiners whose duties

Hon. Julian H. Bagby

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May 13, 1938

are in no respect administrative but wholly that of inspection and examination."

CONCLUSION

This department is of the opinion that the legal situs of the headquarters of the Unemployment Compensation Commission, that is, the place where the records, books and papers of said Commission are to be kept, is now legally located in Jefferson City, Missouri, but we are of the further opinion that, if in the opinion of the Governor of Missouri, the public interest will be best served by locating headquarters at some other place which he shall designate, then the headquarters can be legally changed by him to said situs, upon his order to that effect.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

ADVERTISING: Construction of Section 4308 R. S. Missouri 1929.

June 20, 1938



Hon. E. A. Barbour, Jr.,
Woodruff Building
Springfield, Missouri

Dear Senator Barbour:

We have your request of June 17, 1938, inquiring as to whether or not the ad of the Leader Clothing Company of your City is in violation of state law. That portion of the ad called to our attention reads as follows:

"Free--A beautiful 72 x 84, Part
Wool, Double Blanket, Absolutely
Free with purchase of \$19.85
or more."

Section 4308 R. S. Missouri 1929, prohibits untrue or false advertising. We see nothing objectionable in this form of advertising since every person who purchases \$19.85 of merchandise in the store is to receive one of these wool blankets. This in some ways may be comparable to a penny sale or eagle stamps proposition, and at best merely constitutes a fixed discount on the purchase of \$19.85 or more.

It is therefore the opinion of this office that such advertising is not in violation of any statute of this state pertaining to false advertising.

Respectfully submitted,

APPROVED:

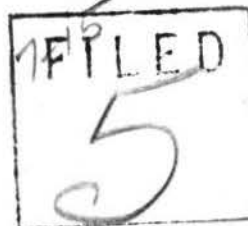
FRANKLIN E. REAGAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

FER:MM

DEPUTY COUNTY COLLECTOR: Need not be twenty one years of age.

July 13, 1938



Hon. William Barton
Representative of Montgomery County
c/o Revision Commission
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of June 28, 1938, in which you request an official opinion as follows:

"What are the qualifications of a deputy county collector in counties around 13,000 population where they do not have township organizations? May a minor qualify for such deputyship?"

We have made a fairly exhaustive examination of the statutes and the Constitution of the State of Missouri, and feel that we are reasonably safe in making the assertion that there is no express legislation or constitutional provisions pertaining to the qualifications of a county collector or his deputies with respect to age.

In view of this fact, we think the provisions of Section 645, R.S. Missouri, 1929, have some bearing upon this question. This section provides as follows:

"The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action

and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that the same may be in derogation of, or in conflict with, such common law, or with such statutes or acts of parliament; but all such acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof."

The effect of this statutory provision is that the common law is applicable in this state at the present time, unless abrogated by the Constitution of the United States, or the Constitution of Missouri or the statutes of the State of Missouri. As no statute or constitutional provision provides what age a person must be in order to qualify as county collector or deputy county collector, we must apply the provisions of the common law to this situation.

In 46 C.J., page 939, Section 38, it is stated as follows:

"It would appear to be the rule of the common law that minors may not hold offices, the performance of whose duties requires the exercise of judgment and discretion; but that they are qualified for ministerial offices."

In 31 C.J., page 1004, Section 31, the rule is stated as follows:

"At common law infants are eligible to offices which are ministerial in their character and call for the exercise of skill and diligence only; but they are not eligible to offices which are judicial or concern the administration of justice, nor should offices imposing duties to the proper discharge of which judgment, discretion, and experience are necessary be intrusted to infants."

July 13, 1938

Thus, it appears the common law of this country is that infants are eligible to hold offices which are ministerial in their character and call for the exercise of skill and diligence only. Applying the rules as stated in Corpus Juris, we think that an infant may hold the office of deputy county collector in the State of Missouri. However, under these rulings, it does not appear that this would extend to the county collector.

CONCLUSION

Therefore, it is the opinion of this department that the office of deputy county collector may be held by a person under the age of twenty one years.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

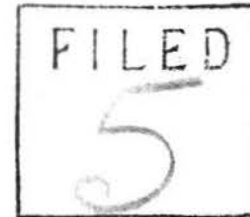
APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

ELECTIONS: Pertaining to amounts a representative may spend for election under Section 10481 R.S. Missouri 1929.

September 21, 1938 9/24



Honorable William Barton
Representative
Montgomery County
Jonesburg, Missouri

Dear Sir:

We have received your letter of September 3rd, which reads in part as follows:

"Please advise the maximum amount a candidate for Representative may spend in Montgomery County for campaign expenses under the Corrupt Practice Act."

We are enclosing a copy of an opinion rendered by this office to the Honorable Roy Hamlin on March 1, 1935. In this opinion we concluded that under Section 10481 R.S. Missouri 1929, the various applicable amounts as set forth in said statute may be expended in the primary election and that the successful candidate may then expend the same amount in the following general election.

The applicable part of Section 10481 relative to the amount each candidate may spend is as follows:

"For five thousand voters or less, two hundred dollars; for each one hundred voters over five thousand and under twenty-five thousand, four dollars; for each one hundred voters over twenty-five thousand and under fifty thousand, two dollars; and for each one hundred voters over fifty thousand, one dollar--the number

September 21, 1938

of voters to be ascertained by the total number of votes cast for all the candidates for president in the state, or in any county, district or municipality thereof at the last preceding regular election held to fill the same;* * *

Section 2, Article IV of the Constitution of Missouri provides that "the House of Representatives shall consist of members to be chosen every second year by the qualified voters of the several counties* * *". Section 11270 R.S. Missouri 1929, provides that Montgomery County is entitled to one representative.

CONCLUSION

Consequently, in order to ascertain the amounts which the candidate for representative in Montgomery County may expend for campaign expenses it is necessary to ascertain the total vote cast for all candidates for president in Montgomery County in the 1936 presidential election. The formula provided in Section 10481 can then be easily applied. The total amount thus ascertained can be spent by any such candidate at the primary and if the candidate is nominated a similar amount can be spent in connection with the ensuing election. We are unable to apply the formula as set out in Section 10481 for figuring the exact amount which a representative from Montgomery County may spend to be elected because we do not have available in this office the total vote cast for president in Montgomery County in the 1936 election. The county clerk of your county will have this information and will no doubt be able to furnish you the same upon request.

Respectfully submitted,

J. F. ALLEBACH,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

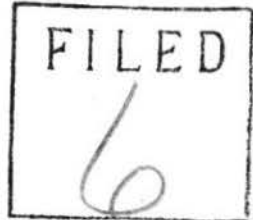
SHERIFFS:
SALARIES AND FEES:
DUTIES:
BOARD OF EQUALIZATION:

Sheriff or his deputy must be in attendance of the court for which he claims a fee of \$3.00 per day.

Sheriffs in counties not under town-

April 7, 1938 ship organization are not required to open board of equalization, and are not entitled to receive three dollars per day while board is in session.

Honorable Noah Bell,
Presiding Judge
County Court of
Oregon County
Alton, Missouri.



Dear Sir:

This is to acknowledge receipt of your request dated March 31, 1938, for an official opinion from this department, which request is as follows:

"I would like to have your opinion on the following questions:

No. 1 Can a Sheriff draw his Salary in Circuit Court at \$3.00 also draw \$300.00 for waiting on County Court on the same day when he did not appear in County Court on that day?

No. 2. Can he draw his Salary of \$3.00 per day in County Court when he is gone to take prisoners to Jefferson City on the same day and no deputy waiting on the Court.

No. 3 Is the sheriff supposed to open the Board of Equalization on April 4 and receive \$3.00 for his services.

The Court has no intention of beating the sheriff out of anything that he is entitled to and don't want to pay

April 7, 1938

him for something unless he is entitled to. We are of the opinion he is trying to double up on us."

The first and second of your questions may be answered together.

By Section 1870, R.S. Mo. 1929, it is provided as follows:

"The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law;" * * * * *

A county court is a court of record. Article VI, Section 36, Missouri Constitution. It would, therefore, appear that it is the duty of the sheriff, in person or by his deputy, to attend the sessions of all courts of record in his county. We construed the above statute to be mandatory upon the sheriff or his deputy to perform this duty. State v. Yager, 250 Mo. 388.

By Section 1871, R.S. Mo. 1929, it is provided that:

"The court shall audit and adjust the accounts of the officer attending it, made pursuant to this chapter," * * *

Section 11789, R.S. Mo. 1929 fixes the compensation of the sheriff for such duties as follows:

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of deputies not to exceed three per day..... 3.00"

Construing the above sections together, it is very evident that it is the mandatory duty of the sheriff in person or by his deputy to attend each court of record or criminal court held in his county when it is in session,

and that his compensation is three dollars (\$3.00) per day and for each deputy he shall receive three dollars (\$3.00) per day.

CONCLUSION

It is, therefore, the opinion of this department that the sheriff in person or by deputy must attend each session of the courts of record and criminal courts of his county and for which he shall receive three dollars (\$3.00) per day and three dollars (\$3.00) per day for each deputy. And it is further the opinion of this department that if the sheriff or a deputy are not in attendance when such courts are in session that they shall not be allowed such fee.

As to the question of whether or not the sheriff is supposed to open the board of equalization and receive three dollars (\$3.00) for his services. By Section 9811, R.S. Mo. 1929, it is provided:

"There shall be in each county in this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year: Provided, that in any county having adopted township organization, the sheriff of said county shall be a member of said board of equalization: Provided further, that in counties containing a population of more than seventy thousand, such board shall meet upon the first Monday of March in each year."

From the foregoing section, it is apparent that in counties which have adopted township organization, the sheriff is a member of the board of equalization; however, Oregon County has not adopted township organization, and, therefore, the sheriff of that county is not a member of the board of equalization.

Section 9818, R.S. Mo. 1929 provides as follows:

"The judges of the county court, the county surveyor, the county assessor, the sheriff, and the county clerk shall receive \$5.00 per day for each day they shall act as members of the county board of equalization: Provided, that this section shall not apply to boards of equalization who are paid a salary."

By this section the sheriff as a member of the board of equalization receives five dollars (\$5.00) per day, but only in counties having township organization is the sheriff a member of the board of equalization; so Section 9818 refers to boards of equalization mentioned in Section 9811.

By Section 9815, R.S. Mo. 1929, it is provided as follows:

"The said board of equalization shall have power to send for persons and papers and compel the attendance of witnesses in relation to any appeal before them, and it shall be the duty of the sheriff of the county to execute such process as may be issued to this end. A majority of said board shall constitute a quorum, and a majority of them present shall determine all matters of appeal or revision."

By this section it appears that the only duties the sheriff

has to perform for the board of equalization in counties not under township organization, is to serve the writs and processes of that board.

In our research of the statutes on this subject we failed to find that the sheriff is required to perform any duties for the board of equalization, except those enumerated in said Sections 9818 and 9815, supra, and, therefore, conclude that it is not the duty of the sheriff to attend or open the board of equalization.

An officer receives his compensation by virtue of the statutes and if they are silent as to his duties and/or as to his fees, he shall not receive any compensation therefor.

In the case of *State ex rel. v. Brown*, 146 Mo., 1.c. 406, the Court said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.'"

CONCLUSION

It is, therefore, the opinion of this department that

Mr. Noah Bell

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April 7, 1938

it is not the duty of the sheriff to open the meetings of the board of equalization, and that the sheriff is not authorized to charge or collect a fee of three dollars (\$3.00) per day for either opening the meeting of the board of equalization or for attending the meeting of the board and awaiting on it.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

ROADS & BRIDGES: County Court may not draw warrant in favor of overseer of districts under Section 7868, until his account is presented and audited by Court

April 9, 1938

412

Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri



Dear Sir:

This Department is in receipt of your letter of April 2, 1938, in which you request an opinion as follows:

"At the present time Crawford County, Missouri, is divided into four special road districts, and two road districts which are not special road districts. Of course each of these districts that is not a special road district has a road overseer appointed by the County Court. The County Court of Crawford County, now proposes to pay to each of these two road overseers at the beginning of each month the road money which is available for their respective district, and then let the overseer disburse this money during the following month as he sees fit, and then at the end of the month to make his report and accounting to the Court.

"I would like to have your opinion as to whether or not this would be legal and proper. "

Crawford County is a county not under township organization. From your request we gather that the road district under consideration here is what is some-

times called a common road district and one which is organized under the provisions of Article III, Chapter 42, Revised Statutes Missouri 1929.

The third proviso of Section 7891, of Article III, Chapter 42, Revised Statutes Missouri 1929, seems to be decisive of the question here. This proviso reads as follows:

"Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

An examination of the above proviso shows that the legislature employed the past tense when providing what must be done before the county court may issue a warrant in favor of a road overseer of a common road district. By so doing these things are made pre-requisites to the issuing of the warrant.

In State ex rel. v. Railroads, 215 Mo. 1. c. 490, the Court said:

"That the grammatical rule of interpretation should be considered and applied along with other rules of construction when there is no conflict between them, and thereby give full force and effect to all."

Further, it is said, at l. c. 491:

"The grammatical construction of a statute is one mode of interpretation. But it is not the only mode, and is not always the true mode."

Honorable G. C. Beckham

-3-

April 9, 1938

We may assume that the draftsman of an act understood the rules of grammar, but it is not always safe to do so."

While it may not at all times be a safe rule to follow, we believe the above construction, based upon this rule, correctly settles this question.

Another rule of construction in Missouri is stated in Cummins v. Kansas City Public Service Co., 66 S. W. (2d) 1. c. 931, where it is said:

"It is, of course, fundamental that where the language of a statute is plain and admits of but one meaning there is no room for construction."

This we think Section 7891, supra, is, and consequently needs no great elaboration in arriving at the legislative intent from the language therein employed.

Therefore, it is the opinion of this Department that the county court of Crawford County may not, at the first of each month, draw a warrant in favor of the overseer of a common road district and pay over to him all funds available for that district in that month, and permit said overseer to disburse said money as he sees fit, accounting for it at the end of the month.

The statute provides the manner in which these warrants are to be handled and must be followed.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

LLB LC

SCHOOLS:
TEACHERS:
RENEWAL OF CERTIFICATE:

Teachers' certificates maybe
renewed. When?

May 10, 1938

7/8



Mr. G. C. Beckham,
Prosecuting Attorney
Crawford County,
Steelville, Missouri.

Dear Sir:

This is in reply to yours of May 7, 1938, requesting an official opinion from this department based on the following letter:

"I would like to ask your opinion upon the following: Here in Crawford County, there is a certain school teacher who was issued a second grade certificate in the spring of 1935. In the spring of 1937 she applied to the County Superintendent of Crawford County, for a renewal of this certificate. The County Superintendent at that time failed and refused to reissue said certificate on account of the fact that he did not approve of her moral character. She has now within the last few days made a further request upon the County Superintendent for a renewal of this certificate, and he still refuses to reissue the same. Section 9474 of the Revised Statutes of 1929 provides that the County Superintendent shall pass upon the moral character of the applicant, but my inquiry is this: Would this also apply in the case of the renewal of a certificate? Does

May 10, 1938

the County Superintendent have this same right to exercise his discretion upon a renewal application as he would upon an original application for a certificate?

I fail to find any case upon this identical point, and would appreciate having your opinion at the earliest convenient date, as this teacher is threatening to obtain a Writ of Mandamus against our County Superintendent."

Upon our research on this question, we find that the following sections of the statutes apply:

Section 9470, R.S. Mo. 1929 provides in part as follows:

"The county superintendent of public schools shall have authority to examine teachers and grant certificates of qualification to teach in their respective counties or in the state.
* * * * *
Certificates issued by said county superintendent of public schools shall be of three grades: Third grade shall be valid for one year and second grade for two years in the county for which they are issued and first grade for three years in the state."* * * * *

Section 9472, R.S. Mo. 1929 provides in part as follows:

"No person shall be granted a license to teach in the public schools of this state who is not of good moral character."* * * * *

Section 9473, R.S. Mo. 1929 provides in part as

follows:

"* * * A second or third grade certificate shall be renewed without examination once. A first grade certificate an unlimited number of times: Provided, that the holder shall give satisfactory evidence to county superintendent of public schools that certain professional work prescribed by state superintendent at the time of the issuing of or former renewal of the certificate has been complied with:"* * * * *

Section 9474, R.S. Mo. 1929 provides in part as follows:

"The county superintendent of public schools shall pass upon the moral character and requirements, other than scholastic as shown by the papers written, of all applicants for certificates to teach in the schools under his jurisdiction, and he shall grade each applicant who has had four months' experience in teaching on teaching ability and management."* * * * *

Section 9475, R.S. Mo. 1929 provides in part as follows:

"* * * * Every applicant for a renewal of his certificate shall pay a fee of one dollar and fifty cents."* * * * *

Section 9476, R.S. Mo. 1929 provides as follows:

"The county superintendent may revoke, upon satisfactory proof, any county certificate for incompetency, immorality, neglect of duty, or the annulling of written contracts with the board

of directors without the consent of the majority of the members of the board which is a party to such contract. All charges must be preferred in writing, signed and sworn to by the party or parties making the accusation, which must be filed with the county superintendent, and the teacher must be given due notice, of not less than ten days, an opportunity to be heard, together with witnesses. In case any person holding a certificate issued by the state superintendent, the board of curators of the state university, or the board of regents of any state teachers college, shall be complained of as herein provided for, then it shall be the duty of the county superintendent in the county where the offense is alleged to have been committed, to notify, in writing, the person or board issuing such certificate, and such person or board shall proceed as herein provided for the revocation of such certificate. The complaint must plainly and fully specify what incompetency, immorality, neglect of duty or other charge is made against the teacher, and if the county superintendent shall, after a hearing, revoke said certificate, the teacher shall have the right to appeal said hearing to the circuit court at any time within ten days thereafter by filing an affidavit and giving bond as is now required before justices of the peace. On any such appeal the judge of the circuit court shall, with or without a jury, at the option of either the teacher or the person making the complaint, hear the whole matter anew and decide the same de novo affirming or denying the action of the county superintendent, and he shall tax the cost against the appellant if the

judgment of the county superintendent is affirmed, but if he disaffirms such judgment, then he shall assess the costs of the whole proceedings against the person or persons making the complaint. Any teacher having his or her certificate revoked by any other authority than that of county superintendent shall have the right to appeal therefrom to the circuit court and shall have the right to a like hearing and trial as is herein provided for in the appeal from the decision of the county superintendent."

The office of the county superintendent of schools is created by the statutes and the powers and duties of this office are confined to such statutes.

From the foregoing sections of the statutes, it is very evident that the lawmakers intended that a person to whom a certificate to teach school is issued must be of good moral character together with the other qualifications prescribed therein.

By virtue of the provisions of said Section 9473, the person who asks for a renewal of a second grade certificate is not required to take an examination, however, he or she must offer satisfactory evidence that they have done certain professional work as prescribed by the state superintendent of schools at the time of the issuance of their certificate. This section also states that the second grade certificate shall be renewed once and nothing is said in this section as to the moral character of the applicant for renewal. Such applicant must pay a renewal fee of one dollar and fifty cents (\$1.50) as prescribed in Section 9475, supra. These seem to be the only requirements for the renewal of a certificate that are imposed by the statutes. Volume 56 Corpus Juris, page 376, section 282 provides as follows:

"Where the statute so provides, a teacher's certificate or license may

May 10, 1938

be renewed or extended provided it
is done in the manner prescribed."

* * * * *

In your request it appears that the county superintendent has refused to renew the certificate on account of the immorality of the teacher. By refusing to renew the certificate, the county superintendent is in effect revoking the certificate.

From a reading of the foregoing statute, it would seem that the proper way to prohibit the person from teaching on account of immorality or any other charge that might be preferred against them would be to follow the provisions of Section 9476, supra, which provides for the revocation of certificates and for the appeal from such revocation orders. By this section the teacher is given an opportunity to face his or her accusers and is given an opportunity to be heard. This section also provides for an appeal from the order of the county superintendent and if the teacher chooses, he or she may have a trial by jury. This procedure is in keeping with our form of government. Said Section 9476 provides that the teacher must be given notice and must be given an opportunity to be heard to produce his or her witnesses. From a close examination of this section of the statute, we think this is the procedure that the lawmakers intended should be taken for taking a certificate from a teacher, and we do not think that they intended that the certificate should be taken by the county superintendent refusing to renew a certificate which the lawmakers, by Section 9473, supra, said should be renewed under certain conditions therein set out.

Volume 56 Corpus Juris, page 375, section 279, states as follows:

"The board or officers authorized to revoke a teacher's license must comply with the provisions of the statute requiring that written specific charges be made against the teacher, and that the prescribed notice of such charges be given to him." * * * * *

May 10, 1938

Depriving the teacher of a certificate to teach is a severe punishment, and statutes authorizing such act should receive a strict construction and nothing should be taken by implication. The statute relating to renewal of certificates does not give to the county superintendent any authority to refuse such renewal. His duties are mandatory, and if he thinks the teacher should not have a certificate on account of immorality or any other statutory charge, the superintendent's remedy is by an action to revoke the certificate. In such action the teacher can be notified, given an opportunity to produce witnesses and to be heard in an orderly manner as prescribed by the statute and as stated above, the teacher has the right finally to a trial by jury if he or she chooses.

CONCLUSION

This office is, therefore, of the opinion that the person who has a two-year certificate to teach school in a county is entitled to have such certificate renewed for two years provided he or she gives satisfactory evidence to the county superintendent of schools in such county that they have performed certain professional work prescribed by the state superintendent at the time of the issuing of the certificate, and provided that he or she pays the renewal fee as prescribed by the statute.

We are further of the opinion that the only way in which the certificate may be revoked is by giving the notice and hearing as is prescribed by said Section 9476, supra.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

COUNTIES
MATERIAL RELIEF

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)

Contracts of a county beyond
statutory powers are void.

January 31, 1938

2-4

Honorable Ray Bennett
Presiding Judge
County Court
Kirkville, Missouri



Dear Sir:

We acknowledge your request for an opinion
dated January 7, 1938, which reads as follows:

"We, the County Court of Adair County,
Missouri, are requesting your opinion
as to the legality of the enclosed
agreement.

"In a few cases, we have made this
type of agreement with certain resi-
dents of Adair County. As indicated
in the sample enclosed, we agreed to
give certain care in return for the
transfer of property by these in-
dividuals to the County.

"We are asking your opinion on this
matter so that we will know what
action to take in similar situations
in the future."

We acknowledge also the receipt of the contract
between the County Court of Adair County and Martha E.
Bishop, which we set out in substance hereafter.

Article VI, Section 36 of the Missouri Consti-
tution provides:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Section 2962, R. S. Mo. 1929, provides in part:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, ** "

Section 12953, R. S. Mo. 1929 provides:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

Section 12954, R. S. Mo. 1929 provides:

"The county court shall at all times use its discretion and grant relief

to all persons, without regard to residence, who may require its assistance."

Section 12955, R. S. Mo. 1929 provides:

"The county court of the proper county shall allow such sum as it shall think reasonable, for the funeral expenses of any person who shall die within the county without means to pay such funeral expenses."

Section 12956, R. S. Mo. 1929 provides:

"The several county courts shall have power, whenever they may think it expedient, to purchase or lease, or may purchase and lease, any quantity of land in their respective counties, not exceeding three hundred and twenty acres, and receive a conveyance to their county for the same."

Under Article VI, Chapter 1, R. S. Mo. 1929, the county court may also provide relief for needy mothers and dependent children.

The terms of your purported legal agreement show that it is in the nature of the annuity insurance contract ordinarily sold by insurance companies. By the terms of your proposed legal agreement, the county of Adair proposes to go into the insurance business, the second-hand business and the real estate business, assuming that the law controlling county courts will sanction such projects as incident to contracts providing material relief. Said proposed contract, by its conditions, extends beyond the term of the existing county court, proposing to tie the hands of the succeeding county court and depriving them of their proper statutory

January 31, 1938

powers. The only statutes which we can find touching on the subject matter of such a contract are above set out.

The vital problem presented by your request is this: Does the statutory power of the county of Adair to purchase real estate in the name of the county, and the duty and power of the county court to provide for the relief, maintenance and support of certain aged, insane, lame, blind and sick persons, and the statutory power to provide for certain needy mothers and certain dependent children, mean that the county court of Adair County can, as second party, enter into an agreement with one of those unfortunate, yet above described persons eligible to relief, as party of the second part, whereby such eligible person owning some real estate, furniture, household goods and personal belongings, "agrees and does convey" said real estate, furniture, household goods and personal belongings to Adair County, reserving a life estate in said property, and Adair County, as second party, then agrees to accept such a conveyance, and in consideration of such conveyance agrees to furnish board, room, lodging and necessary care up to \$10.00 per month during the lifetime of the first party, deducting all old age pension benefits, if any, and then paying the funeral expenses after death, and repairing, maintaining and keeping all buildings and improvements on the real estate, and finally permit second party to use all personal property during his or her lifetime?

The courts are slow to imply power in a county court not expressly given by legislative act. In the case of *Blades vs. Hawkins*, 144 S. W. 1198, 240 Mo. 187, 1.c. 195, the court said:

"The more important proposition, and the one chiefly controverted, is as to the power of the county court to employ an expert accountant to audit the public records and the accounts of present and prior officials. Its power to do so must be found in some express statutory grant, or else implied as essential to the proper execution of powers expressly granted or duties expressly im-

posed. Section 6759, Revised Statutes 1899, prohibits counties and other municipal bodies from making any contracts not within the scope of the powers of the municipality or expressly authorized by law. This provision is but declaratory of the common law; for these public corporations never have been deemed to possess authority to contract, or do any other act, unless the power was granted by statute or could be implied because necessary and incidental to the due performance of powers granted or duties enjoined. This doctrine applies to county courts and commissioners, as well as to the governing bodies of other subordinate political corporations. *** There is in our statutes no grant of authority to a county court to employ an expert to audit and examine the books and accounts of the county and its officers. Hence, if this authority existed in the present instance, it was because the law implied it as essential to the due exercise of powers specifically vested in the county court by statute or the performance of a duty specifically required of said tribunals. The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created. ** "

In the case of King vs. Maries County, 249 S. W. 418; 297 Mo. 488, l.c. 496, the court said:

"It has been held uniformly that county courts are not the general agents of the

counties, or of the State. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. ** This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. ***

"In this case there is no claim that there was any statute which expressly gave to the county court power to employ the plaintiff in the capacity here involved. If such power existed at all it must be looked for among those powers which can be implied only as being essential to effectuate the purpose manifested in an express power or duty, conferred, or imposed upon the county court by statute. If such a power existed it must be one related to the subject with which the court was attempting to deal, and necessary to be exercised by the court in the discharge of a duty imposed by law upon that body. ** "

In the case of Bayless vs. Gibbs, 258 S. W. 590, 251 Mo. 492, l.c. 506, the court said:

"This court, in numerous cases, has repeatedly held, that the county courts of the respective counties of the State are not the general agents of the counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void.

CONCLUSION

The Constitution above quoted creates the county court as a body to take care of "county business", and Section 2962, supra, means that the county as a governmental business agent, has only such powers as are expressly given or necessarily implied in statutes constitutionally enacted, and the court so held in the Blades case, supra. Regardless of any benefit to the county or any value received by the county, we must apply the above rule of law in this matter.

The statutes above quoted make it county business to provide material relief to certain unfortunate persons. It is also county business to purchase real estate in the name of the county. We find no statute expressly giving the county power to execute the proposed agreement, to exchange material relief for the real estate and household goods, etc. of any person. If the county could do this, it is because such an agreement is in the scope of the county court's powers necessarily implied from statutory powers expressly given.

We assume that persons with real estate and household goods, etc. who apply for material relief, are otherwise qualified. Unless qualified, the county court has no business with them. Without considering the purported contract by the yardstick of public policy, we fail to understand how stripping such a miserable creature of ownership of all earthly belongings and in the nature of things meager belongings, could have been intended by the Legislature under any material relief statute giving the county court power to grant relief. We believe the Legislature intended qualified cases for county material relief to be charitably administered unto, pursuant to outright, unqualified material donations rather than by crafty uncharitable administration through a contractual scheme of qualifying said material relief.

Honorable Ray Bennett

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January 31, 1938

The Legislature did not intend these relief statutes to be used as a means of exchanging material relief for land, household goods, etc.. The acquisition of such property is not necessary for any county purpose authorized by the statutes. It is not necessary that Adair County go into the real estate business, the second hand business or the insurance business, and especially so when the only authority to do so would be by statutory implications not reasonably intended by the Legislature. The temptation for hungry persons to execute such a contract with the county under duress, hence without consideration, would be apparent on the face of such an agreement.

We are of the opinion that such a contingent relief contract as proposed is absolutely void.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. L. TAYLOR
(Acting) Attorney General

WOS:FE

CRIMINAL PROCEDURE:
RECOGNIZANCE OF WITNESS:
JUSTICE OF THE PEACE

Recognizance of witnesses taken by justice of the peace in a felony case should be for appearance of witness in circuit court and in case such witness refuses to give such recognizance and is committed, he should only be held under such order of commitment of the justice until the day he is required to appear in circuit court after June 3, 1938 which time the recognizance for appearance should be required by the circuit court.

Mr. Ernest Binnicker,
Assistant Prosecuting Attorney,
Buchanan County,
St. Joseph, Missouri.



Dear Sir:

This is in reply to yours of June 1, 1938 requesting an official opinion based upon the following letter:

"Following is a statement of facts relating to a certain criminal case now pending in the Circuit Court of Buchanan County, Missouri:

Virginia Homan and Fred Mead were charged by a felony complaint, filed in the justice court, with murder in the 1st degree. The preliminary hearing was held sometime during the month of February, 1938. Upon Completion of the testimony the case of Virginia Homan was certified to the May, 1938 term and Mead was discharged. At the request of Mr. Hoffman, prosecuting attorney, Mead was placed under bond of \$5,000 to appear on the first day of the May, 1938 term as a material witness. During the present May term the case of Virginia Homan was continued to the October term upon the instance of the state because of the absence of a very material witness. I might say that Mead is confined in jail upon a failure to furnish said bond.

I would like to know if bond for Mead as a material witness should be set by the Circuit Judge, or if the bond set by the Justice is a continuing bond, and if he can be held in jail upon his failure to furnish said bond."

From your request it appears that Fred Mead, who was a material witness for the state in the case of State v. Homan, was committed to jail by the justice who held the preliminary examination because the witness refused to enter into a recognizance for his appearance as a witness to the May, 1938 term of your circuit court.

Section 3483, R.S. Mo. 1929 provides as follows:

"If it appear that a felony has been committed, and that there is probable cause to believe the prisoner guilty thereof, the magistrate shall bind, by recognizance, the prosecutor, and all material witnesses against such prisoner, to appear and testify before the court having cognizance of the offense, on such day as the prosecuting attorney shall designate in writing duly filed with the magistrate at the time, and not to depart such court without leave."

And Section 3485, R.S. Mo. 1929 provides as follows:

"If any witness so required to enter into a recognizance refuse to comply with such order, the magistrate may commit him or her to prison until he or she comply with such order or be otherwise discharged according to law."

We are assuming that the justice of the peace in committing Mead for refusing to enter into a recognizance

We are assuming that the justice of the peace in committing Mead for refusing to enter into a recognizance for his appearance at the May term, executed the proper commitment papers and delivered them to the sheriff whose duty it was then to hold the witness until the May term of your circuit court unless the witness entered into the recognizance for his appearance as required by the order of the justice.

These acts of the statute insofar as they deprive the person of his liberty should have a strict construction.

Volume 70, Corpus Juris, page 65, section 59, provides as follows:

"* * * * * Except where the statute requires, or permits the court to require, sureties to be furnished, the personal recognizance of the witness must be accepted. The recognizance must acknowledge an indebtedness to the state, or people, mention the offense charged and as to which the witness is to testify, and designate the time at which the witness is to appear."* * * * *

At section 60, page 66 of said Volume Corpus Juris, it is provided as follows:

"Where a witness in a criminal case is lawfully directed to give a recognizance or bail for his appearance at the trial, and fails or refuses so to do, he may ordinarily, under the statutes providing for recognizances or security, be committed to jail, and held in custody, for not more than a reasonable time, to insure that he will be present to testify,"* * * * *

If the prosecuting attorney desired that this witness be required to appear in the circuit court at the time the case was to be called at the next term, it was his duty to designate in writing the day he desires the

appearance of the witness, and the justice of the peace should take the recognizance of the witness for his appearance on that day and that he would not depart without leave of court. When that day came and the witness, being in the custody of the sheriff for failure to enter the recognizance required by the justice of the peace, is taken into court, then the requirement of the justice as to the appearance of the witness has been met. If the case is not tried on that date or is continued, if the presence of the witness is desired at a later date the judge of the circuit court may require him to enter into a recognizance as is provided by Section 3656, R.S. Mo. 1929 which is as follows:

"Whenever a criminal case shall be continued, all the witnesses in attendance shall be called by the court, and as many of them as the parties may desire shall be required to enter into recognizance for their appearance on the day of the next term on which such case shall be set for trial, which day shall be fixed and designated by the court at the time the continuance is granted; and if any such witness shall fail to appear in said court when so called, for the purpose of being recognized, such witness shall forfeit all his fees as witness in such cause, and may be compelled to appear by attachment."

Said Sections 3483, 3485 and 3656, very clearly set out the procedure to be followed to enforce the appearance of witnesses in criminal cases.

Said Section 3483 by the words at the end of the section, "and not to depart such court without leave", seems to indicate that it was the intention of the lawmakers that the recognizance provided for is a continuing obligation and we would so hold, were it not for the provisions of said Section 3656. This section specifically provides for a recognizance of a witness in the circuit court if the

Mr. Ernest Binnicker

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June 3, 1938

case is continued and the order of the justice court is then no longer binding upon the witness.

CONCLUSION

It is, therefore, the opinion of this department that a justice of the peace who requires witnesses in a criminal case to enter into a recognizance for their appearance in circuit court, can only require that the witness appear in the circuit court on the day that the prosecuting attorney designates in writing, and if said witness appears on that date, the requirements of the justice of the peace recognizance have been met and the witness is thereby discharged from the recognizance and should be released if confined.

We are further of the opinion that any recognizance required after the date fixed by the justice when he binds the defendant over to the circuit court should be fixed by the circuit court.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

STATE PURCHASING AGENT: No authority to sign contract for architectural services for construction of Missouri Building at 1939 New York World's Fair.

May 4, 1938 5/17



Mr. George Blowers
State Purchasing Agent
Jefferson City, Missouri

Dear Mr. Blowers:

This Department wishes to acknowledge your request for an opinion under date of April 7, 1938, wherein you state as follows:

"Please note the attached copy of a letter which I received from Jamieson and Spearl, Architects, on the Missouri building to be constructed at the New York World's Fair, 1939.

Please advise whether or not the signing of the contract comes under the jurisdiction of this office."

Laws of Missouri 1933, pages 411-414, hereinafter referred to as the Act, creates a State Purchasing Agent, and in Section 2 of said Act grants him the following authority:

"The Purchasing Agent shall purchase all supplies except printing, binding and paper, as provided for in Chap. 115, R.S. 1929, for all departments of the State, except as in this Act otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

Section 10 of said Act declares all contracts in violation of said Act void, as follows:

"Whenever any department or agency of the state government shall purchase or contract for any supplies, materials, equipment or contractual services contrary to the provisions of this Act or the rules and regulations made thereunder, such order or contract shall be void and of no effect. The head of such department or agency shall be personally liable for the costs of such order or contract, and, if already paid for out of state funds, the amount thereof may be recovered in the name of the state in an appropriate action instituted therefor."

Section 11 of said Act defines among other terms that of "contractual services", as follows:

"The term 'supplies' used in this Act shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this Act otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this Act shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the State."

It is not necessary, as we view it, to determine whether contractual services as above defined is broad enough to include a contract for architectural services, the reason being that the Legislature in 1937 (Laws of Missouri 1937, page 397) created a New York World's Fair Commission, and invested in them the following powers and duties (Section 3):

"Such commission shall proceed as speedily as practicable to arrange for the active participation by the State of Missouri in the New York World's Fair of 1939. It shall select an appropriate site and make all arrangements, by lease or otherwise for a suitable State exhibit on the lands upon which such Fair is to be held, let all contracts required in its discretion for the construction and maintenance thereof, and perform such other acts, including the acquisition by gift, loan, purchase or otherwise, collection and transportation of such exhibit of the State, as may be necessary to insure suitable participation by the State in such Fair and to carry into effect the purpose of this act, including such proper disposition of such exhibit as they may deem advisable at the close of said exposition. The appropriate State Departments shall perform such duties in carrying out the provisions of this act as the commission requires."

In the case of State ex rel. Buchanan County vs. Fulks, 247 S.W. (2) 129, 1. c. 132, 296 Mo. 614, the Court in holding that a special statute, if later than the general statute relating to the same subject matter, will be regarded as an exception to, or qualification of the prior general one, said:

"Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; * * * *"

Mr. George Blowers,

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May 4, 1938

The Act creating the New York World's Fair Commission being a special statute and of a later date than the State Purchasing Agent Act, which is a general statute, will be regarded as an exception to, or qualification of the prior general one as it relates to authority to enter into contracts for services.

The Legislature having granted the New York World's Fair Commission the power to enter into all contracts relating to the construction of buildings to house Missouri exhibits, we are of the opinion that the authority to sign the contract for architectural services in connection with the construction of the Missouri Building at the 1939 New York World's Fair does not come within the jurisdiction of the State Purchasing Agent.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

STATE PURCHASING AGENT:
PURCHASE OF SUPPLIES ON
OPEN MARKET:
APPROVAL OF GOVERNOR:

Purchasing agent should have the
approval of the Governor before
purchasing supplies on the open
market and such approval should be
had for each and every transaction.

June 16, 1938



Mr. George Blowers,
State Purchasing Agent,
Jefferson City, Missouri.

Dear Sir:

This is in reply to yours of June 13, requesting
an official opinion based upon the following letter:

"Will you please give this Department an opinion covering Section 3, Page 411 of the State Purchasing Agent's Act of 1933 as to whether or not the Governor could approve the policy of the State Purchasing Agent buying on the open market without his approval on each and every transaction.

Also, please advise regarding Section 5, Page 412 of this same Act, if the Purchasing Agent authorizes the Institutions or Departments to buy direct on an emergency purchase, whether the orders approved by this office after being purchased by the Institution or Departments, would come within the law if there were no bids attached to the order."

On the question submitted in the second paragraph of your letter I find that this office on August 28, 1933, rendered an official opinion to your department covering this question. I am enclosing a copy of this opinion for your information in case the other opinion has been misplaced.

June 16, 1938

As to the first paragraph of your request I find that Section 3, page 411, Laws of Missouri, 1933 is applicable and provides as follows:

"All purchases shall be based on competitive bids. On any purchase where the estimated expenditure shall be two thousand dollars (\$2,000.00) or over, the Purchasing Agent shall advertise for bids in at least two daily newspapers of general circulation in such places as are most likely to reach prospective bidders at least five days before bids for such purchase are to be opened. On purchases where the estimated expenditure is less than two thousand dollars (\$2,000.00) bids shall be secured without advertising. In all cases, the Purchasing Agent shall post a notice of the proposed purchase on a bulletin board in his office. He shall also on all purchases estimated to exceed two thousand dollars (\$2,000.00) solicit bids by mail from prospective suppliers. All bids for such supplies shall be mailed or delivered to the office of the Purchasing Agent so as to reach such office before the time set for opening bids. The contract shall be let to the lowest and best bidder. The Purchasing Agent shall have the right to reject any or all bids and advertise for new bids, or, with the approval of the Governor, purchase the required supplies on the open market if they can be so purchased at a better price. All bids shall be based on standard specifications wherever such specifications have been prepared by the Purchasing Agent as hereinafter provided. The Purchasing Agent shall make rules governing the delivery, inspection, storage and distribution of all supplies so purchased and governing the manner in which all claims for supplies delivered shall be

submitted, examined, approved and paid. He shall determine the amount of bond or deposit and the character thereof which shall accompany bids."

This section requires the purchasing agent to solicit bids for all supplies which he purchases for the state. All contracts let by him for the purchase of such supplies are to be let to the lowest and best bidder unless the purchasing agent rejects all such bids, and with the approval of the Governor purchases these supplies on an open market at a better price than that offered by the bids made on the contract for the sale of such supplies.

Said Section 3 provides that contracts for purchase shall be let to the lowest and best bidder, the purchasing agent may exercise his discretion in determining which is the lowest and best bidder. In the case of State ex rel. v. McGrath, 91 Mo. 387, l.c. 393, the court said:

"The decided weight of authority on these questions, to which we have been cited, and to which we have had access, is to the effect following:

High's Extraordinary Legal Remedies, section 92, treating of the duties of public officers entrusted with the letting of contracts for public work, uses this language: 'The better doctrine, however, as to all such cases of this nature, and one which has the support of an almost uniform current of authority, is, that the duties of officers, entrusted with the letting of contracts for works of public improvements to the lowest bidder, are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond the control of the courts by mandamus.'"

And in State ex rel. v. Meier, 142 Mo. App. 309, 1.c. 310, the court said:

"Contracts for public work in St. Joseph are awarded under the provisions of section 9 of the charter (Laws 1903, p. 63). That part of the section bearing on this controversy reads as follows: 'All contracts relating to any improvements herein contemplated shall be made by said board, and shall be awarded to the lowest and best bidder, but such board shall have, at all times, the power to reject any and all bids.'

Relator's petition states his bid was the lowest and best and his compliance with all provisions of the law and his readiness to enter into all proper contracts required, and asks that the board be compelled to award him the contract.

We do not see any merit in relator's view of the case. The petition for the writ must be interpreted with the law under which it is drawn. The charter above quoted leaves to the discretion of the board the decision of which is the best bid. And, furthermore, the board is given, in terms, the authority to reject all bids. No authority is cited by relator in support of his claim, and we are not impressed with the suggestions he makes. The trial court properly interpreted the charter. (Clopton v. Taylor, 49 Mo. App. 117.) Under the law the board has such authority and discretion as will place it beyond control by mandamus."

While the lawmakers, by said Section 3, have conferred discretionary powers upon the purchasing agent by permitting him to determine who is the lowest and best

bidder on a contract or the power to reject bids and advertise for new bids, yet for the purpose of having a check on this discretionary power they provided that the Governor should approve any purchase of supplies on the open market, if they can be purchased at a better price than the bids were on the same.

The Governor, in giving his approval for a purchase on the open market, as a matter of course, will inquire as to what was the lowest and best bid made for the sale of said supplies, and as to why the bids were rejected, and why it would not be to the best interest of the state to readvertise for bids. All of these things the Governor would inquire into in determining whether the agent had properly exercised his discretion in the premises. Different facts and circumstances would surround each case and different elements may enter into the question of who is the lowest and best bidder and for that reason it would seem that the purchasing agent would be required to have the approval of the Governor on each transaction in which he has received and rejected bids for the purchase of supplies and in which he desires to purchase supplies on the open market.

CONCLUSION

It is, therefore, the opinion of this office that when the purchasing agent desires to purchase supplies on the open market after having received bids thereon and rejected same, he should obtain the approval of the Governor to purchase such supplies for each and every contract.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

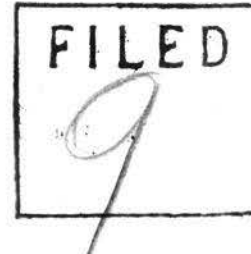
TWB:DA

STATE PURCHASING AGENT: Right to dispose of property owned by the State or any department thereof.

June 30, 1938.

6-30

Hon. George Blowers,
Purchasing Agent,
Jefferson City, Missouri.



Dear Sir:

We are in receipt of your request for an opinion, which is as follows:

"State Hospital No. 3, Nevada, Missouri, will soon have on hand approximately 3,000 bushels of wheat produced from the farms. They are very desirous of trading this wheat to the flour mills for flour.

"Will you kindly render an opinion as to the legality of this transaction."

Relative to the problem you present, it resolves itself into this: Can the Hospital, through your office, purchase flour and pay for it in wheat, or can the Hospital exchange or trade wheat for flour? We will endeavor to answer the two questions in order.

I.

CAN THE HOSPITAL PURCHASE FLOUR AND PAY FOR IT IN WHEAT, OR, PUT DIFFERENTLY, CAN IT SELL THE WHEAT AND BE PAID FOR IT IN FLOUR?

The pertinent sections of the State Purchasing Act as found in the Laws of 1933, at page 410, et seq., provide in part as follows:

"Sec. 3. All purchases shall be based on competitive bids. On any purchase where the estimated expenditure shall be two thousand dollars (\$2,000.00) or over, the Purchasing Agent shall advertise for bids * * *. On purchases where the estimated expenditure is less than two thousand dollars (\$2,000.00) bids shall be secured without advertising. * * *"

"Sec. 4. * * * The Purchasing Agent shall not furnish any supplies to any department without first securing a certification from the auditor that an unencumbered balance remains in the appropriation and allotment to which the same is to be charged and that an unencumbered balance remains in the fund from which payment is to be made, each sufficient to pay therefor. * * *"

Hence, it seems reasonably clear from the context of the above sections that it is the legislative intent that the purchases contemplated are such that are to be paid for in money or funds appropriated by the Legislature, and not a purchase to be paid for in some commodity, by reason of the fact, if for no other reason, that the Auditor is required to certify that there is money on hand wherewith to pay for the purchase.

Turning to that part of the above question proposed, namely, can the Hospital sell the wheat and be paid for it in flour, Section 7 of the Act deals with the authority of the State Purchasing Agent in this respect, to-wit:

"The purchasing Agent * * shall also have power, subject to the same provisions as for bids for purchases, to sell any * * unneeded * * property in his hands or owned by the State or any department thereof."

It is to be observed that the power of the State Purchasing Agent to sell is subject or limited to the same provisions as for bids for purchases, which means, as we construe this section, that advertisements should be made--depending on the value of the property--calling for bids, and the award made to the highest and best bidder.

If our view is correct, as hereinbefore stated, that it is contemplated by Sections 3 and 4, supra, that all purchases are to be made upon a cash or money basis, then applying the same provisions to sales, as required by Section 7, the consideration the State, or any department thereof, should receive should be cash or money.

II.

CAN THE HOSPITAL EXCHANGE OR TRADE THE WHEAT FOR FLOUR?

It is pertinent here to determine the legal character of the proposed transaction.

In the case of *Martin v. The Ashland Mill Co.*, 49 Mo. App. 23, the facts were that it had been the custom of the mill for many years to receive wheat from the neighboring producers, and allow them, according to custom, so many pounds of flour per bushel, to be subsequently delivered on demand, or to pay them, at their option, the value of the wheat in money. The plaintiff delivered his wheat to the mill but failed to receive his flour thereafter by reason of the mill being destroyed by fire. One of the questions presented in the case was the legal character of the transaction. On this issue the court said, page 29:

"Whether the transaction was a sale or not depends upon whether it contained these elements: First, parties competent to contract; second, mutual consent; third, absolute property in the thing which was the subject of the transfer; fourth, a price in money. Tiedeman on Sales, sec. 1. The consideration agreed upon for the delivery of the wheat was a specific quantity of flour, and not a price in money. And, therefore, the transaction was not a sale within the meaning of the rule just stated. * * *

"The transaction between these parties was, properly speaking, an agreement for an exchange of goods and not for a sale."

Hence, assuming for the purpose of argument, that you have authority to enter into a sale or purchase for a commodity consideration, that is, other than money, yet it is manifest, in view of the above opinion, that the transaction you propose constitutes an exchange of property and not a sale or purchase thereof.

Section 7 of the Act permits you to make inter-department transfers of supplies, but we are unable to find anywhere within the entire fourteen sections of the Act any authority, express or implied, which would permit you to exchange or trade any of the property of the State, or of any department thereof, for the property of any individual, firm, or corporation, save and except the inter-department transfers mentioned.

CONCLUSION

It is the opinion of this office that you, as State Purchasing Agent, and likewise the Hospital, are without authority to exchange or trade the wheat mentioned to any flour mill for flour.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR

CRIMINAL LAW) Section 4266 R.S. Missouri 1929 includes
OBSCENE PUBLICATIONS) publications about all persons whether
real or imaginary.

November 28, 1938

U-29

Mr. Oliver Blackinton
914 International Office Bldg.
Chestnut Street at Eighth
St. Louis, Missouri



Dear Sir:

This is in reply to yours of recent date requesting
an opinion on the following question:

"We have been informed by certain
parties that the wording in Section
4266 restricts prosecution to cases
where actual and living persons are
involved and written about and that
if the parties mentioned in stories
are fictitious or non-existent that
the Statute does not apply."

The Section to which you refer is 4266 R.S. Missouri
1929, which provides as follows:

"Every person or persons who shall,
within this state, engage in the
business of editing, publishing or
disseminating any newspaper, pamphlet,
magazine, or any printed paper, devoted
mainly to the publication of scandals,
whorings, lechery, assignations, in-
trigues between men and women, and
immoral conduct of persons, or any
person or persons who shall knowingly
have in his or her possession for sale,

or shall keep for sale, or expose for sale, or distribute, or in any way assist in the sale, or shall gratuitously distribute or give away, any such newspaper, pamphlet, magazine or printed paper in this state, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years."

Your request goes to the question of whether or not the publication mentioned in the foregoing section must be about acts and conducts of persons who are real or of persons who are fictitious. From an examination of this section it seems that the lawmakers were striking at those who edited, published or disseminated any newspaper, magazine or printed paper devoted to publishing the scandal, etc., named in that section. The section does not limit the acts of persons written about to actual or living persons, and from a reading of the entire section it does not appear that it was so intended. By limiting this section to actual or living persons only it would not be giving the section the construction that it should have. This section is quite plain in its language and if the provisions in it only applied to stories written about actual or living persons then the purposes for which the law was enacted have failed for the reason the prohibited articles may be written about fictitious persons and have the same effect as if written about actual or living persons.

In Volume 46 C.J. p. 857, Section 17, in discussing the rule of law similar to the one here in question, it is said:

"Some statutes prohibit the publication and sale of newspapers devoted largely to the publication of scandals and accounts of lecherous and immoral con-

duct, or the exhibition and distribution to minors of publications largely devoted to the publication of criminal news and stories of crime. The gist of the offense is the massing of these immoralities in one publication for circulation, and demands that the paper shall be mainly or largely devoted to the publication of such matter;* * *

We find one Missouri case, namely, State vs. VanWye, 136 Mo. 231, wherein the defendant was charged with a violation of this statute. We have examined the information in that case and find that the charge in the information did not require the publication to be about any person actual or living, but it referred to the wrongful acts between men and women, not naming any particular persons. It is quite evident from this case that actual and living persons need not be the ones about which such publications are issued and circulated.

In Volume 46 C.J. p. 858, Section 19, the test of obscenity is given in the following language:

"The test which determines the obscenity or indecency of a publication is the tendency of the matter to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands such a publication may fall. The question does not depend upon its being true or false."

In Volume 76 A.L.R. p. 1100, the case of Commonwealth vs. Landis, 8 Phila. (Pa.) 453, is quoted as follows:

"The obscenity of a book, alleged to be an obscene libel, is not affected by the truth or scientific accuracy of the statements contained therein, but the character of the publication as obscene or otherwise is to be determined by its tendency to inflame the passions and debauch society."

Mr. Oliver Blackinton

-4-

November 28, 1938

In Commonwealth vs. Calloway, Manager, 171 Ky. 521,
it is said:

"The test which determines the
obscenity or indecency of a publication
is the tendency of the matter to deprave
and corrupt the morals of those whose
minds are open to such influence and
into whose hands such a publication
may fall."

It seems that the test of obscenity in cases under
Section 4266, supra, is not the truth or falsity of the names
of the parties written about but the character of the article
is the determining feature.

CONCLUSION

From the foregoing it is the opinion of this Department
that the wording in Section 4266 R.S. Missouri 1929, does not
restrict prosecutions to cases where actual and living persons
are involved and written about, but that the parties mentioned
in such stories may be fictitious or non-existent, and if the
tendency of the story is to deprave and corrupt the morals of
those whose minds are open to such influence and into whose
hands such a publication may fall, then there is a violation
of the foregoing statute.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

ROY McKITTRICK
Attorney General

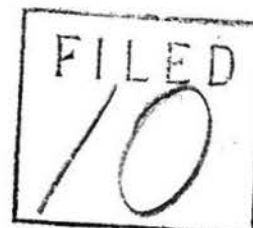
TWB:MM

INTOXICATING LIQUOR: Place may be partitioned so as to constitute two premises, thereby permitting the sale of intoxicating liquor in original package on one premises and beer by the drink on the other, under certain conditions.

January 17, 1938

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Mr. Wallace I. Bowers,
Chief Clerk,
Department of Liquor Control,
Jefferson City, Missouri.



Dear Sir:

This will acknowledge receipt of your letter of January 6th requesting an opinion from this department, which reads as follows:

"The Supervisor respectfully requests an opinion on the following subject:

"In the Attorney General's Interpretation of the Liquor Control Act under 'premises', page #13, the following appears:

'Partitions may be run through a building which would make two separate premises, which, however, must be distinct and separate from each other, capable of being individually described in the license, so that non-intoxicating beer for consumption on the premises may be sold under a permit describing one premises which has been partitioned off, and another permit may also be issued describing the other premises for the sale of intoxicating liquors.'

"The question that is continually confronting this department is whether or not the partitions should run clear through the building, that is, from front to rear, or through only part of the building.

"We have already ruled that the partition must be of solid wood with no connecting entrance

or doors, but would like to have the above opinion in order to be guided in our decision relative to the same party qualifying for both original package liquor and beer permits."

In rendering this opinion we assume you refer to persons licensed to sell intoxicating liquor in the original package on premises particularly described in the application, who at the same time are attempting to sell 3.2% non-intoxicating beer or 5% beer by the drink on the same premises described in the original package license by partitioning off one part of the building.

The law clearly prohibits in certain localities the sale of intoxicating liquor in original packages and the sale of beer by the drink on the same premises.

Section 13139z-21, Laws of Missouri, 1935, page 401, provides:

"No person having a license under the provisions of this act to sell non-intoxicating beer at retail shall be granted or permitted to hold a license to sell malt liquor containing alcohol in excess of three and two-tenths per cent (3.2%) by weight or any other kind of intoxicating liquor; nor shall any person be granted or permitted to hold a license to sell non-intoxicating beer in, upon or about the premises of any person who is the holder of a license to sell intoxicating liquor.

"Any person holding a license to sell non-intoxicating beer only who shall sell, give away or otherwise dispose of, or suffer the same to be done in, upon or about his premises any malt liquor containing alcohol in excess of three and two-tenths per cent (3.2%) by weight, or any other intoxicating liquor of any kind or character, shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years, or

by imprisonment in the county jail for a term of not less than three months nor more than one year or by a fine of not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1000.00) or by both such fine and jail sentence."

Section 22, Laws of Missouri, 1935, page 274, in part, provides:

" * * * Provided, that a licensee authorized to sell malt liquor, at retail by the drink for consumption on the premises where sold, shall not be permitted to obtain a license for the sale of intoxicating liquors, other than malt liquor, in the original package, * * * ."

Section 20, Laws of Missouri, Extra Session, 1933-1934, page 83, in part, provides:

" * * * Every license issued under the provisions of this act shall particularly describe the premises at which intoxicating liquor may be sold thereunder, and such license shall not be deemed to authorize or permit the sale of intoxicating liquor at any place other than that described therein."

It is evident from reading Section 20, supra, that the Legislature intended that premises where intoxicating liquor was to be sold should be particularly described.

"Premises," as used in the Liquor Control Act, has many times been defined. In Words and Phrases (Third Series), Vol. 6, page 43, "premises" is defined as follows:

"Liquor Tax Law (Consol. Laws, c. 34) sec. 8, subd. 9, added by Laws 1910, c. 494, provides that no further liquor tax certificate shall be issued in any town, village, or city unless the ratio of population to certificates shall be greater than 750 to 1, but that this prohibition shall not apply to any

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'premises' in which such traffic was lawfully carried on at some time within one year preceding the passage of the act, provided such traffic has not been abandoned during said period. Section 17 provides that a certificate shall be issued where the application is correct in form and does not show on its face that the applicant is prohibited from trafficking in liquors in such 'premises' by virtue of section 8, subd. 9. Relator whose hotel was situated partly in the town and partly in the city of Corning, for two years prior to 1914 had a certificate to traffic in liquors in the town of Corning, although in 1910 and 1911 he had a city license when the town was dry. Held, that the term 'premises', in section 17, means the place where liquors are authorized to be sold, and does not include relator's whole hotel, the town certificate only entitling him to sell in that portion of the building located in the town; and hence, the city ratio of certificates to population being over that fixed by statute, relator could not obtain a city certificate in 1914 upon the town voting dry, as the relator, by carrying on his business under a town license, had lost any right he might have had under the 1910 and 1911 city tax certificates. People ex rel. Chambers v. Shults, 149 N. Y. S. 913, 915, 87 Misc. Rep. 348."

Another definition of the word "premises," as used in the Liquor Control Act, is found in Words and Phrases (First Series), Vol. 6, page 5512, and reads as follows:

"'Premises,' as used in 1 Wag. St. (Ed. 1872) p. 554, sec. 29, requiring a person selling beer, cider, and native wine in less quantities than one gallon to have a license, except any wine grower selling wine of his own production in any quantity on his own premises, means the place where the wine is produced or manufactured. The premises for the production or manufacture need not necessarily be in or upon the

vineyard where the grapes are grown. A man may well have his vineyard at one place, and his wine cellar and appliances for making and producing wine at another, and this last place, where the wine is actually made and stored, would be the premises contemplated by the law. State v. Wyl, 55 Mo. 67, 68."

In Words and Phrases (Second Series), Vol. 3, page 1145, the word "premises" is defined as follows:

"The word 'premises,' as used in Rev. St. c. 29, sec. 49, commanding an officer to enter the place or premises before named and therein to search for intoxicating liquors, signifies it as a distinct and definite locality. It may mean a room or a shop or a building or a definite area, but in either case the locality is fixed; otherwise the use of the word would be misapplied. State v. Fezzette, 69 Atl. 1073, 1075, 103 Me. 467."

Therefore, from the above and foregoing we think it was unquestionably the intention of the Legislature, by using the word "premises" in the Liquor Control Act, to restrict the operation under said license to that particular place or premises as described in the license.

The sole question for determination now is, since the law clearly prohibits in certain localities the sale of beer by the drink on the same premises where intoxicating liquor in the original package is sold, is it possible to partition said premises where intoxicating liquor is sold so as to constitute two premises instead of one?

In construing statutory provisions a primary rule is to ascertain the lawmakers' intent and give the language honestly and faithfully its plain and rational meaning. Cummins v. Kansas City Public Service Co., 66 S. W. (2d) 920, 334 Mo. 672.

Another fundamental rule of construction is that all parts of an act should be made effective if possible. Elsas v. Montgomery Elevator Co., 50 S. W. (2d) 130, 330 Mo. 596.

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We are not unmindful of the fact that many times small businesses that do not require a large space within which to transact their business will both occupy one store building by running a partition through the middle, thereby making two separate places of business, but such business does not require the strict regulations as does the liquor business. The sale of liquor must be regulated for the protection of public health, morals, welfare, and safety of the people. It comes under the police power of the state. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 37 S. Ct. 180, 61 L. Ed. 326; *McCormick & Co., Inc. v. Brown*, State Commissioner, 286 U. S. 131, 52 S. Ct. 522, 76 L. Ed. 1017. The courts in construing liquor laws relating to the enforcement have been very liberal in favor of the state.

It is the opinion of this department that each case must stand on the conditions existing at the time of the filing of an application for a license. The location and surroundings should be taken into consideration. There is no set rule that will apply in each instance. However, since the Liquor Control Act specifically prohibits in certain localities the sale of beer by the drink on the same premises where intoxicating liquor in the original package is sold, the Supervisor of Liquor Control should carefully examine each request for a license which would require a division of one premises, and not permit what in fact would be a mere subterfuge to circumvent the provisions of the Liquor Control Act. The Supervisor of Liquor Control should take into consideration with respect to the location of said premises, whether same is located in a thickly settled community, in a city, town or village, or in the county away from other business, also if said place is at all times open for business, with someone in charge, or is only there for the accommodation of customers and can be opened for an occasional sale.

Therefore, if after an investigation the Supervisor of Liquor Control finds the locality and surroundings of said premises will not be conducive to a disorderly house or permit violations of the Liquor Control Act, then it is the opinion of this department that if said premises is sufficiently large enough and so properly constructed as to accommodate the two businesses, it will not defeat the purpose of the Liquor Control Act to permit a solid partition (with no openings whatsoever in said partition) to divide the building in the following manner only: Said partition shall run from the front of said building to the rear of said building, from the ceiling to the floor, and be permanently affixed to the ceiling,

Mr. Wallace I. Bowers

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floor, front and rear of said building in such a manner as to make two entirely separate and distinct premises. There shall also be a separate entrance in the front of each premises, unobstructed from view, and each premises shall have a different street address, so as to sufficiently indicate that said businesses are run separate and distinct from each other and not in conjunction with each other.

Yours very truly,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

ARR:HR

INTOXICATING LIQUOR: Supervisor may disregard corporate fiction and refuse license to president and principal holder of stock, when corporation's license had been previously revoked.

January 19, 1938.

Mr. Wallace I. Bowers,
Chief Clerk,
Department of Liquor Control,
Jefferson City, Missouri.



Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"Please find enclosed, letters of December 3rd and 6th from Mr. D. G. Hamilton with copies of our replies of December 4th and 8th thereto attached.

"Please be advised that we request your opinion as to whether or not Mr. Hamilton can qualify for the permits requested.

"We would appreciate your returning the enclosed correspondence with your reply."

In rendering this opinion we are assuming the following facts to be true: That Mr. D. G. Hamilton, who now is applying for a liquor license in his own name, was prior to the liquidation of the Hamilton Wholesale Drug Company, the president of said company; that he was also the manager and had full power and discretion to handle all important matters pertaining to the operation of said business. We are informed that while this company was incorporated Mr. Hamilton owned practically all of the stock of said company. On November 12, 1935, the liquor license of the Hamilton Wholesale Drug Company was revoked by the Supervisor of Liquor Control. Subsequent to this

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and on June 30, 1936, said company was liquidated and it is no longer in existence. The question now to be determined is whether or not Mr. Hamilton, who was formerly the president of said company, may obtain a liquor license in his own name.

The whole question depends on whether or not the license under which the Hamilton Wholesale Drug Company was operating prior to its revocation could be construed to in reality be the license of Mr. D. G. Hamilton.

Section 27, Laws of Missouri, 1937, page 533, specifically prohibits any person obtaining a license or permit whose license as such dealer has been revoked:

" * * * and no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, * * *."

Section 43a, Laws of Missouri, Extra Session, 1933-1934, page 91, defines the word "person" as follows:

"The term 'person' as used in this act shall mean and include any individual, association, joint stock company, syndicate, co-partnership, corporation, receiver, trustee, conservator, or other officer appointed by any State or Federal Court."

Section 27, supra, further prohibits the licensing of any corporation unless the managing officer of such corporation be of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village:

" * * * nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; * * *"

From the foregoing, there is no doubt but what an organization such as the Hamilton Wholesale Drug Company, for

the purpose of the Liquor Control Act, was considered a person. The Hamilton Wholesale Drug Company, in order to obtain a license, was compelled to comply with Section 27, supra, which required the managing officer to be of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village.

In construing statutory provisions, the fundamental rule is that the whole act should be construed if same can possibly harmonize. Another controlling rule of construction to be remembered is to determine the intention of the Legislature.

Since Section 43a, supra, defines a person to be also a corporation, for the purpose of this act, a corporation cannot be licensed absent the managing officer of such corporation complying with the qualifications as contained in Section 27, supra, and no person shall be granted a license or permit hereunder whose license as such dealer has been revoked.

We are of the opinion that to permit the president of a corporation whose license as a corporation was revoked and subsequent thereto the corporation was liquidated, to then be licensed in his own name, when said officer of the corporation was not only president but owned in his own name practically all the stock of said corporation, would, in effect, be issuing a license to a party whose license had been revoked, which would be in violation of Section 27, supra. It is not sound law to permit something to be done indirectly that cannot be done directly.

In Fletcher's Cyclopedia on Corporations, Vol. 1, page 134, Sec. 41, the following principle of law may be found:

"In previous sections the doctrine that a corporation is an 'entity' or a 'personality' has been discussed. It there appeared that the entity or personality of the corporation is, by some authorities, regarded as a fiction or abstraction, the real thing or being consisting of the collective or unitary body of members; while others regard the entity as the fact or thing to deal with. Notwithstanding the lack of agreement on these points, practically all authorities agree that under some circumstances in a particular case the

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corporation may be disregarded as an intermediate between the ultimate person or persons or corporation and the adverse party; and should be disregarded in the interest of justice in such cases as fraud, contravention of law or contract, public wrong, or to work out the equities among members of the corporation internally and involving no rights of the public or third persons. There is a growing tendency of courts to do so. Cases which announce this general rule are cited below. A leading and much cited case puts it as follows: 'If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.'

"Another rule is that, when the corporation is the mere alter ego, or business conduit of a person, it may be disregarded."

In *Smith v. Moore*, 199 Fed. 689, 697, the court said:

"In the first place, while it is true that in general a corporation is a distinct entity from its stockholders, nevertheless, where an individual owns practically all of its stock and controls all of the operations of the corporation, they are, in proper cases, regarded by the courts as one and the same."

In *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, 255, the court said:

"If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient

reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

In 157 Fed. 609, In re Rieger, Kapner & Altmark, the court said, l. c. 613:

"The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."

In People v. Michigan Bell Telephone Co., 224 N. W. 438, 440, the court said:

"Where a corporation is so organized and controlled, and its affairs so conducted, as to make it a mere instrumentality or agent or adjunct of another corporation, its separate existence as a distinct corporate entity will be ignored, and the two corporations will be regarded in legal contemplation as one unit. In re Muncie Pulp Co. (C.C.A.) 139 F. 546; Interstate Telegraph Co. v. Baltimore & O. Telegraph Co. (C.C.) 51 F. 49; Wormser on Disregard of the Corp. Fiction, 54. When a corporation exists as a device to evade legal obligations, the courts, without regard to actual fraud, will disregard the entity theory. Higgins v. California Petroleum & Asphalt Co., 147 Cal. 363, 81 P. 1070; Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334, 1.L.R.A. (N.S.) 176."

A similar situation arose respecting the issuing of licenses to persons as dealers in motor vehicle fuels whose licenses had been revoked. In an opinion to Hon. Roy H. Cherry, State Inspector of Oils, under date of March 17, 1937, this

1/19/38

office held the State Inspector had a right to disregard corporate fiction in refusing to grant application for dealer's license, a copy of which we are enclosing.

Therefore, in view of the above and foregoing, it is the opinion of this department that to license Mr. D. G. Hamilton to manufacture or wholesale intoxicating liquor would in fact be the same as issuing a license to a person whose license had previously been revoked by the Supervisor of Liquor Control, and would be in violation of the provisions of Section 27, supra.

Yours very truly,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

ARR:HR

INTOXICATING LIQUOR: No one can sell intoxicating liquor without first having obtained a license

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January 25, 1938



Mr. Wallace I. Bowers
Chief Clerk
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this Department which reads as follows:

"Please favor this department with an opinion on the matter mentioned below:

"The Adjustment Bureau of Kansas City Association of Credit Men, has taken over two small stocks of intoxicating liquor and has requested this department to grant permission to sell the assigned liquor.

"Therefore, in the absence of any specific provisions of the Liquor Control Act, we would appreciate an opinion as to whether or not this association could legally offer the intoxicating liquor in question for sale and whether or not the association would be responsible for a state permit before being in a position to offer said intoxicating liquor for sale.

"Also in this same connection, could the intoxicating liquor have to be sold to a person holding a permit to sell such intoxicating liquor or could it be offered

for sale to the general public.

"This specific case is mentioned merely for outline purposes but we would be pleased to receive your opinion in order that we may be in a position to act upon similar cases which might arise in the future."

No one has the natural right to manufacture or sell intoxicating liquor. The liquor business stands on a different plane than any other occupation. The sale of intoxicating liquor is illegal unless expressly authorized by law. Many decisions of our courts announced the above principles. Nowhere, however, are the above rules more clearly or succinctly stated than in the case of State v. Distilling Company, 236 Mo. 219, wherein the court, at l. c. 255, stated:

"We think it is fairly deducible from the foregoing authorities, that no one has a natural or primary right to manufacture, sell or refine intoxicating liquors, in any quantity, in this State, but such occupation can only be pursued when the person who desires to engage therein first procures a license from the proper authorities of the State authorizing them to so do.

"Those authorities also establish the fact that the liquor traffic is not a lawful business, except as authorized by express legislation of the State; that no person has the natural or inherent right to engage therein; that the liquor business does not stand upon the

same plane, in the eyes of the law, with other commercial occupations. It is placed under the ban of law, and it is thereby differentiated from all other occupations, and is thereby separated or removed from the natural rights, privileges and immunities of the citizen."

The State Liquor Control Act provides a complete scheme for the regulation of the manufacture, sale, possession, transportation and distribution of intoxicating liquor. No one can sell or dispose of intoxicating liquor unless expressly authorized to do so by said act.

Section 18 of the Liquor Control Act provides:

"It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as herein defined, in any quantity, without taking out a license."

Section 21 of said act provides, in part:

"No person, partnership, association of persons or corporation shall manufacture, distill, blend, sell or offer for sale intoxicating liquor within this state at wholesale or retail, or solicit orders for the sale of intoxicating liquor within this state without procuring a license from the Supervisor of Liquor Control authorizing them so to do. * * * * *"

Sub-section (g) of Section 21-a1 of said Act reads as follows:

"Any person who shall sell in this state any intoxicating liquor without first having procured a license from the Supervisor of Liquor Control, authorizing him to sell such intoxicating liquor shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail, for a term of not less than three months nor more than one year, or by a fine of not less than one hundred (\$100.00) dollars nor more than one thousand (\$1,000.00) dollars, or by both such fine and imprisonment."

CONCLUSION

In view of the above, it is the opinion of this Department that no person, partnership, association of persons, or corporation, can sell intoxicating liquor within this state without first having obtained a license from the Supervisor of Liquor Control authorizing them to do so.

It is our further opinion that any person who sells intoxicating liquor without a license is guilty of a felony.

The question of to whom a person, firm or corporation can sell intoxicating liquor depends upon the kind of license such person, firm or corporation has obtained. This, of course, is governed by the

Mr. Wallace I. Bowers

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January 25, 1938

Liquor Control Act, with which you are familiar.

Yours very truly

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED

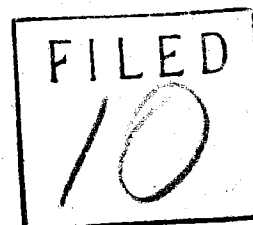
J. E. TAYLOR
(Acting) Attorney General

JET LC

PARK BOARD:
APPROPRIATIONS:

Personal service may be paid out of
appropriations for labor, maintenance
and repairs.

February 2, 1938.



Mr. I. T. Bode,
Director of Parks,
State Park Board,
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"The appropriation for the State Park Board for the biennium will be found on page 168, Section 145-0 Laws of Missouri, 1937. Paragraph A is designated 'personal services'.

"I would like to know if the State Board is restricted, solely, to the amount appropriated in this paragraph, in paying the personal services of employees of the board".

Laws of Missouri, 1937, Section 145-0, page 168, provides as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the general revenue fund, and payable to the State Park Board, the sum of Ninety Thousand Eight Hundred Twenty-five Dollars (\$90,825.00) to pay the salaries, wages, and per diem of the officers and employees and other expenses of the state parks, as follows; for the period beginning July 1st, 1937 and ending January 1st, 1939:"

Mr. I. T. Bode.

February 2, 1938.

A. Personal Service:

Twenty-six (26) park superintendents, chief of parks and refuges, assistant chief of parks and refuges, publicity director, two (2) construction engineers, and refuge inspector, three (3) park inspectors, extra labor and skilled help, landscape architect, also extra help and expenses for burning fire protection lines, clearing lands, draining ditches, riding range lines, roadways and walks, life preservers, and so forth....

\$15,000.00

B. Additions:

Labor and expenses, material and supplies for the erection of buildings, installation of light plants and water supply and plumbing and for operative equipment, including educational and recreational equipment, household, kitchen and dining room equipment, production and construction equipment and transportation and conveying equipment.....

10,000.00

For the purchase of lands for park purposes.

10,350.00

Labor, material and supplies for erection of structures.....

15,000.00

For purchase, improvement and development of land for park purposes.....

10,000.00

C. Repairs and Replacements:

Buildings, building equipment, including light plant, water supply and plumbing and operative equipment consisting of educational and recreational equipment, household, kitchen and dining room equipment, production and construction equipment (non-industrial) transportation and conveying equipment and structures.....

10,475.00

D. Operations:

General expense including communication, regulative transportation of things, travel in and out the State, travel and other general expense; also Material and Supplies: Consisting of clothing and dry goods, farm and garden supplies, grounds and roadways material and supplies, household supplies, laundry, cleaning and sanitation supplies, small tools, miscellaneous supplies and repairs and special material and supplies, and for bonds for accountable officers.....

20,000.00

TOTAL..... \$90,825.00

An appropriation law is to be construed under and by the same rules as other legislation (59 C. J. 262). The language is to be presumed to have been used in its natural and ordinary meaning and not to be given a forced and unnatural construction (State vs. Seibert, 12 S. W. 348, 99 Mo. 122).

We, therefore, look to paragraphs B, C, and D of the Appropriation Act to see if the legislature intended that compensations for personal services should be paid out of the sums appropriated in these paragraphs.

Under paragraph B, which is designated "Additions", the first appropriation for \$10,000.00 is for "labor and expenses" for the erection of buildings and installation of certain equipment. The third sum appropriated under paragraph B is for \$15,000.00 which is to be used for "labor, material and supplies for the erection of structures". As was said in State ex rel. McKinley Publishing Company vs. Hackman, 282 S. W. (2nd) 1007, 314 Mo. 33:

"Where the intention of the legislature is plain and obvious, there is no rule for judicial construction of an appropriation".

The inclusion of the word "labor" in the two appropriations stated above, plainly shows that the compensation for the personal services rendered in erecting the buildings and installing the various equipment can be paid out of these funds.

The second item in paragraph B is for "the purchase of lands for park purposes", and we believe is equally obvious that this money is to be used only for the purchase of lands and no pay for personal services may be taken out of this sum.

The fourth item in paragraph B is "for purchase, improvement and development of land for park purposes". As to the meaning of the word "maintain" as used in connection with a park, the Supreme Court of

Illinois in *People ex rel. Gibbons vs. Clark*, 129 N. E. 593, 296 Ill. 48, said:

"Improvement of a park necessarily includes watering and mowing the grass, watering and cultivating the flowers, and cultivating and trimming the shrubbery and trees. To do these things it is necessary to have officers and employees to supervise and do the work.

Any reasonable-minded taxpayer willing to assume his just proportion of the burden of maintaining public parks for the pleasure and improvement of the people would have no difficulty in understanding that "improvement" of a park would include provisions for maintaining and governing the park".

In view of the above construction of the word "maintain", it will be seen that the compensation for personal services for supervising and doing the work in improving land for park purposes may be paid out of item 4, paragraph B.

The title of paragraph C is, "repairs and replacements" and for this \$10,475.00 has been appropriated. This sum is to be expended in repairing or replacing "buildings, building equipment * * * and operative equipment".

According to *Barber-Asphalt Company vs. Hezel*, 56 S. W. 449 - 155 Mo. 391, "to repair means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction". Patent-ly in repairing buildings and equipment, personal service is a big item and there should be no question but that the amount of these services, which is such a necessary and integral part of this work, should be paid out of the appropriation for this item.

Mr. I. T. Bode,

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February 2, 1938.

Paragraph D is designated as "Operation". It provides for materials and supplies, the kind of which are specifically enumerated. It also provides for general expenses, including communication, regu-
lative transportation of things, travel in and out the State, travel and other general expense. It is a rule of statutory construction, known as the rule of "ejusdem generis" that where general words in a statute follow specific words designating special things, the general words are, as a rule, limited to cases of the same general nature as those which are specified (City of St. Louis vs. McLaughlin, 49 Mo. 559; Tucker vs. Frisco Railway Company, 233 S. W. 512).

Under this rule the phrase "other general expenses" is to include only the same type of expenses as are enumerated in the special words that go before, that is, communication, traveling and transportation expenses. Therefore, personal service cannot be paid out of this item of the appropriation.

CONCLUSION.

It is, therefore, the opinion of this department that the personal services rendered in erecting new structures and installing new equipment in State Parks may be paid out of items 1 and 3, paragraph B of Laws of Missouri, 1937, page 168. Compensation for supervising and labor used in improving and developing State Parks may be paid out of item 4, paragraph B. For labor in repairing buildings and building equipment enumerated in paragraph C, the amount appropriated therein may be looked to for payment.

It is, further, the opinion of this department that no compensation for personal services may be paid out of item 2 of paragraph B or out of paragraph D.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
Assistant Attorney General.

SCHOOLS: May consolidated school district extend boundaries to take in part of consolidated district in another county

February 7, 1938

Mrs. May Bowlin
Superintendent
Cass County Public Schools
Harrisonville, Missouri



Dear Mrs. Bowlin:

This is to acknowledge your letter as follows:

"There has been submitted to me the question of whether or not a consolidated school district in one county can extend its boundaries so as to take in part of a consolidated school district in another county? If the extension can be made, would the district making the extension and the part to be included in the extension be the only portion that would have a right to vote on the question?

"The foregoing questions are such as will affect every county in this state and as such will be of such general interest, I have hope that you may give your opinion on same.

"Section 9343, R. S. 1929, provides, 'All the provisions of Section 9275 relating to change of boundary lines of common school districts, shall apply to town, city and consolidated school districts.

"Section 9275 R.S. 1929, provides for change of boundary lines of two or more districts.

"In the case of State vs. Thurman, 274 S. W. 800, the court holds that a change of boundary lines may be made between a consolidated school district and a common school district, or between two consolidated school districts but you will note that the two consolidated districts concerned do not lie in two different counties. The main question that is confusing me is the fact that one consolidated district lies in Cass County and the other district concerned is also a consolidated district across the line in Bates County.

"In the case of State vs Gwaltney, 28 S. W. (2) 678, seems to pass upon the right of Appeal. But does this case hold that a consolidated school district in one county cannot extend its boundary so as to take in part of a consolidated school district in another county? For example, when the consolidated school district No. 1 in Cass county wants to extend its boundary so as to take therein the north half of consolidated school district No. 2 in Bates county, could the extension be made by District No. 1 in Cass voting for the extension and the north half of District No. 2 in Bates county voting separately for the extension?

"I trust that you can give your opinion relative to the foregoing matters."

We agree with you that the decision of the Supreme Court in State ex rel. v. Thurman et al, 274 S.W. 800, is difficult to be reconciled with the opinion

of the Springfield Court of Appeals in State ex rel. v. Gwaltney, 28 S. W. (2) 678. The conflict apparently exists when a consolidated district has territory which extends in two counties. As we understand the facts in your case, however, the consolidated district does not have territory in two counties, but seeks to acquire territory in an adjoining county, and hence we believe the opinion of the Springfield Court of Appeals in State ex rel. v. Gwaltney, supra, does not apply. Note the language of the Court in the Gwaltney case at page 680:

"It is our opinion no appeal lies from an election on a proposition for a change of boundaries between a consolidated district and an adjoining district, when the territory of the consolidated district lies in two counties."

Your letter states that a consolidated district in Cass County wants to extend its boundaries so as to take in territory of a consolidated school district located in another county. In our opinion such is permissible, relying as authority upon the case of State ex rel. v. Thurman, supra.

Section 9343, Revised Statutes Missouri 1929, is part of Article IV, Chapter 57, which relates to "city, town and consolidated schools." Said Section provides that the provisions of Section 9275 "relating to the changes of boundary lines of common school districts * * * shall apply to town, city and consolidated districts." Section 9275, Revised Statutes Missouri 1929, pertains to the formation of new districts, and we can see no distinction between the formation of a new district when territory is taken from a consolidated district and a common school district, or between two common school districts or two consolidated districts, because the formation of new districts is all that is done, whether it be common

Mrs. May Bowlin

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February 7, 1938

school districts or consolidated school districts, by virtue of Sections 9275 and 9343, supra.

The Springfield Court of Appeals based its ruling in the Gwaltney case solely on the method of appeal from a decision of the voters when a change of boundaries was proposed, because Section 9275 provides that the appeal shall be referred to the county superintendent of schools, and the district had territory in two counties. In the Thurman case the appeal went to the county superintendent of schools in which the land was located and was evidently sanctioned by the Court, even though not mentioned in the opinion.

If property of a consolidated district located in Cass County is sought to be annexed to a consolidated district of Bates County, then the county superintendent of schools of Cass County would be the one to decide the question in the event of an appeal, in our opinion; and if there were a dispute as to the superintendent's decision, the same could be reviewed by the proper court by certiorari as was done in the Thurman case.

We are attaching hereto copy of opinion rendered by this Department on February 13, 1936, to Honorable Elbert L. Ford, Prosecuting Attorney, Dunklin County, relating to consolidated districts changing their boundaries.

From the above and foregoing, it is our opinion that the boundary lines of two consolidated school districts may be changed so that part of the property of one district could be annexed to another district, even though the territory be situated in different counties. Section 9275, supra, is self-

Mrs. May Bowlin

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February 7, 1938

explanatory as to the notice to be given and the voting upon the question proposed.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

JLH LC

Inclosure

PROSECUTING ATTORNEYS: Prosecuting Attorney, and the
County Court, controls county litigation.
COUNTY COURTS:

March 18, 1938



Honorable F. C. Bollow,
Prosecuting Attorney,
Shelby County,
Shelbyville, Missouri.

Dear Sir:

We acknowledge receipt of your request for an opinion,
which is as follows:

"You no doubt have a vivid recollection of the County Bond Suit. This suit was instituted by me in response to a Court order made by the County Court. Both Mr. Henderson and myself have advised the County Court that we believe the case could be reversed on appeal. And I have also advised them that you were of the same opinion. In spite of all this the County Court has made an order directing me to proceed no further with the cause if the ruling of the motion for a new trial be adverse.

"What I want to know is whether or not I have the right or authority to appeal this case in the face of this Court order. And if I have such authority, consider this a formal request for an opinion from the Attorney General's Office on the point, and send me out such an opinion at your very earliest convenience, so that I may be able to proceed with the opinion itself to rely upon. Furthermore if you should determine that I have such authority, and I should order the Bill of Exceptions from the official Court Reporter could the County

Court refuse to pay for the same, and if they did so refuse what could be done about it."

Replying thereto, Sections 11316 and 11318, R. S. Mo. 1929, prescribe the duties of the prosecuting attorney. Section 11316 states:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; * * * *"

Section 11318 provides:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto; * * * *"

This section has a proviso that county courts owning swamp or overflowed lands may employ special counsel or attorneys to represent the county in prosecuting or defending suits for the recovery or preservation of swamp or overflowed lands, and quieting title thereto, and to pay such special counsel compensation out of the general revenue fund of the county.

In the case of State ex rel. v. Lamb, 237 Mo. 437, the Supreme Court of Missouri en banc, in 1911, discussed the authority of the prosecuting attorney to file in the name of the State proceedings to enjoin a public nuisance, and held that he had such authority, and that a bond was not required because the action was prosecuted officially for the State. At page 451 the court says:

"The sovereign power of government can only be exercised through its officers. Consequently, to each officer is delegated some of the powers and functions of government. Usually a discretion that is within the power granted to an officer cannot be controlled by other officers. * * * A prosecuting attorney has discretionary power to institute or discontinue prosecutions. * * * He may file informations without leave of court (State v. Kyle, 166 Mo. 1. c. 306) * * *. In Texas, the Supreme Court decided that a judge had no power to enter a nolle prosequi, or dismissal of a case pending, against the objection of the district attorney. * * * So in New Hampshire the Supreme Court, speaking of the right of the prosecuting officer in this regard, says: 'The law has lodged that duty with the officer selected for that special purpose, and who are responsible for the manner in which they perform their duties.' * * * In State ex rel. v. Rose, 84 Mo. 198, we held that a prosecuting attorney may file an information in the nature of quo warranto, ex officio, without leave of court, * * *. This upon the principle that when he acts ex officio, he is exercising the discretion which the State has delegated to him, and, through him, the State may act without leave of court. * * *

"It is clear that if the prosecuting attorney acts at all ex officio, he must act for and in behalf of the State. If he has power to act for the State, and institute proceedings at his discretion,

as we think he has, then it follows that proceedings instituted by him of the character in question are in behalf of the State."

At page 455 the court says:

"Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance, * * *."

In Meador v. Texas County, 167 Mo. 201, the question arose as to whether the County should compensate the prosecuting attorney for services performed by him in appearing and orally arguing a criminal case in the appellate court. He contended that he should determine when it was necessary for him so to do, and the county court contended that it should determine when it was necessary for him so to do. At page 204 the court states:

"This statute makes it the duty of the prosecuting attorney to represent the State in all criminal cases in the Court of Appeals from his county, and it specifies that in the performance of that duty he shall make and cause to be printed, at the expense of the county all necessary abstracts of record and briefs. Those duties are required of him unconditionally. In addition to those absolute duties, the statute further declares that 'if necessary' he shall appear in court in person."

At page 205 the court says:

"The statute does not make either the prosecuting attorney or the county court the sole arbiter of that matter. The statute says he should go if necessary, and shall be paid a reasonable fee for his services. But the question of the necessity and that of the quantum meruit are open questions of fact to be tried on the evidence

by the court which is to pass judgment on the claim when presented, * * *. Was it necessary in this case for the prosecuting attorney to attend on the Court of Appeals in person? That must be decided by the triers of the fact, like any other question of fact in the case. "

In State ex rel. v. Wurdeman, 183 Mo. App. 28, the question arose as to whether the prosecuting attorney had authority of his own accord, and contrary to the wishes of the county judges, to defend the county judges who were sued in mandamus to require the county court to consider a dram-shop license. Upon the return made of the judges of the county court, the prosecuting attorney appeared and moved the circuit court to permit him to assume control of the defense on the ground that it was a case in which the county was interested, and therefore the statute made it incumbent upon him to do so. The circuit court denied this motion, as though it were competent for the county judges to exclude the prosecuting attorney with respect to the matter of the defense of that case and employ other counsel to control and manage it. The circuit judge declined to permit the prosecuting attorney to defend the case. Thereupon this mandamus suit was instituted to test the ruling of the circuit court.

The St. Louis Court of Appeals quotes approvingly from Kansas decisions and at page 34 states that the Supreme Court of Kansas, construing the question of the right of the county commissioners or the prosecuting attorney to control the case in court, approvingly quotes from the case of Clough & Wheat v. Hart, 8 Kan. 487, 494:

"The county attorney is elected by the people of the county and for the county. He is the counsel for the county, and cannot be superseded or ignored by the county commissioners. His retainer and employment is from higher authority than the county commissioners. The employment of a general attorney for the county is not by the law put into the hands of the county commissioners, but is put into the hands of the people themselves. The

county attorney derives his authority from as high a source as the county commissioners do theirs, and it would be about as reasonable to say that the county attorney could employ another board of commissioners to transact the ordinary business of the county as it is to say that the county commissioners can employ another attorney to transact the ordinary legal business of the county. Both would be absurd. It is the duty of the county attorney to give legal advice to the county commissioners, and not theirs to furnish legal advice to or for him."

"The doctrine of that case was affirmed in *Waters v. Trevillo*, 47 Kan. 197, 27 Pac. Rep. 822, and has never been questioned, so far as we have been able to ascertain. Other courts either quote and approve it, or proceed in the same view on fundamental reasons."

At page 38 the court says:

"Therefore, the county being interested in the subject-matter of the mandamus suit against the judges of the county court, the statute (Sec. 1008) imposed the duty upon the prosecuting attorney to control and defend that case. His right no one can dispute, for the statute pointedly prescribes and affixes it as a duty upon him in all cases in which the county is interested, and this, too, in addition to the duties affixed by the prior section (1007) where the suit is against the county."

At page 41 the court says:

"Obviously, if it be the official duty of the prosecuting attorney under the statute to thus appear, and one which he is sworn to perform, then its performance on his part cannot depend upon the consent of the respondent county officer in the mandamus,

and such county officer should not be permitted to defeat the prosecuting attorney in the performance of his official duty by withholding consent to put the interests of the county forward in his return."

At page 45 is this:

"Therefore, it appearing that it is the clear legal right of the prosecuting attorney to appear in and to control, manage, and defend the mandamus suit pending * * * against the judges of the county court as such, the alternative writ of mandamus will be * * * made peremptory."

That case was certified to the Supreme Court because of a dissenting opinion filed by Judge Reynolds, but the records of the Supreme Court show no further opinion written on it, but it was dismissed in the Supreme Court, perhaps because time had made the further prosecution of the suit unnecessary, so it would seem that the decision in this case is the law with reference to the rights and authority of the prosecuting attorney of Shelby County as to who controls the litigation.

In the Murdeman case, the court at page 32 said:

"Under the statutes both the judges of the county court and the prosecuting attorney are elected by the people of the county and with a view of serving its inhabitants in the discharge of the duties annexed by law to the respective offices of county court and prosecuting attorney. The office of the county court and of the prosecuting attorney are, of course, separate and independent and neither is necessarily subservient to the other. The county court consists of three judges, elected by the people, but its members are not required to be learned in the law, while one of the qualifications prescribed for the prosecuting attorney

is that he shall be so learned. By statute, certain judicial duties and certain other ministerial and administrative duties are committed to the county court, while other statutes commit certain duties which appertain to the profession of a lawyer to the prosecuting attorney as the law officer of the county."

It will be noted that not only do the decisions of the courts hold that the prosecuting attorney is the person to determine the course of litigation, but other significant facts, than those referred to as stated above in the decided cases, appear from the statutes conferring authority upon the county court and upon the prosecuting attorney.

Section 11318 puts the duty upon the prosecuting attorney to represent the county, except where the proviso empowers the county court, in matters having to do with swamp or overflowed lands, to employ other attorneys than the prosecuting attorney in handling the last mentioned litigation. The fact that the Legislature saw fit to specifically mention and give authority to the county court in this last matter is significant as indicating that the county court is confined to the limits of the statute as to the duties to be performed by the prosecuting attorney.

Section 11316 is the source of authority of the prosecuting attorney to act as such prosecuting officer in criminal cases.

We have never heard of a county court attempting to assume the authority to control the procedure to be followed in the prosecution of a criminal case. The same statute that authorizes the prosecuting attorney to so institute and control the conduct of criminal actions gives him the same authority with reference to the conduct of civil actions. It says (Sec. 11316), "The prosecuting attorneys shall commence and prosecute all civil and criminal actions * * * in which the county or state may be concerned." The statute makes no distinction in the authority of the prosecuting attorney, depending on whether it be a civil or a criminal action. The statute does not merely say he shall file the suit. It says he shall "prosecute or defend, as the case may require," both

civil and criminal actions. His authority to prosecute an action includes his authority to exercise his judgment as a lawyer as to the course that shall be pursued.

The object to be sought in the prosecution of a criminal action is the conviction of the defendant, in order that the defendant may be made to realize that he has transgressed the rules of society as laid down either by the common law or by statute, to the end that he and others may be more careful against such transgressions in the future, and that he be punished for such violation. The object sought in the prosecution of the usual civil lawsuit is the recovery of property. Neither of these objectives can be accomplished except by procedure along well recognized lines that are known, not by laymen, but by lawyers who have devoted their time and efforts to the acquisition of knowledge of the law, and who have especially equipped themselves to apply given facts to given rules of law and determine from a scientific and a professional viewpoint the ultimate result of the litigation through the courts. That result cannot be accurately or scientifically measured by laymen.

It seems to the writer that there would be just as much reason to say that the county court, consisting of laymen, unskilled in the law, should have the right to determine the method of putting on evidence in the conduct of the lawsuit in the trial court, or what witnesses shall be subpoenaed, or what argument shall be made to the jury, or what shall be embodied in the motion for new trial, as for the county court, composed of laymen, to determine that the suit instituted and tried by the prosecuting attorney in the trial court should not be appealed.

By the same construction and line of reasoning which leads to the result that this statute authorizes the prosecuting attorney to control the conduct of the criminal litigation, he is authorized to control the conduct of the civil litigation.

In the Lamb case, supra, it is held that the prosecuting attorney had the power to act for the State and institute a lawsuit. In that case he exercised his own judgment as a lawyer as to whether such action should be prosecuted. He did not go to any other official to get instructions as to such litigation. The highest court of this state, en banc, held that he had that authority because the statute conferred upon him that duty to act for the State.

In the Meador case the statute was again followed. The statute there said that "if necessary" the prosecuting attorney should appear in the Court of Appeals in person. The Supreme Court of this state held in that case that the county court did not have authority to determine that he should not attend the Court of Appeals, but that if it was necessary, all of the facts and conditions surrounding the case considered, that he appear in said court, then he should do so regardless of whether the county court wanted him to, or instructed him to, or instructed him not to.

In the Wurdeman case the statute again was followed and the law in the appellate court was declared to be that the prosecuting attorney receives his mandate and instructions, not from the county court, but from the statute, and that the statute making it his duty to defend the litigation gave him the authority to appear in the circuit court and conduct that defense, and that the circuit court had no authority to deny him that right. In that case both the county court and the circuit court attempted to deny the prosecuting attorney the right to so appear and defend the litigation, but the appellate court held they were wrong and that he had the right to appear and defend the litigation notwithstanding their attempted denial thereof.

That there may be no misunderstanding as to the relevancy to this opinion of the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, we mention that case, which discusses the authority of the county court to employ private counsel to institute civil litigation on the part of the county where the prosecuting attorney has declined to act on matters vitally affecting the county welfare. There the county would have lost substantial revenues by the running of the statute of limitations if suit had not been filed on the day it was filed. The county court had directed the prosecuting attorney to file such suit and he had declined to act. Thereupon they employed other counsel who did institute the lawsuit and did recover for the county a substantial sum of money. It was contended on appeal that the judgment should be reversed and the county denied the money that was justly due it because the lawyers who prosecuted the suit for and on behalf of the county were not lawfully employed by the county. The Supreme Court held that where the county had a just claim that was about to be barred by the statute of limitations, and the county court had instructed the prosecuting attorney to file the lawsuit and he had declined, and thereupon the county employed private

counsel, who successfully prosecuted the litigation and recovered in the trial court the money for the county, that the judgment in favor of the county would not be reversed, but that the county had the authority to employ such other counsel in the emergency in order to save the county's property rights which would have been lost if such action had not been taken. In that case, however, there was no effort on the part of the county court to control the litigation. Their action was merely in instituting the litigation. The court on appeal, as we read that opinion, merely held that the prosecuting attorney could not ignore the rights of his client, the county, and thereby deprive the county of the recovery of its just deserts.

It appears that the county is entitled to the double protection, that is, the prosecuting attorney, being the legal adviser of the county and invested with the statutory duty of prosecuting and defending both civil and criminal litigation on behalf of the county or state, has authority to institute such litigation. It also appears by the Fulks case that the county has the additional power, when the prosecuting attorney declines to act, to employ other counsel to prosecute litigation for the county, where such other counsel, exercising their judgment as lawyers, believe the county has a meritorious case and successfully try it and recover judgment for the county for the money. If, however, this private counsel had been unsuccessful in recovering for the county, perhaps a different conclusion might have been reached by the appellate court.

The facts in the instant case are essentially different from the facts in the Fulks case, and we do not regard the Fulks case as militating against the views herein expressed.

The county court, not being learned in the law, would not be acting in a becoming way if they would assume to determine and evaluate the worth or merit of a lawsuit that has been prosecuted in the circuit court. If the county court could do that, then on the same line of reasoning the county court would have authority to determine the course of conduct of that trial in the circuit court. Who would contend that the county court should write the motion for new trial or make objections and assign the reasons therefor to the introduction of evidence, or determine what facts should be proven, or what witnesses should be subpoenaed? And yet if the county court has authority to

control the course of the litigation in one respect, it must have authority to determine and control the litigation in its other respects. In such a case there would be no place for a lawyer. In such a case the legislature would not have enacted the statute saying the county court should be invested with certain other duties and the statute defining the duties of the prosecuting attorney to be to prosecute and defend criminal and civil litigation for the county.

The statutes do not contemplate that the county court shall be learned in the law, nor that they know the vital things affecting the merits of litigation. The statute places that duty on the prosecuting attorney. He must be a lawyer. The reason why he must be a lawyer is that the evaluation of a lawsuit, in order that the object of it be attained, can be better reckoned with, summed up and determined by a lawyer than by a layman. As was said in the Wurdeman case,

"Obviously, if it be the official duty of the prosecuting attorney under the statute to thus appear, and one which he is sworn to perform, then its performance on his part cannot depend upon the consent of the respondent county officer in the mandamus, and such county officer should not be permitted to defeat the prosecuting attorney in the performance of his official duty by withholding consent to put the interests of the county forward * * *."

So it would appear in the instant case that the county court "should not be permitted to defeat the prosecuting attorney in the performance of his official duty by withholding consent to put the interests of the county forward." It is the duty of the county court, of course, to faithfully represent the public. Their first and only allegiance is to the public. That duty comprehends that every reasonable effort shall be made in order to recover for the county all moneys that are due the county. In so doing the county court should not be deterred by any thought of private gain by private individuals, nor favors, nor political advantage or disadvantage. If it is necessary to institute litigation for the recovery thereof, the prosecuting attorney, elected by the people to represent the county in a legal way and to prosecute its civil as well as criminal litigation, is the proper person to determine what steps are reasonably

necessary to be taken in order that the rights of the county may be preserved. The people elect both, and the prosecuting attorney receives his mandate and authority direct from the people and not from the county court.

CONCLUSION.

It is our opinion that the prosecuting attorney, having instituted a lawsuit for and on behalf of the county, has authority to control the further disposition of that lawsuit, at least to the extent of determining whether the case should be appealed, and has authority to contract the debts on behalf of the county reasonably necessary in such further disposition of the lawsuit, and that if in his opinion the case should be appealed, he has authority to order the transcript of the evidence from the official court reporter, and that the county court is obligated to pay for the same and may not lawfully refuse to pay for the same, and if they do refuse that they may be required by mandamus proceedings to pay said bill.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

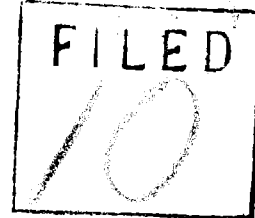
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APPROPRIATION:
BOARD OF PHARMACY:
INVESTIGATING COMMITTEE:
EXPENSES OF, HOW PAID:

Expenses of investigating
committee of board of pharmacy
should be paid out of appropriation
to the Governor for that
purpose under Laws of Missouri,
1927, found at page 17.

June 2, 1938

6-7



Mr. Charles R. Bohrer, Secretary
Missouri Board of Pharmacy,
West Plains, Missouri.

Dear Sir:

This is in response to yours of May 30, 1938, wherein you request an opinion from this department as to the manner of the payment of the expenses of a special investigating committee appointed by your board, at the direction of the Governor, which committee was appointed for the purpose of making an investigation of charges of irregularities which were alleged to have occurred during an examination held by the board of pharmacy.

We note from the enclosures with your request that the board received the following letter:

"After our conference today, you are hereby requested to appoint an Investigating Committee from the membership of your Board of Pharmacy to thoroughly investigate charges of irregularities during an examination recently held by your Board in St. Louis.

You will please hold this investigation at the earliest practicable date, and make a complete written report of your findings, together with the Board's recommendations as to what action should be taken in the premises.

I have consulted the Attorney General regarding this matter, and he approves of this procedure."

Pursuant to that letter an investigating committee was appointed by your board and you are now seeking information as to how the expenses incurred by this committee in making the investigation may be paid.

Section 13151c, page 231, Laws of Missouri, 1937, provides in part as follows:

"* * * * All fees collected by the secretary for the examination of pharmacists and for the issuing of the permits authorized by this chapter, and for the renewal of certificates of registration and permits, and all other funds collected by the Secretary of the Board of Pharmacy under this chapter shall by him be paid into the State Treasury monthly, and shall be placed to the credit of a fund for the use of the Board of Pharmacy. The compensation and expenses of the Secretary, Assistant Secretaries, Clerks in office, and the members of the Board of Pharmacy, and all expenses incurred by the Board in carrying into execution the provisions of this Chapter, shall be paid out of said fund upon the warrant of the auditor of state, issued upon requisition, signed by the President and Secretary of the Board."

The investigation for which the committee was appointed was for the purpose of determining whether or not there had been irregularities in a pharmaceutical examination held by the board in St. Louis, and from a reading of the foregoing Section 13151c, supra, it does not appear that the expenses of such investigation can be taken from the earnings and funds of the board of pharmacy.

The 1937 appropriation to the board of pharmacy contains the following items:

"A. Personal Service:

Salaries, wages and per diem of the
Board Members, secretary, attorney
and clerk..... \$9,000.00

D. Operation:

General expense: including communi-
cation, printing and binding, trans-
portation, travel and other general
expense, material and supplies: in-
cluding stationery and office supplies,
light, heat, water and power supplies,
insurance and premiums on bonds.....
..... \$8,000.00."

It is evident from this appropriation act that the
lawmakers did not provide for the payment of the expenses
of the investigating committee to be paid out of the funds
appropriated to the board of pharmacy.

Section 43, article IV of the Constitution of Missouri
provides as follows:

"All revenue collected and moneys
received by the State from any source
whatsoever shall go into the treasury,
and the General Assembly shall have
no power to divert the same, or to
permit money to be drawn from the
treasury, except in pursuance of regu-
lar appropriations made by law."* * *

In the case of State ex rel. Kessler v. Hackmann,
304 Mo. 458, the court said:

"On the other hand, this court has
held that a fund, raised by an act
for a special purpose, could not be
paid out of the State Treasury
except upon an appropriation by an
act of the Legislature. (State ex
rel. Fath v. Henderson, 160 Mo. 190,

l.c. 214; State ex rel. v. Gordon, 236 Mo. 142, l.c. 158.) In the case last cited the court had under consideration a fund for the support and maintenance of the Game Department. It was held that the creation of a special fund is not a continuing appropriation of the fund, or of any part of it, to pay accounts drawn against it. That the creation of the fund is one thing, and the appropriation of money to pay accounts against the fund is quite another thing. The language of the Constitution is unequivocal; it requires an appropriation before payment of money received by the State 'from any source whatsoever.' The money collected by the board is received by the State; it goes into the State Treasury. To make it more specific, the requirement that an appropriation by the Legislature will be necessary before money can be paid out of the treasury of the State, it is applied, not only to state funds, but to 'any of the funds under its management.'"

We have cited the constitutional provisions and the Hackmann case for the purpose of sustaining our views that the fees collected by the board of pharmacy can only be paid out under an appropriation bill passed by the legislature.

Investigation of irregularities in the conduct of an examination held by the board of pharmacy do not appear to have been authorized by chapter 94, R.S. Mo. 1929, which relates to the board of pharmacy, etc. As the board is created by statute, its powers and duties are limited thereby. There act does not authorize the board of pharmacy to expend any moneys for the investigations such as were held pursuant to the order from the Governor by his letter dated May 18, 1937.

At page 17, Laws of Missouri, 1937, we find that the Legislature made the following appropriation for the

June 2, 1938

biennial period of 1937 and 1938:

"A. Personal Service:

The pay of stenographers and special employees, investigators, accountants, attorneys and other employees whom the Governor may deem necessary to make investigations, and to procure information respecting the conduct or operation of any department, board, bureau, or commission or other agency of the State government, and to enforce any law, the enforcement of which is not otherwise provided for, at such compensation as may be agreed upon by the Governor and the persons who may be by him employed, to pay the salary of the Lieutenant-Governor when acting for the Governor, and to pay janitors; and for these purposes there is hereby appropriated the sum of 35,000.00"

It is quite apparent from the above appropriation act that the lawmakers intended that the expenses incurred in investigations of boards and bureaus be taken from this fund. It includes the charges for the investigating committee and stenographer's expenses and/or any other expenses in connection with the investigation which the Governor may deem necessary and proper.

CONCLUSION

It is, therefore, the opinion of this department that if the Governor deems that it was necessary and proper to employ the stenographers, and the investigating committee to make the investigation as directed by his letter of May 18, 1937, to the board, then the expense of such investigation after being approved by the Governor should be paid out of the appropriation was made by the legislature at page 17, Laws of Missouri, 1937, and hereinabove referred to.

We are returning to you all letters and copies which you enclosed with your request.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
(Acting) Attorney General

TYRE W. BURTON
Assistant Attorney General

TWB:DA

CONSERVATION COMMISSION - Authorized to spend purchase money
on Big Oak Tree State Park.

June 21, 1938.

Honorable I. T. Bode, Director
State Park Board
Jefferson City, Missouri



Dear Sir :

We acknowledge your letter of June 16th, which reads as follows:

"Reference is made to the purchase of Big Oak Tree State Park in Mississippi County.

"The question has arisen concerning the authority of the Conservation Commission to disburse money for land for the benefit of the State Park Board. I am asked to obtain an opinion on this precise condition.

"I have a letter of April 7 from Mr. Sawyers to Mr. Bode, in which it is stated that the Conservation Commission has the power to pay for a part of this land, however, I am asked to obtain this additional opinion.

"There appears to be no doubt that the Conservation Commission has authority to pay for land for the benefit of the Commission, but a doubt concerning the authority of the Conservation Commission to pay for land for the benefit of the State Park Board."

I am informed that this land, identified as Big Oak Tree State Park, was contracted for an \$8,000.00

consideration, one-third to be paid by Mr. Babler, one-third to be paid out of the Missouri State Park Board appropriation, and one-third to be paid by the Missouri Conservation Commission. The 1937 Laws, page 169, shows \$10,350.00 appropriated for the purchase of lands for park purposes, said money appropriated to the State Park Board.

Missouri Laws 1937, page 520, creates the State Park Board and provides in part:

"The State Park Board shall have the power to acquire by purchase, eminent domain or otherwise, all property necessary, useful or convenient for the use of said Park Board or the exercise of its powers hereunder necessary for the recreation of the people of the State of Missouri. ** "

Missouri Laws 1937, page 115, shows that \$750,000 was appropriated to the Conservation Commission to carry out the provisions of constitutional amendment #4.

Missouri Laws 1937, page 614, sets out the constitutional amendment #4 creating the Conservation Commission and reads in part:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry, and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, ****

"Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. *****

"The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose."

CONCLUSION

The Big Oak Tree State Park deed, as tendered, will place the title in the "State of Missouri, for the use and benefit of the State Park Board."

In our opinion, this deed complies with the appropriation and the law, supra, as far as the State Park Board is concerned. The State Park Board is authorized to

June 21, 1938

purchase said property, after a finding of record on their minutes that said property is necessary, useful or convenient for the use of the State Park Board.

Not one word of the constitutional amendment restrains the Conservation Commission to spend money only on the purchase of land in its own name. The appropriation act, supra, appropriates money to the Conservation Commission to carry out provisions of the constitutional amendment. The constitutional amendment gives the Conservation Commission control over all State property in this State which is acquired for the purpose of conservation of fish, game, forestry and wild life resources of the State.

The Big Oak Tree State Park in Mississippi County, with title in the "State of Missouri, for the use and benefit of the State Park Board," is acquired for the purpose of conservation of fish, game, forestry and wild life resources of the State. That being true, we are of the opinion that the Conservation Commission is authorized to acquire by purchase or gift said property after a finding of record on their minutes that said acquisition is necessary, useful or convenient for the use of the Commission.

In an official opinion from this department dated July 9, 1937 to Honorable Wilbur C. Buford, this department held: "in state parks containing both wild life resources and recreational areas the wild life resources contained in said parks, including game, fish, birds, hatcheries, sanctuaries, refuges and reservations, are under the control and management of the Conservation Commission, and the recreational areas contained in said parks, including cabins, picnic grounds, swimming pools and beaches, concessions, etc. are under the control and management of the State Park Board."

In our opinion, this tendered deed complies with the appropriation and Constitution, supra, so far as the

Honorable I. T. Bode

-5-

June 21, 1938

Conservation Commission is concerned, and said Conservation Commission has full constitutional authority to spend its funds pursuant to the deed as tendered.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

TAXATION AND REVENUE:

(1) Park superintendents who operate concessions in state parks with permission of the State Park Board must collect sales tax. (2) State Park Board charging camp fees in state parks for reimbursement of wood used by campers is not liable for sales tax.

July 8, 1938



Honorable I. T. Bode
Director, State Park Board
Jefferson City, Missouri

Dear Mr. Bode:

We desire to acknowledge your request for an opinion of July 1st, which is as follows:

"In several of the parks we have Concessionaires who are state employees and who operate their concessions on a percentage basis, that is, the Concessionaire provides the operating capital and returns a percentage of the net profit to the state.

"The question is, should these park Superintendents who operate concessions in this manner collect sales tax? It has been suggested that since the state participates in the net profit of the concessions, that they are state-operated and that a sales tax should not be charged. Actually, we are collecting sales tax and would like to know if we are proceeding in the proper manner.

"We have other concessions which are let for a cash consideration and in these instances the Concessionaires are paying a sales tax the same as any other merchant. The matter of collecting a sales tax on a camp fee has arisen. In this case we are not collecting sales tax. You will recall that the camp fee which is charged in the parks is 25¢ per day and was set up for the purpose of reimbursing the state for wood used by campers.

Honorable I. T. Bode

This money goes back into the general revenue but actually the amount received does not reimburse the state for the cost of the wood which is used by campers."

Your request for an opinion is divisible into two parts. First, under the 1937 statute relating to sales tax, should park superintendents, who operate a concessionaire in state parks, providing their own operating capital and giving the State Park Board a percentage of the net profits, pay sales tax on such sales? Second, should the State Park Board in charging camp fee of 25¢ per day, which is charged in the different parks of the state for the purpose of reimbursing the state for wood used by campers be required to pay sales tax on such fees?

I.

The Missouri Sales Tax Act, being House Bill No. 6 of the 59th General Assembly of Missouri, 1937 Laws, provides in Section 2 (b) as follows:

"A tax equivalent to two (2) per cent of the amount paid, for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events."

The Legislature has defined the term "person" in Section 1 (a) of the 1937 Sales Tax Act on page 555 to include as follows:

"'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency (except the State Highway Department) estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number."

On page 556 of said 1937 Session Acts, the Legislature has defined the term "purchaser" and "seller" to include those persons buying, selling or furnishing tangible property or rendering services, the receipts from which are taxable under the Sales Tax Act.

Honorable I. T. Bode

Therefore, state park superintendents, who operate concessions by permission of the State Park Board, furnishing their own capital and paying the state a percentage of the net profit of such sales, are liable for the collection and payment of sales tax on such sales, unless they be exempt from such payment by one of the two sections of said Act providing who may be exempted.

Section 46 of the Sales Tax Laws of 1937 provides exemption from sales tax for religious, charitable, educational, eleemosynary and penal institutions and said Act could not possibly be construed so as to bring said concessionaires within its exemptions, and if they shall be exempted, it is by virtue of Section 3 of said Laws of 1937, which is as follows:

"There is hereby specifically exempted from the provisions of this Act and from the computation of the tax levied, assessed or payable under this Act such retail sales as may be made between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the Constitution of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state. In order to avoid double taxation under the provisions of this Act, no tax shall be paid or collected under this Act upon the sale at retail of any motor fuel, subject to an excise or sales tax under another law of this state; or upon the sale at retail of fuel to be consumed in manufacturing or creating gas, power, steam or electrical current to be sold ultimately at retail; or feed for livestock or poultry, which is to be used in the feeding of livestock or poultry to be sold ultimately in processed form or otherwise at retail; or grain to be converted into food stuffs which are to be sold ultimately in processed form at retail."

Taxation is a sovereign right of the state, and the abandonment of the right to exercise it can never be presumed; but the intention to abandon it must appear in the most clear and unequivocal

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terms which must be clear and unambiguous and should not be created by implication. Scotland County v. Railroad Co., 65 Mo. 134; State ex rel. v. Arnold, 136 Mo. 1.c. 450, 38 S.W. 79. Pacific Railroad v. Cass County, 53 Mo. 1.c. 27.

The construction of laws exempting property from taxation must be strictly construed and as a rule all property is liable to taxation and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. Fitterer v. Crawford, 157 Mo. 1.c. 58, 57 S.W. 533, 50 L.R.A. 191.

As the burden of taxation ordinarily should fall upon all persons alike, when one claims an exemption therefrom he must be able to point to the law granting such immunity and must be clear and unambiguous. Kansas Exposition Driving Park v. Kansas City, 174 Mo. 1.c. 433, 74 S.W. 981. In State ex rel. Globe Democrat Pub. Co. v. Gehner, 316 Mo. 696, 294 S.W. 1.c. 1018, the court said:

"The policy of our law, constitutional and statutory, is that no property other than that enumerated shall be exempt from taxation."

The above decisions announce a rule on exemptions in regard to personal and real estate.

In State ex rel. Mo. Portland Cement Co. v. Smith, 90 S.W.2d 405 (1936), the court says:

"A tax imposed upon every retail sale in the state of tangible personal property is an excise and not a property tax, and the imposition of such tax on a sale of personal property to the State Highway Department does not violate a provision of the State Constitution exempting the property, real and personal of the state, counties, and municipalities from taxation, since such exemption provision applies to property taxes only."

But, said concessionaires being included in the classification of those who must collect and pay the sales tax, unless exempted under Section 3, supra, it must clearly show that it was the intent of the Legislature to include them in such exempted class.

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In the case of State v. Smith, 90 S.W.2d 405, 1.c. 408, in passing on the question as to whether an agency of the state may be liable for the collection and payment of sales tax, the court said:

"Undoubtedly it was within the power of the Legislature to make the tax applicable to the state and its agencies. But the theory underlying the presumption that property belonging to the state is not taxable, i.e., that such taxation would merely be taking money out of one pocket and putting it into another, seems to us to have peculiar application here, notwithstanding the general rule hereinabove noticed with respect to the extent of the principle of exemptions. It must be remembered that the involved tax is levied and collected solely by and for the benefit of the state and not by any municipality or other subdivision."

In giving the right to concessionaires to use their own capital in putting in a stock of goods and selling them in the state parks and retaining the percentage of the net profits, neither the State Park Board nor the State is making the sale. The concessionaire is not even an agent of the State, but becomes an individual seller. The fact that the sales are made by a park superintendent in a state park does not make their sales the sales of the State, nor the State Park Board.

In passing on a similar question, the Court in Burnett v. A. T. Jergins Trust Co., 288 U.S. 508; 53 S.Ct. 439; 77 L.Ed. 925, held:

" * * that under an oil and gas lease made by a city to a private party the receipts of the lessee are not exempt from federal tax because the subject taxed was remote from any governmental function in the collection of the tax and does not trench upon the immunity of the state as a sovereign."

In passing on a similar question, the Court in Helvering v. Mountain Producers Corp., 58 S.C.R., held that mere theoretical conceptions of interference to the functions of the state is not a test as to whether income from a gas and oil lease covering state land is subject to federal income tax, an income from such a lease is taxable where the lessee derives his profits in the same way as others who are engaged in similar business.

Honorable I. T. Bode

CONCLUSION

Therefore, it is the opinion of this department that where the State Park Board permits park superintendents to operate concessions in the state parks, said park superintendents, who use their own capital in the business and paying a percentage of the net profit to the State for the use of the concession, must collect and pay sales tax under said 1937 Session Acts.

II.

The State Park Board, as an agency of the State, has the right to charge a camp fee of 25¢ per day in the state parks for the purpose of reimbursing the state for wood used by campers, and not collect and pay sales tax on said fee.

Under Section 1 (a) of the 1937 Sales Tax Act, the Legislature made the sales tax applicable to the State and its agencies, but under the decision in State v. Smith, supra, the State and its agencies were exempted on the payment of sales tax for the reason:

" * * that such taxation would merely be taking money out of one pocket and putting it into another."

Section 1 and subsection "g" thereof of said 1937 Session Acts at page 556 defines "sales at retail" as follows:

"'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this Act and the tax imposed thereby, it shall be construed to embrace."

If the above transaction comes within said definition, it is under (5) of said subsection (g), which is as follows:

"Sales or charges for all rooms, meals and drinks furnished at any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist camp, tourist cabin, or other

Honorable I. T. Bode

place in which rooms, meals or drinks are
regularly served to the public."

Therefore, said (5) supra clearly shows that no such transaction was contemplated by the Legislature as being covered by the Sales Tax Act.

CONCLUSION

Therefore, it is the opinion of this department that the State Park Board charging camp fees in state parks for reimbursement of wood used by campers is not liable for sales tax.

Respectfully submitted,

S. V. Medling
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

DEAD ANIMALS - REMOVAL OF: A trucker is not liable for the hauling of swine which are dead of disease under Sec. 12786, R. S. Mo. 1929.

September 14, 1938

9-15



Honorable Fred C. Bollow
Prosecuting Attorney
Shelbina, Missouri

Dear Sir:

This is to acknowledge receipt of your request for an opinion from this department under date of September 8th, 1938, which is as follows:

"I have noticed articles in the newspapers where you have handed down an opinion that a party who did not file for nomination at the primary, and who nevertheless received the most votes for the office by the method of having his name written in on the ticket was not in fact nominated, and could only be elected by having his name written in again in the general election. There has been some contention here that this did not apply to such officers as the Justice of the Peace. And while I see no reason why the opinion should not affect all offices, yet I am requesting that I be furnished with a copy of the opinion and a statement from your office whether or not it concerns candidates for the Justice of the Peace. I would like to have your opinion at an early date, so that the County Clerk may be advised as to whether or not such a party is entitled to have his name placed on the ticket at the general election.

"A second problem which I have is based on a proper interpretation of provisions of Section No. 12786 of the Revised

Statutes for 1929. We have a community sale in this community. This sale has no regulations requiring swine to be cholera immunized before they are brought to the sale. And consequently this sale is a means of spreading hog cholera throughout the community.

"I have filed an information against a trader, who sold hogs at the community sale, and am able to prove that at said time they were affected with the disease. I am not able to prove, nor do I allege in my information, that the defendant knew the hogs to be so infected with the disease. And the circumstances are not such as to charge him with that knowledge.

"The method these traders use, if they want to dispose of any hogs which may be sick, is to trade them back and forth between each other so that the man whose name they are last listed in has only owned them a matter of minutes or hours before they are sold, thus he cannot be charged with the knowledge that the hogs were diseased. Therefore the question resolves itself down to one of whether or not knowledge on the part of the defendant that the hogs were diseased, must be alleged and proved to sustain a conviction under the provisions of Section No. 12786.

"A further problem which I have, and which stands or falls upon the contents of the same section of the law, is raised through the fact that a trucker from the State of Iowa comes into this community, and hauls out dead animals over and upon the public highway into the State of Iowa. I am able to prove that in one instance he hauled over the highway swine which had died of disease. But from reading this section of the statute, it occurs to me that possibly the provisions refer only to live swine and not to dead swine.

"I am desirous of stopping this practice, if at all possible; and as this trucker comes into this community sometimes as often as

once or twice a week, I shall urge upon you to forward me this opinion at your earliest convenience. I am awaiting your advices in the matter before proceeding further."

I.

In answer to the first question asked in your request concerning the writing of names on the primary ballot, we are herein enclosing an opinion rendered by this office on August 10, 1938, to Mr. H. D. Allison, County Clerk of Buchanan County, St. Joseph, Missouri. This opinion fully covers the first question asked in your request.

II.

Under your second problem, Section 12786, R. S. Mo. 1929, reads as follows:

"That it shall be unlawful for any person to sell or offer for sale any swine in this state which is infected with hog cholera, or any other disease; or to drive on foot, or haul in any wagon or other conveyance, any such infected swine along, or across, any public highway; or across, or over, any unfenced land in this state; or to suffer any such infected swine to run at large on any common or unfenced lands in this state: Provided, that this section shall not be so construed as to prohibit the movement of such swine under conditions prescribed by the state veterinarian, for the purpose of segregation or quarantine."

All of the cases hold that to obtain a conviction under an information filed under this section, even though this section as now set out does not contain the word "knowingly", nevertheless knowledge must be proved either directly or indirectly. The same rule applies as to cases bottomed on circumstantial evidence.

In the case of State v. Krokston, 187 Mo. App. 67, 1. c. 69, the court said:

"Guilty knowledge does not have to be established by affirmative evidence expressly stating that fact. It may be inferred from other facts shown, provided it can reasonably and clearly be seen to follow therefrom according to the natural, usual, and ordinary experience of men. In such case, the jury can infer knowledge on the part of defendant. Guilty knowledge is a state of the mind and frequently it is impossible to prove it except as a reasonable inference to be drawn from all the facts proved.

Also, at page 71, the court said:

"The only feature of the case resting upon circumstantial evidence is as to the defendant's knowledge that the hogs had cholera, and that does not rest entirely on such evidence. But even if the case be one of circumstantial evidence, we cannot say the defendant's conviction violates the rule, well established in such cases, that in order to justify a verdict of guilty the facts and circumstances must be consistent with each other and with the guilt of defendant and inconsistent with any reasonable theory of his innocence.

"The jury have found the defendant guilty. There was ample evidence to sustain the verdict if believed by them, and no reversible error appears in the case. The judgment must, therefore, be affirmed."

In the case of Wells v. Welch, 205 Mo. App. 136, 224 S. W. 120, 1. c. 122, the court said:

"It is now urged that these errors are harmless on the theory that our statute (Laws 1917, page 133) makes every vendor

of hogs an absolute warrantor against hog cholera or any other disease, latent or otherwise, affecting the animals sold. We concede that this statute, though criminal, may be the basis of a civil action for damages. That statute among other things makes it 'unlawful for any person to sell or offer to sell any swine in this state which is infected with hog cholera, or any other disease.' Section 1. By its third instruction the court told the jury that all the plaintiffs needed to prove to recover was that these hogs were infected with cholera, or other fatal disease, at the time of the sale. Under this instruction, and such is plaintiff's contention here, the vendor of hogs is made liable if such hogs subsequently prove to have had a disease, however incipient or latent at the time, and regardless of the vendor's knowledge, or means of knowledge, of such disease, and regardless of his good faith and exercise of care in avoiding the sale of diseased hogs. This we think is a too drastic construction of the statute. For instance, the same statute makes it a misdemeanor to drive on foot or haul in a conveyance any such infected swine along a public highway. The plaintiffs did this very thing with these hogs in taking them home, and, should they be indicted for violating this statute, they would be surprised to know that their ignorance of the hogs being diseased, which they established in this case, would be unavailing as a defense to the criminal charge. Also by another section of the same act it is made a misdemeanor for the owner of diseased hogs to fail to give immediate notice to owners of adjoining premises of such fact. Suppose the disease is incipient only, and so latent that the owner by due care does not know of the infection, is he nevertheless guilty of failing to notify another of that of which he is excusably ignorant? It is true that prior statutes somewhat similar (sections 4864 and 4863)

used the word 'knowingly' or 'willfully' in describing the offense, but such does not prove that the element of knowledge and intent is not necessarily implied here. * * *

"We are not holding that a vendor of hogs can recklessly shut his eyes to conditions and symptoms which if investigated would disclose that his hogs are infected or likely to be so, or that he can be indifferent or careless as to their being diseased, and thus hide behind the shield of ignorance. A vendor cannot claim ignorance when reasonable care and caution would disclose the truth."

In the case of State v. Miller, 258 S. W. 34, the court in holding that circumstantial evidence was sufficient to prove knowledge of the disease of hogs, said:

"This is a prosecution under an indictment, based upon section 4264 of the Revised Statutes of 1919, for selling and hauling in a wagon along and across a public highway 20 hogs charged to have been infected with cholera. The defendant, a farmer living north of Mexico, in Audrain county, met, at Mexico, on December 6, 1921, Charles T. Powell, a local buyer and shipper of live stock, and agreed with him for the sale of 20 hogs located on defendant's farm. Two days afterwards, pursuant to the agreement, defendant delivered the hogs to Powell at Mexico, hauling them to Mexico in a wagon along the public highway. The evidence showed that the hogs were infected with cholera at the time they were sold. The crucial issue at the trial was whether or not the defendant had knowledge of the infected condition of the hogs at the time he sold them. The cause was tried to a jury. Though proof was made of both the offending acts charged in the indictment, to wit, (1) the selling of the hogs and (2) the hauling of the hogs across and along the public highway, only

one of the offending acts, to wit, the selling of the hogs, was submitted to the jury by the instructions. The jury found the defendant guilty, and assessed his punishment at a fine of \$10. The defendant appeals.

* * * * *

"The defendant complains of the following instruction given for the state:

"'In determining whether the defendant knew at the time of the sale of the hogs to Powell that they were infected with hog cholera, if you find they were so infected, you are instructed that his knowledge, if any, thereof need not be proven by direct and positive evidence, but it may be lawfully and properly inferred by you from all the facts and circumstances in evidence having reference to and bearing upon and tending to prove such knowledge, provided such evidence is sufficient to satisfy you of such knowledge beyond a reasonable doubt.'

"It is insisted that this instruction is erroneous in that it omits essential elements necessary to make circumstantial evidence sufficient foundation for a conviction, such as that the circumstances relied upon should be consistent with each other and with defendant's guilt, and such as to exclude to a moral certainty every other reasonable hypothesis but that of guilt. The instruction is in form and substance practically identical with instructions approved by our Supreme Court in numerous cases.

* * * * *

"Under this state of facts we cannot say that there was such a failure of proof of knowledge on the part of defendant of the infected condition of his hogs at the

time he sold them as will authorize this court to disturb the verdict of the jury. State v. Underwood, 263 Mo. 677, loc. cit. 685, 173 S. W. 1059.

"Finding no error in the record, the Commissioner recommends that the judgment of the circuit court be affirmed."

CONCLUSION

In view of the above authorities, it is the opinion of this department that, under the facts set out in your second problem, knowledge on the part of the defendant that the hogs were diseased must be alleged and proven to sustain a conviction under the provisions of Section 12786, supra.

III.

You further ask whether or not Section 12786, supra, refers to the hauling of live swine or dead swine.

In construing the intention of the Legislature in the construction of a statute, one must investigate into the purpose of the legislation and also should take into consideration all of the clauses and words set out in said section. Also in construing the intention of the Legislature in the construction of a statute, one must read separate sections of the act which are *pari materia*. In construing whether Section 12786, supra, refers to dead animals, one must also read Section 12787, R. S. Mo. 1929. This section reads as follows:

"That it shall be the duty of the owner, or other person in charge of any swine which shall die of any disease, to burn the carcass or carcasses on the premises where death occurred within twenty-four hours after its death."

In Section 12786 the Legislature in setting out the prohibition of the hauling of diseased swine, infected with hog cholera or any other disease, specifically sets out the words "drive on foot, or haul in any wagon or other conveyance, any such infected swine along, or across, any public highway." It will be noticed that this part of Section 12786 does not refer to dead animals, but that Section 12787 does refer to swine which shall die of any disease. If it had been the intention of the Legislature to construe Section 12786 to mean dead swine, it would not have been necessary to enact a different section (Section 12787) in reference to dead swine, but could have provided for the burning of the carcass in Section 12786. In construing the purpose of Section 12786 it may be readily seen that this applies to live animals for the reason that it mentions about running at large or on unfenced lands in this state.

In the case of Fischbach Brewing Co. v. City of St. Louis, 95 S. W. (2d) 335, 1. c. 339, the court said:

"A cardinal rule of statutory construction is to give effect to the legislative intent, where ascertainable; another is to favor such a construction which would tend to avoid injustice, oppression, and absurd and confiscatory results and be in harmony with the rule of reason. The benign objectives heretofore pointed out were surely within the legislative intent as shown by all the surrounding circumstances covering the period in which this law was enacted. Rutter v. Carothers, 223 Mo. 631, 643, 122 S. W. 1056."

The penalty imposed for the owner of swine in refusing to burn the carcass on the premises where death occurred within twenty-four hours after its death is as follows (Section 12791, R. S. Mo. 1929):

"Any person who shall violate any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than ten dollars, nor more than fifty dollars."

September 14, 1938

In the case of Holder v. Elms Hotel Co., 92 S. W. (2d) 620, 1. c. 622, 338 Mo. 857, 104 A.L.R. 339, the court said:

"In construing a statute the legislative intent must be kept in mind, if it may be ascertained, and the whole act, or such portions thereof as are in pari materia, should be construed, together. (Keeney v. McVoy, 206 Mo. 42, 103 S. W. 946.)"

CONCLUSION

In view of the above authorities, it is the opinion of this department in your third problem that Section 12786 only applies to live swine and not dead-swine, but under Section 12787, if the trueker should happen to be the owner of a swine which died of any disease, and he did not burn it on the premises where the death occurred within twenty-four hours after its death, he would be subject to prosecution under Section 12787. This section also could be enforced against any owner of swine which have died of any disease and were not burned on the premises of the owner where the death occurred within twenty-four hours after their death. In this case it would be necessary to allege in the information that the swine died of a disease.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

STATE PARK BOARD: State Park Board must deposit fees and other income in the State Treasurer's Office and cannot disburse money that has not been appropriated to that department.

September 15, 1938

9-16



Honorable I. T. Bode
Director, State Park Board
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your request for an opinion from this department under date of September 9, 1938, which is as follows:

"The Park Board has \$4200.00 on deposit in a local bank which has been collected from the concessions in the state parks during the period in which the State Park Board has been in existence until the present time. More particularly from July 1, 1937 to, and including, August 31, 1938.

"We are requesting an opinion as to the disposition of this money and other similar money which will be collected from the concessions in the parks in the future.

"A very nominal part of this bank balance was collected from the sale of property which had lost its usefulness to the Department, such as surplus feed and other items of a nominal nature. Collections from camping fees are also included in this bank balance."

Session Laws, 1937, page 520, which is the creation of the State Park Board, reads as follows:

"Sec. 1. There is hereby created a State Park Board to consist of the Governor, Attorney General and Director of Conservation, the members of said Board to act without compensation. The Director of Conservation shall also be known as the Director of State Parks.

"Sec. 2. The State Park Board shall have the power to acquire by purchase, eminent domain or otherwise, all property necessary, useful or convenient for the use of said Park Board or the exercise of its powers hereunder necessary for the recreation of the people of the State of Missouri. In the event the right of eminent domain be exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. Said Park Board shall have the power to make and promulgate all rules and regulations as it may deem necessary for the proper maintenance, improvement, acquisition and preservation of all state parks. Said park board is hereby authorized to employ such persons or assistants as may be necessary and may fix the compensation of persons thus employed within the amount appropriated therefor by the Legislature. All vouchers for the payment of bills or for compensation shall be drawn and approved by the Director of State Parks and when presented to the State Auditor shall be paid out of the funds appropriated for such purposes.

"Sec. 3. All laws or parts of laws in conflict with the provisions of this Act are hereby repealed insofar as such laws are in conflict with this act, and expressly Section 8220, Revised Statutes of Missouri, 1929."

Section 43, Article IV, of the Constitution of Missouri reads in part as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law.
* * *."

In the case of State ex rel. Kessler v. Hackmann, State Auditor, 264 S. W. 366, 1. c. 367, the court said:

"Relators cite the case of State ex rel. v. Wilder, 199 Mo. 470, 97 S. W. 940, where this court had under consideration funds of the insurance department, to show that the money in the insurance department was not public money in a sense that it was subject to be appropriated for any general purpose. That was a mandamus proceeding seeking to compel the state auditor to issue a warrant in payment of an account incurred by the insurance department. In that case, however, there was an appropriation by act of the Legislature.

"On the other hand, this court has held that a fund, raised by an act for a special purpose, could not be paid out of the state treasury except upon an appropriation by an act of the Legislature. State ex rel. Fath et al. v. Henderson, 160 Mo. 190, loc. cit. 214, 60 S. W. 1093; State ex rel. v. Gordon, 236 Mo. 142, loc. cit. 158, 139 S. W. 403. In the case last cited the court had under consideration a fund for the support and maintenance of the game department. It was held that the creation of a special fund is not a continuing appropriation of the fund, or of any part of it, to pay accounts drawn against it.

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That the creation of the fund is one thing, and the appropriation of money to pay accounts against the fund is quite another thing. The language of the Constitution is unequivocal; it requires an appropriation before payment of money received by the state 'from any source whatsoever.' The money collected by the board is received by the state; it goes into the state treasury. To make it more specific, the requirement that an appropriation by the Legislature will be necessary before money can be paid out of the treasury of the state, it is applied, not only to state funds, but to 'any of the funds under its management.'

"It is manifest that the intention of the Legislature in placing the funds in the hands of the state treasurer was, not only to provide official information as to its disbursement, but to keep the expenses of the department within the limits provided by the Legislature. The Legislature may be presumed to have had the constitutional restrictions in mind when they passed the act creating the fund."

In the case of State ex rel. Thompson, State Treasurer v. Board of Regents for Northeast Missouri State Teachers' College, 264 S. W. 698, the court held that money received for tuition and other fees as paid by the students need not be turned into the state treasury for the reason that the enactment of the State Legislature in respect to the State Teachers' College provided for the use of the funds in the repair and upkeep of the school, but the court also said as follows, 1. c. 699:

"This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the state from any source whatsoever.' By revenue, whether its

September 15, 1938

meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. With this limitation--and the Constitution itself is but an instrument of limitations--it should be strictly construed. Thus construed, the spirit which prompted the adoption of the provision is fully recognized and its purpose is promoted. Unless, therefore, it can be successfully contended, in harmony with well-recognized rules of interpretation, that the board of regents of the college is the state, and that moneys received by it other than from appropriations is state money, the constitutional provision will afford no support to the relator's contention."

It will be noticed as above set out in Article IV, Section 43, of the Constitution of Missouri, the General Assembly is limited and has no power to divert any of the revenue collected and moneys received by the State, or to permit money to be drawn from the treasury except by regular appropriation made by the Legislature. In view of this holding, it necessarily goes without saying that the money on hand and collected by the State Park Board, as described in your request, cannot be spent or disbursed for any pur-

pose except by way of direct appropriation from the Legislature. Also, according to this section of the Constitution, all revenue collected and moneys received by the State from any source shall go into the treasury.

Section 1, Session Laws, 1933, page 415, reads as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or

September 15, 1938

from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

According to the above section, it specifically states that all fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation, shall be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly. In creating the State Park Board, no particular fund was set apart separately for that board, as was done in Section 8220, R. S. Mo. 1929, which was repealed by this Section 1, Session Laws of 1933, page 415. It necessarily follows that the money should be deposited in the general fund of the state treasury.

CONCLUSION

In view of the above authorities, it is the opinion of this department that money received by the State Park Board from any source, including camping fees and sale of surplus feed and other items, must be deposited in the general fund of the state treasury and cannot be disbursed by the State Park Board for the reason that the board is limited to the appropriation act for the State Park Board.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

CRIMINAL COSTS:

Criminal Clerk should issue execution at the end of the term against parolee who is not protected by the insolvency act.

Oct. 21, 1938

11-4



Mr. Fred C. Bollow
Prosecuting Attorney
Shelbina, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of October 19, 1938 with reference to costs in a criminal case. Your letter reads as follows:

"While there is no dispute that the trial judge has a right to grant bench paroles, I am wondering if he may continue such parole indefinitely without requiring the defendant to pay the cost. There has been a practice in this County of never requiring defendants to pay the cost, and thus make these costs fall on the County eventually.

"It has always been my opinion that no one could waive the payment of cost. I would therefore like to know whether or not while a bench parole is in effect if I have a right, in vacation, to procure an execution and commitment from the clerk's office against the defendant for the amount of unpaid cost."

In accordance with the above request, we first cite Section 3825 Revised Statutes of Mo., which reads as follows:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Under this section, whenever a defendant is convicted or pleads guilty to any crime, a judgment must be rendered against him for the costs and under no circumstances except as hereinafter set out should the cost be paid by the state or county. Shelby county has a population according to the last 1930 census of 11,983. The power of a judge to parole a defendant is governed by Section 3809, Revised Statutes of Mo., 1929, which reads as follows: ✓

"The Circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis, shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

This section 3809 was amended by the laws of 1935 page 307, and laws of 1937 page 400, in reference to the City of St. Louis and Jackson County. Section 3811 reads as follows: ✓

"When any person of previous good character and who shall not have been previously convicted of a felony, shall be convicted of any felony except murder, rape (where the rape charged and the proof shows said rape to have been committed by means of force, violence or by putting the female in fear of immediate injury to her person), arson or robbery, and imprisonment in the penitentiary shall be assessed as the punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

It will be noticed under Section 3811 that it only excepts certain felonies and only applies to felonies and not misdemeanor. Section 3814 reads as follows:

"Any person confined in jail under judgment of conviction before a justice of the peace may be paroled, his parole terminated and absolute discharge granted by the court or judge of the court having jurisdiction of appeals from justices of the peace in criminal cases in the county wherein the justice rendering the judgment resides, in the same manner and subject to the same restrictions as if such person had been convicted in said court."

Under this section the Circuit Judge has the power to parole a defendant, who has been convicted before a Justice of the Peace. Section 3810 partly reads as follows:

"The courts named in section 3809 of this article, or the judge thereof in vacation, subject to the restrictions hereinafter provided, may, in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed by said court, or any person actually confined in jail under judgment of a justice of the peace, or sentenced to the state industrial home for girls, or to the Missouri training school for boys, will, if permitted to go at large, not again violate the law, parole such person and permit him or her to go at large upon such conditions and under such restrictions as the court or judge granting the parole shall see fit to impose * * * *"

Under Section 3810, the court after a parole has been granted and revoked, may grant a second parole upon the payment of all costs in the case.

You will notice that under Section 3813 of the Revised Statutes of Missouri 1929, it refers to Section 3811; which covers a punishment by imprisonment in the state penitentiary only. In setting out the procedure of parole in this section 3813, it provides that before granting such parole, to require such person, with one or more sureties, to enter into bond to the state of Missouri in a sum to be fixed by the court, etc. Under Section 3810 Revised Statutes of Missouri 1929, this section sets out the procedure for the paroling of a person who has been sentenced by a jail sentence or by an imposed fine only, either by the Circuit Court or a Justice of the Peace. As you notice by this Section 3810, there is no requirement as to making bond before parole as is set out in Section 3813 of the Revised Statutes of Missouri 1929.

Under Section 3817 of the Revised Statutes of Missouri 1929, this section provides that no person under the provisions of Section 3810 shall be granted an absolute discharge at an earlier period than six months after the date of his parole, nor shall such parole be continued for a longer period than two years from date of parole, as set out above 3810 is the section where the conviction imposed a sentence to the county jail or imposed a fine only. Section 3817 further provides that under the provisions of Section 3813 no person shall be granted an absolute discharge at an earlier period than two years from the date of his parole, nor shall such parole continue for a longer period than ten years. Under this latter part of Section 3817, it refers to Section 3813 where the punishment imposed by imprisonment in the state penitentiary. Section 3818 of the Revised Statutes of Missouri 1929 reads as follows:

"It shall be the duty of the court granting the parole to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled shall be insolvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such persons being required to serve any time in jail for non-payment of fine or costs. Such payment of costs by the state or county shall not relieve such person from liability for the same, but if at any time before his final dis-

charge he shall become able to pay said costs, it shall be the duty of the court to require said costs to be paid before granting a discharge, and said costs when so paid shall be turned into the state or county treasury as the case may require."

As you notice in Section 3818 it specifically sets out to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled shall be insolvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such person being required to serve any time in jail for non-payment of fine or costs. It also further says that the payment of the costs by the state or county shall not relieve such person from liability for the same, but if at any time before his final discharge he shall become able to pay said costs it shall be the duty of the court to require said costs to be paid before the granting of a discharge. Section 3730 reads as follows:

"It shall be the duty of the clerk of the court having criminal jurisdiction for the county at the end of each term, to issue executions for all fines imposed, and the costs of conviction in criminal cases, during the term and remaining unpaid, which shall be executed in the same manner as executions in civil cases, and the property of the defendant may be seized and sold thereon, notwithstanding he may be in custody for the same demand."

Under this section it is the duty of the clerk of the court to issue executions for all fines imposed and the costs of conviction in criminal cases. This execution may be issued and the sheriff may make a nolle bona return. Upon an execution issued, the parolee may avail himself of the insolvency act described in Article 20, Chapter 29 of the Revised Statutes of Missouri 1929 and in that event he will be relieved of the payment of any criminal costs. The parole is not a part of the criminal case and it was so held in the case of state vs. Kelley 274 S. W. 731, local citation 733, where the court said:

"Of course, the special judge may pass on the motion for a new trial, grant an appeal, settle the bill of exceptions, etc. This because such matters, being but procedural steps to be taken in arriving at the ultimate determination of defendant's guilt or innocence, are so related to the trial of the cause as to be deemed incident thereto. But the granting of a parole has naught to do with the ascertainment of guilt or innocence. It presupposes the defendant's guilt. An application for parole cannot be entertained until after a judgment of conviction has been rendered (sections 4156 and 4157, R. S. 1919) and that judgment has become a finality (section 4167, R. S. 1919). The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence or a conditional pardon is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. No appeal lay from the judgment entered on the pleas of guilty of defendants Morgan and Burnett. It was a final determination of the cause. When Judge Ing rendered that judgment, his powers and duties as special judge came to an end. Consequently he was not the judge of the Cape Girardeau county circuit court on the 31st day of August, 1923, for any purpose whatever."

CONCLUSION

In view of the above authorities it is the opinion of this department that the parolee must pay the court costs where he has property that is subject to levy upon an execution but if the parolee takes advantage of the Insolvency Act, described in Article 20, Chapter 29 of the Revised Statutes of Missouri 1929, the state where liable must pay the costs, and the county where liable must pay the costs. It is further

October 21, 1938

the opinion of this department that the court can not waive the payment of costs except where the parolee takes advantage of the Insolvency Act, and in that event the parolee could not be incarcerated again for the payment of said cost. Under Section 3730 an execution could be issued at any time within the Statute of Limitations for the payment of the costs. It is further the opinion of this department, that where the costs shall be paid by the state or county as in other cases, without such person being required to serve any time in jail for non-payment of fine or costs, such payment of costs by the state or county shall not relieve such person from liability for the same, but at any time before his final discharge, if able to pay, the court shall require the cost to be paid before granting a discharge. When the costs have been paid in this manner by the parolee, the money should be returned to either the state or the county, into the state treasury or the county treasury, as the case may require.

Respectively submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

WJB:WW

LIQUOR CONTROL - Corporation composed of retail dealers may not act as purchasing agent or behalf of its members. Liquor traffic can only be engaged in, in the manner provided by law

November 21, 1938

11-21



Mr. Wallace I. Bowers
Chief Clerk
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion on the following question:

"May a corporation consisting of licensed retailers, purchase intoxicating liquor ordered by the said licensed retailers with money advanced to so purchase, and act as a purchasing and distributing agent for and within the scope of its employment by the licensed retailers without being required to obtain a wholesaler's or retailer's license."

As we understand it this corporation is to act only in the capacity of purchasing agent on behalf of its members. Its plan of operation is that the various members thereof make known to the corporation their needs in the way of liquors to be purchased for the member. The corporation then holds said order until sufficient other orders have accumulated so that it can purchase in large lots at a better price. All the purchases are to be made from

a duly licensed wholesaler in this state. After the purchase, the corporation will then make delivery. For this service each member who uses the corporation's facilities must pay a certain commission to it to defray operating expenses.

The question, as we see it, is: May this corporation engage in the liquor traffic in this manner, or is this type of liquor traffic authorized by the law?

In *State v. Parker Distilling Company*, 236 Mo. 219, 255, the court reviews a number of authorities and makes this statement:

"Those authorities also establish the fact that the liquor traffic is not a lawful business, except as authorized by express legislation of the State; that no person has the natural or inherent right to engage therein; that the liquor business does not stand upon the same plane, in the eyes of the law, with other commercial occupations. It is placed under the ban of law, and it is thereby differentiated from all other occupations, and is thereby separated or removed from the natural rights, privileges and immunities of the citizen."

Previous to this the Court said:

"* * * such occupation can only be pursued when the person who desires to engage therein first procures a license from the proper authorities of the State authorizing them to so do."

Under the law as declared in the above case it is clear that a person or corporation desiring to engage in the liquor traffic, must find its authority to do so in the law pertaining to the regulation and control of liquor.

The only kind of liquor trafficking authorized by law, is that for which a specific license has been provided.

Under the terms of Section 3, Laws of Missouri, Extra Session, 1933-34, page 79, this corporation cannot obtain a license as a wholesaler. This section reads in part: " * * * * wholesaler, * * * * their employees, officers or agents, shall not under any circumstances, directly or indirectly, have any financial interest in the retail business for the sale of intoxicating liquors, * * * ". This corporation is made up entirely of licensed retail dealers in liquor and its officers are members of this group.

However, it is not engaging in the liquor business as a wholesaler, and for this reason also cannot get a license as such. In Fishbach Brewing Company v. City of St. Louis, 95 S. W. (2d) 335, a wholesaler of intoxicating liquors is defined as "a species of merchant, a dealer, a trafficker * * * * 'one who buys in comparatively large quantities and who sells, usually in smaller quantities, but never to the ultimate consumer or an individual unit. ' "

Under this definition we see that the instant corporation lacks one of the essentials of being a wholesaler - that of selling in smaller quantities. The corporation here buys on behalf of a certain named person and makes delivery, but does not resell anything except services. Neither is said corporation a retail dealer in liquor because it does not sell anything, nor does it deal with the ultimate consumer.

It obviously is not a manufacturer.

The only type permit left, after the elimination of the above is the solicitor's permit. But a "solicitor" is one who offers to sell, or sells, some commodity. This corporation only purchases and delivers. Thus not being a solicitor, the corporation may not obtain this type of permit.

We have shown there is no type of license authorized by statute which may be granted to this corporation to engage in the liquor traffic solely as a purchasing agent. It is not a manufacturer, retailer or solicitor. Due to its peculiar organization it cannot obtain a wholesaler's permit, nor is it a wholesaler.

However, said corporation is engaged in the liquor traffic in that it accepts orders from its members, places said orders with a wholesaler and handles the delivery of intoxicating liquor.

No person having the right to engage in the liquor traffic without a license authorizing them to do so and no license being authorized by statute, it is apparent that the type of business desired to be undertaken is not authorized.

CONCLUSION

Therefore, we are of the opinion that no license is provided for a corporation composed entirely of licensed retail liquor dealers to act as purchasing agent for the members of said corpora-

Mr. Wallace I. Bowers

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November 21, 1938

tion and that no license being provided this type
of trafficking in liquor is illegal.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

LLB LC

COUNTY BUDGET ACT:

(1) Classes should be paid in order of their priority; (2) Section 12140, R. S. 1929, should be considered in payment of warrants; (3) Constitutionality of the Budget Law.

December 20, 1938

Mr. Frankie Booker
Treasurer
Ripley County
Doniphan, Missouri



Dear Sir:

This Department is in receipt of your letter of December 15th. As your letter involves several questions, we shall attempt to segregate the questions and answer each.

The first question is as follows:

"Whether Class 2 Warrants drawn on the County Revenue shall have priority of payment over all except Class 1 Warrants as provided by the Budget Law of 1933, pages 340-341, Section 1, and whether Class 3 shall constitute the third obligation of the County, and so, as provided by said law.

It appears by our files that we have rendered an opinion which deals with the principle involved in your question, said opinion being to Miss Carrie Williams, Treasurer of Barry County, Cassville, Missouri, on June 21, 1934. Copy of the opinion is herewith enclosed, which is to the effect that each class receives priority of payment over all succeeding classes. In other words, we think it was the intention of the Legislature that all warrants in Class 1 should be paid if such warrants are protested before the warrants of Class 2, and each subsequent class should be paid.

Mr. Frankie Booker

Dec. 20, 1938

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Your second question is as follows:

"The question has been presented to us that the Legislature failed to repeal Section 12139 and 12140 R. S. Mo. 1929 in the enactment of the Budget Law of 1933 although it attempted to do so by the provisions of Sections 1 and 22 thereof, for the reason that Sections 12139 and 12140 were not expressly repealed, and therefore, that County Warrants shall be paid in the order in which they shall be presented for payment and not according to the Class in which they are drawn. And further the question has been raised the Budget Law of 1933 is unconstitutional."

Relative to the above question, this Department rendered an opinion to Honorable Charles Farrar, Prosecuting Attorney, Buffalo, Missouri, on September 27, 1934.

We note that this opinion discusses Section 12140, R. S. Mo. 1929. We are also enclosing copy of opinion written to Honorable H. B. Schroeder, Treasurer of Crawford County, Missouri, on October 26, 1933, in which the effect of Section 12140 is discussed. However, the section should further be considered, in the payment of warrants, to the effect that if protested warrants are in Class 1 the warrants should be paid according to the time which said warrants are registered and should take precedence over the warrants in other classes. In other words, the registration of warrants should be followed according to time in the individual classes and the warrants of each class should take precedence over each subsequent class.

Relating to the constitutionality of the Budget Law, it is not the policy of this Department to pass upon the constitutionality of acts of the Legislature and declare the same unconstitutional. However, the constitutionality of the Budget Act, relating to counties of more than 50,000 inhabitants,

Mr. Frankie Booker

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Dec. 20, 1938

was raised in the decision of *Graves v. Purcell*, 337 Mo. 574, and the Act was held to be constitutional.

We are also enclosing copy of opinions which further bear on the questions presented by your letter. In the event there is any further information we can give you please feel free to write us.

Very truly yours

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG
Encs.

LOTTERIES--DRAWINGS.

February 4, 1938

27



Hon. Charles D. Brandom
Prosecuting Attorney
Daviness County
Gallatin, Missouri

Dear Sir:

We have your request for an opinion as to merchants giving away tickets with each purchase, and the tickets being put in a large container and once or twice a week being drawn therefrom, and the persons whose names appear on the tickets thus drawn are given prizes.

A lottery is any scheme or device whereby anything of value is, for a consideration, allotted by chance. State vs. Emerson, 318 Mo. 633, 1 S. W. (2) 109, 111; State ex rel. vs. Hughes, 299 Mo. 529, 253 S.W. 329, 28 A.L.R. 1305; State vs. Becker, 248 Mo. 55, 154 S. W. 769.

The Court in Valhalla Hotel & Company vs. Carmona, 44 Phillipine, 233, 1. c. 242, said:

"While ingenuity is continually at work to evolve some scheme which is within the mischief but not quite within the letter of the law--we propose to go beyond the shell to the substance and to condemn the same."

Hon. Charles D. Brandom

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February 4, 1938

CONCLUSION

It is therefore the opinion of this office that the drawing as outlined in the above statement constitutes a lottery in violation of Section 4314 R. S. Missouri 1929.

Yours very truly,

FRANKLIN E. REAGAN,
Assistant Attorney General

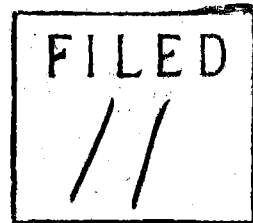
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

TAXATION: Definition of Taxpayer.

May 5, 1938.



Honorable Charles D. Brandom
Prosecuting Attorney
Daviness County
Gallatin, Missouri

Dear Sir:

This department has received your letter of May 2nd, which letter reads as follows:

"I wish you would please render me an opinion on what constitutes a 'tax-paying citizen' with reference to the qualifications of an applicant for a liquor license under Section 27 of the Liquor Laws of this state.

"Would a person who has just been assessed for taxes on which assessment taxes will not be paid until 1939 be a tax-paying citizen?

"Would a person who has formerly paid taxes, but has not paid taxes within the last year, or who is delinquent one or more years in paying taxes of a respective county or city, be a tax-paying citizen?"

Section 27 of the Liquor Act found in the Laws of Missouri, 1937, page 533, states that:

"No person shall be granted a license hereunder unless such person is * * * a tax-paying citizen of the county, town, city or village, * * * ."

The first and principal question to be determined therefore is, who is a taxpayer and under what circumstances. We find the following definition of a taxpayer in 61 C. J. 1748:

"The generally accepted definitions of a taxpayer are : a person chargeable with a tax, or who owning property in the state, or within the territory, is subject to taxation; one from whom government demands a pecuniary contribution toward its support; one who is liable for the payment of taxes; one who is required to pay taxes; one who is subject to and liable for a tax; one who owns property, within a town or municipality, subject to taxation;
* * *

Cooley in his work on taxation in Volume 1, 4th Ed. Section 17, defines a taxpayer as follows:

"A taxpayer, as the term is generally used, is one who owns property within a state or taxing district and who pays a tax or is subject to and liable for a tax."

In the case of State on Inf. Bellamy vs. Menengali, 270 S. W. 101, the Supreme Court of Missouri, said:

"In Webster's New International Dictionary, a taxpayer is defined as: 'One who pays a tax.' In Funk & Wagnall's New Standard Dictionary, a taxpayer is defined as: 'One who pays any tax, or who is liable for the payment of any tax.' The evidence is clear and undisputed that respondent, on June 1, 1920, was the legal owner of the property heretofore described, and that it was not exempt from taxation."

In the case of State ex rel. Sutton vs. Fasse, 71 S. W. 745, the St. Louis Court of Appeals defined a taxpayer as:

"A person owning property in the state subject to taxation, and on which he regularly pays taxes."

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It is to be noted in the Fasse case, that the definition of a taxpayer is enlarged to require that a person must own property subject to taxation and also pay taxes on the same regularly before he can so qualify. This court, however, was construing a statute which provided that a school director, in order to qualify as such, must be a resident taxpayer and must also have paid a state and county tax within one year next preceding his election. Since the statute definitely required that school directors must have actually paid taxes within a year next preceding the election, the definition of a taxpayer as announced by that court was necessarily influenced thereby. The court announced this definition of the term only after fully considering the statute to be construed.

A quite complete discussion of the term, which includes an accumulation of authorities on the question, is found in the case of Leventhal vs. Gillmore, 206 N. Y. S. 121. In this case the court said:

"In general, a 'taxpayer' is defined as 'one who pays any tax, or is liable to pay any tax' (Standard Dictionary); also as 'one who pays a tax' (Webster's Dictionary); and as 'a person chargeable with a tax; one from whom government demands a pecuniary contribution towards its support' (Black's Law Dictionary). An examination of the authorities discloses no material variance from the foregoing and generally accepted definition. In matter of Kersburg, 101 Misc. Rep. 241, 243, 166 N. Y. Supp. 900, 902, affirmed 179 App. Div. 969, 166 N. Y. Supp. 1100, a 'taxpayer' is defined as follows.

"One owning property within the territory subject to taxation. To constitute a taxpayer in the meaning of the statute, it is not necessary that the taxes due on his property should have been assessed. Hillsman v. Faison, 57 S. W. Rep. 920, 922; 23 Tex. Civ. App. 398."

"In Winters v. Independent School District (Tex. Civ. App.) 208 S. W. 574, it was held:

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"One otherwise qualified to vote at an election in an independent school district to determine whether or not the district should levy an additional school tax is a 'taxpaying voter,' if liable for taxes on property, whether or not his property has been assessed for taxes."

"The qualification required in the last-mentioned case was that a voter should be a 'taxpaying voter.'"

"In *Kempen v. Bruns* (Tex. Civ. App.) 195 S. W. 643, the constitutional requirement to vote on the proposition of the expenditure of money, or assumption of debt, was that an elector pay taxes in the towns or cities of the state, and the same was defined as follows:

"One who pays taxes has been construed to mean a taxpayer, and it has been determined that a taxpayer, in the meaning of the constitutional provision mentioned, is one who owns property in the town or city subject to taxes. *Hillsman v. Faison*, 23 Tex. Civ. App. 398, 57 S. W. 920. There is no law making the tax records the exclusive evidence that the voter is a taxpayer. Neither is it necessary that the property tax be actually paid."

With the above general principles in mind, we will consider your first question, that is, whether a person who has just been assessed for taxes, but which taxes will not be paid until 1939, can be considered a taxpaying citizen. Apparently you have in mind a person who has recently acquired property and has not been actually paying taxes in the "county, town, city or village." If any such person has acquired title to property and the same has been assessed, it is our opinion that the holder of such property is qualified as a taxpayer, under the terms of Section 27 of the Act. We do not believe that the court, in construing the statute in the *Fasse* case, intended to place any different construction on the word "Taxpayer" where the word is used alone and no

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further statutory requirements are made as to payment of taxes as is required in the School Statute.

The case of *In re Kersburg*, 166 N. Y. S. 900, is directly in point. Here an attempt was made to oust a liquor commissioner for the reason that he was not a taxpayer at the time of his appointment, as required by the statute. The law required that, within twenty days after its effective date, the mayor of each of the cities, "shall appoint a commission to consist of three members, who shall be residents and taxpayers of the city or town * * *."

The court said, on page 902, of the case:

"It appears without dispute that Charles L. O'Connor, the commissioner who it is claimed is disqualified because he was not a taxpayer, became the owner of a piece of real property in the city of Lackawanna on the 2d day of May, 1917, and that the law in question became effective on the 22d day of May, 1917. The Standard Dictionary defines a taxpayer as:

"One who pays any tax or is liable to pay any tax."

"Taxpayer," as used in Rev. St. Tex. 1895, art. 3942, providing that all persons who are legally qualified voters of the state and of the county of their residence, and who are resident taxpayers in said district, as shown in the last-assessment rolls of the county, shall be entitled to vote in any such school district, does not mean only those whose names appear on the last assessment rolls of the county, but means one owning property within the territory subject to taxation. To constitute a taxpayer in the meaning of the statute, it is not necessary that the taxes due on his property should have been assessed. *Hillsman v. Faison*, 23 Tex. Civ. App. 398, 57 S. W. 920, 922.

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"I am therefore of the opinion that Mr. O'Connor possessed the legal qualifications of a commissioner at the time of his appointment by the mayor and the approval of his appointment by the commissioner of excise."

Undoubtedly the true definition of a taxpayer is one who pays a tax, or who is liable for the payment of a tax. It is not necessary for one to have actually paid a tax, or to have paid taxes regularly. The legal liability for the tax is sufficient.

As we stated above, it follows that anyone owning property within the prescribed limits which is subject to taxation, although no taxes might have been in the past paid on such property, that the owner thereof is to be considered a taxpayer because such property is subject to taxation. Such a person would, therefore, be qualified as a taxpaying citizen as meant and intended in said Section 27.

Your next question reads as follows: "Would a person who has formerly paid taxes but has not paid taxes within the last year" be considered a taxpaying citizen. We assume that you refer to persons who have formerly owned property and formerly paid taxes on same but who do not now own any property, whatsoever, or are they now paying taxes. Such persons in our opinion, are not now eligible for a license. Section 27 is written in the present and not past tense in this respect. The statute states that:

"No person shall be granted a license hereunder unless such person is * * * a taxpaying citizen * * *."

The fact that a person may have owned property and became liable or paid taxes in the past could not qualify such person, as a present taxpayer, for a present license. All the cases cited herein required that the taxpayer must be a present taxpayer to be so considered.

Your next and last question is whether a person "who is delinquent one or more years in paying taxes of a respective county or city" may be considered a taxpaying citizen. It will be noted in the cases cited above, that

May 5, 1938

the actual payment of taxes is not a necessary prerequisite in determining who is a taxpayer. The principal point appears to be that, if a one is "chargeable with a tax" or "is liable for the payment of any tax" through the ownership of property, that such person is considered a taxpayer. Therefore, if a person owes taxes on property which he owns but the same has been allowed to become delinquent, this delinquency in itself, does not prevent such person from being classified as a taxpayer.

CONCLUSION

It is the opinion of this department that a taxpayer is a one who pays a tax or is liable for the payment of a tax; that actual payment of taxes is not necessary if the liability therefor exists, in order to qualify a person as a "tax-paying citizen" within the meaning of Section 27 of the Liquor Act.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA:LB

OPTOMETRY -- Restoration of expired license must be made
when statutory fee for same be tendered.

May 13, 1938

5-73

Dr. J. F. Brawley, Secretary
Mo. State Board of Optometry
Jefferson City, Missouri



Dear Sir:

We acknowledge your letter of May 9, 1938
requesting an opinion, which letter reads as follows:

"Will you please give me an official
opinion if such a ruling of the Mis-
souri State Board of Optometry is
within the Laws regulating the prac-
tice of Optometry in Missouri

'The Board has ruled that any
registered Optometrist who
has retired from the practice
of Optometry for more than
five years, cannot renew his
certificate of Registration
without taking another Ex-
amination of the Missouri
State Board of Optometry'. "

Section 13508, R. S. Mo. 1929, provides:

"Every registered optometrist and every
registered apprentice who continues in
active practice or service, shall, an-
nually, on or before the first day of
April, renew his certificate of regis-
tration and pay the required renewal
fee. Every certificate of registration
which has not been renewed during the
month of April in any year shall expire
on the first day of May in that year.

A registered optometrist or a registered apprentice whose certificate of registration has expired may have his certificate of registration restored only upon payment of the required restoration fee. Any registered optometrist who retires from the practice of optometry for not more than five (5) years may renew his certificate of registration upon payment of all lapsed renewal fees."

Section 13510, R. S. Mo. 1929, provides:

"*The fee to be paid upon the renewal of a certificate of registration is \$5.00. The fee to be paid for the restoration of an expired certificate of registration as a registered optometrist is \$10.00. The fee to be paid for the restoration of an expired certificate of registration as a registered apprentice is \$2.00."

Section 13512, R. S. Mo. 1929:

"The state board of optometry may adopt reasonable rules and regulations relating to the enforcement of the provisions of this chapter."

46 C. J. page 1034, Section 295, reads:

"Rules and orders made by administrative boards must accord with the authority conferred upon the board by law."

In the case of Little River Drainage District vs. Lassater, 29 S. W. (2d) 716, l.c. 718; 325 Mo. 493, the Supreme Court said:

"It is the duty of the courts, in construing two or more statutes dealing with the same subject, to read them together and to harmonize them if possible, and to give force and effect to each."

CONCLUSION

Section 13512, supra, gives the Optometry Board power to make "rules and regulations" relating to the enforcement of the provisions of Section 13508 and Section 13510, supra.

We look to the substance of the rule of the Optometry Board as quoted, supra, to see if said rule conflicts with the legislative provisions of Sections 13508 and 13510, supra. The Optometry Board does not have power to make a rule which conflicts with or nullifies express legislative provisions, where the Legislature has expressly provided for renewal of certificates.

The statutes above quoted should be construed together to determine legislative intent. The language of the Legislature is not ambiguous. The Legislature has expressly provided that optometry licenses not annually renewed in April with a \$5.00 renewal fee, will definitely expire on May 1st of the same calendar year, and that after the latter date, the expiration certificate of registration may be restored upon payment of all accumulated annual renewal fees at the rate of \$5.00 per year, plus an additional \$10.00 for restoration of said license. When such a tender in full is made, the Optometry Board is legally bound to accept and restore the license.

We are of the opinion that the rule of the Optometry Board requiring an examination before restoration of an optometry license, is void, as made contrary to existing statutes on the subject. Said rule purports to restrict

Dr. J. F. Brawley

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May 13, 1938

a statutory right of restoration of license to an individual to an examination before the Board before restoration, and the Legislature did not intend an examination before the Board as a condition precedent to the right to restoration. In such cases, the Legislature intended only the payment of delinquent fees.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

Officers: Committee appointed by the Governor to supervise mixing and distribution of poison bait for insects are not officers or agents of the state and hence not immune from liability for tort.

July 19, 1938

7-20

Hon. Chas. D. Brandom
Prosecuting Attorney
Daviness County
Gallatin, Missouri



Dear Sir:

This will acknowledge receipt of your inquiry of June 18, 1938, which reads as follows:

"The question has arisen in this county in connection with the mixing of poison bait for grasshopper and army worm control as to the liability of the persons in charge with reference to any one working with the poison compound who might become injured or poisoned and as to how the matter should be handled to avoid such liability on the part of the committee of persons in charge.

"It seems that Governor Stark has appointed fifteen men of this county as a committee in charge and the work is all done under their instructions. Is their appointment by Governor Stark such that they would be considered agents of or a part of the Government and if so would they be personally liable for any injuries in connection with the matter?

"It seems that some of the counties have been contemplating incorporating under the Nonprofit Cooperative Association Statutes (Section 12676 and following R.S. Mo. 1929) in order to relieve any personal liability on any of the members in charge. But the question arises as to whether the poisoning of the grasshoppers and army worms would be within the powers granted such an association under the statute which article of the statute seems to deal more with the matter of marketing farm products. If incorporated as suggested, it would seem that any protection (if any) the members of the committee so appointed by the Governor might have by reason of government connection would be eliminated and their sole protection from liability would depend upon the corporation.

"I would like to have your opinion:

"1st. As to whether or not this committee is protected in any way from personal liability by reason of their appointment by Governor Stark.

"2nd. Would incorporation under Article 24, chapter 87, R.S. Mo. 1929 protect said committee members (which necessarily involves the question as to whether such grasshopper control comes within the statutes).

"3rd. Your suggestion as to how the matter should be handled for the protection of those in charge.

"4th. Would they be subject to the Social Security Act with reference to the employees?

"Inasmuch as the grasshopper season is now in full swing, I would like to hear from you immediately. No doubt, this matter has already

July 19, 1938

had your attention and you can furnish me with a copy of some opinion rendered, but if not I would like your opinion herein."

We have searched the laws and we are unable to find any statute empowering or directing the Governor to appoint such a committee as you inquire about. Therefore, we must conclude that such committee is appointed without authority of law and that it is accordingly an unofficial committee. Such committee was no doubt appointed in order to comply with rules of the department of the Federal Government which handled such matters.

Since the committee inquired about was not created by authority of law, the members thereof are not public officers. The accepted definition of public officers in this state is found in the case of *State ex rel v. Bus*, 135 Mo. l.c. 331-332, in the following language:

"A public office is defined to be 'the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' Mechem, Pub. Offices, 1. The individual who is invested with the authority and is required to perform the duties is a public officer."

By similar reasoning, the members of such committee are not employees of the state since there is no law of the state authorizing or directing such work to be done.

CONCLUSION

It is, therefore, our opinion that the members of the committee appointed by the Governor to supervise the mixing

July 19, 1938

and distribution of poison bait for insects are not officers or employees of the state and that they are not exempt from liability for tort by reason of their appointment by the Governor.

II

Your next inquiry is whether the committee inquired about could incorporate under the provisions of Article 24, Chapter 87, R.S. Mo. 1929. Section 12677 of said Article reads as follows:

"Eleven (11) or more persons, a majority of whom are residents of this state, engaged in the production of agricultural products, may form a non-profit co-operative association, without capital stock, under the provisions of this article, for the following purpose or purposes: To engage in any activity in connection with the marketing or selling of the agricultural products of its members or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof or the manufacturing, or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein. (Laws 1923, p. 111, Section 2.)"

The activity of fighting grasshoppers in which the committee is engaged might properly be classed as an activity in connection with the preserving of agricultural products. Under the above article, eleven (11) or more persons may incorporate into a non-profit cooperative association. However, it should be noted that the activities authorized to be engaged in by such an association are limited to those connected with the

July 19, 1938

agricultural products or by-products of the members of such associations. Therefore, if the committee inquired about consists of eleven (11) or more persons and they should incorporate under said Article 24 of Chapter 87, R. S. Mo. 1929, their activities would be limited to the protection of the agricultural products or by-products of the members of said association only. They could not engage generally in protecting the crops or products of other farmers.

CONCLUSION

It is, therefore, the opinion of this office that the committee appointed by the Governor to supervise the mixing and distribution of poison bait for insects can incorporate under the provisions of Article 24, Chapter 87, R. S. Mo. 1929, provided there are as many as eleven (11) of them, but the activities of such incorporated association would be limited to protecting the agricultural products or by-products of the members of such association only.

III

Your next question is whether the committee inquired about would be subject to the Social Security Act with respect to its employees.

We take it you have in mind Title IX of the U. S. Social Security Act, found at page 126 of the 1937 Cumulative Annual Pocket Part to Title 40-42 USCA. By Section 1107 of said Act, agricultural labor is expressly exempted from the operation of the law. We think that the activities inquired about would properly be classed as agricultural labor.

CONCLUSION

It is, therefore, the opinion of this office that the committee appointed by the Governor to supervise the mixing

Hon. Chas. D. Brandom

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July 19, 1938

and distribution of poison bait for insects would not be subject to the National Social Security Act with respect to the employees of such committee.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

HHK/w

ELECTIONS: Residence is a matter of intention.

September 28, 1938



Hon. Charles D. Brandom
Prosecuting Attorney
Davless County
Gallatin, Missouri

Dear Sir:

We have received your letter of September 20, 1938,
which reads as follows:

"I wish you would please furnish me with an opinion as soon as possible as to what constitutes a 'resident' of a township in the meaning of Section 12276 R.S. Missouri 1929, providing 'No person shall be eligible to any township office unless he shall be a qualified voter and a resident of such township.'

The particular case I have in mind is this: The president of one of the township boards of this county owns a farm in the township and retains a room there with some of his personal effects, but he operates and owns a business in another county where he rents a house for living purposes. He considers this county his legal residence and votes here. Is he eligible to hold the township office under the circumstances?"

In your letter quoted above you have set out Section 12276 R.S. Missouri 1929, in full. Conversely stated this statute provides that if a person is a qualified voter and a resident of a township he shall be eligible to hold a township office in the particular township.

We gather that the principal question about which you are concerned is whether or not the township officer you have described is, or can be as a matter of fact or law, a resident of the particular township under the circumstances. If this officer is a resident then apparently he is and has been for sometime a qualified voter, at least as far as the length of such residence is concerned.

The courts of this state have held many times that residence is largely a matter of intention. In the case of In Re: Lankford Estate, 272 Mo. 1, l. c. 9, the Court said:

Residence is largely a matter of intention. (Lankford vs. Gebhart, 130 Mo. 621.) This intention is to be deduced from the acts and utterances of the person whose residence is in issue."

The case of In Re: Ozias' Estate, 29 S.W. (2d) 240, decided by the Kansas City Court of Appeals is almost directly in point as to the facts. In that case the deceased and his wife owned and lived on a farm in Johnson County, Missouri, for about twelve years after their marriage. They then purchased a house in Kansas City, Missouri, and moved there. A year or two thereafter they purchased another house in Kansas City and moved to the second house. The Court set out other pertinent facts as follows:

"There was testimony tending to show that decedent retained control of his farm; that he spent week-ends with his wife in Kansas City; that he kept a bank account in Centerview and in Warrensburg in Johnson county; that he voted, when he did vote, at Centerview; that he told several of his friends and acquaintances that his home was on his farm; that he owned jointly with his wife a house in Kansas City, Jackson county, where his wife lived, and where he spent the weekends; that the telephone in the house in Kansas City was listed in the wife's name; that he rented a box at the post office in Centerview where he received mail; that he retained a room or rooms in the house on the farm furnished by him, and that this room or the rooms were occupied by him and his wife when there; or by him when there without his wife."

The principal question in the Ozias' Estate case was whether the deceased was a resident of Johnson County or Jackson County, and in which of the two counties the estate should be probated. In determining that the estate was properly probated in Johnson County and that the deceased was at all times a resident of Johnson County, the Court said:

"The ruling herein depends upon the proper construction of the word domicile. Our Supreme Court held in *Re Estate of Lankford*, 272 Mo. 1, 197 S.W. 147, that residence is largely a matter of intention, to be deduced from the acts of a person.

* * * * *

Bouv. Law Dict., Vol. 1, page 915. Proof of domicile, or legal residence, does not depend upon any particular fact, but upon whether all the facts and circumstances taken together tend to establish the fact. Engaging in business and voting at a particular place are evidence of domicile there, though not conclusive. *Hayes vs. Hayes*, 74 Ill. 312; *Inhabitants of East Livermore vs. Inhabitants of Farmington*, 74 Me. 154. To constitute a change of domicile three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicile, and (3) an intention of acquiring a new one. *Berry v. Wilcox*, 44 Neb. 82, 62 N.W. 249, 48 Am. St. Rep. 706. It has been held a wife's removal into another state for the benefit of her husband's health and a residence there for twelve years will not change the original domicile. *In re Reed's Will*, 48 Or. 500, 87 P. 763; *Ensor vs. Graff*, 43 Md. 291.

A person can have but one domicile, which, when once established, continues until he renounces it and takes up another

in its stead. It is not lost by temporary absence. The question is one of fact which is often difficult to determine. Words and Phrases, Second Series, Vol. 2, page 133; City of Lebanon vs. Biggers, 117 Ky. 430, 78 S.W. 213, 214. We hold there is substantial evidence of record to support the findings of fact, and we will not interfere with the judgment in this respect."

CONCLUSION

Under the rule that a person's residence is largely a matter of intention, we are of the opinion that the officer you have described is a resident of the township in which he was elected. He maintains a room in the house on his farm in such township which he appears to occupy occasionally. The fact that he "considers" his farm as his residence and that he votes there is the strongest evidence of his intention in this respect. Consequently this officer is eligible for township office under the terms of Section 12276 R.S. Missouri 1929.

Respectfully submitted,

J. F. ALLEBACH,
Assistant Attorney General

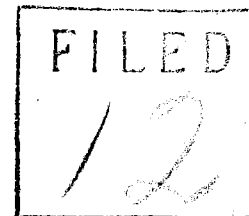
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA:MM

BALLOT TITLES: For constitutional amendments to be submitted November Election 1938 for Senate Joint and Concurrent Resolutions (1) No. 3 - Compensation of members of General Assembly; (2) No. 6 - Reelection of State Treasurer as own successor; (3) No. 7 - special tax for support of county hospitals.

January 8, 1938



Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Attention: Mr. Holman, Chief Clerk

Dear Sir:

Pursuant to your request of recent date, we are enclosing to you Ballot Titles for three of the Joint and Concurrent Resolutions of the 59th General Assembly, amending the Constitution of Missouri, as follows:

- (1) Senate Joint and Concurrent Resolution No. 3, pertaining to compensation of members of the General Assembly.
- (2) Senate Joint and Concurrent Resolution No. 6, making the State Treasurer eligible to reelection as his own successor.
- (3) Senate Joint and Concurrent Resolution No. 7, authorizing county courts to levy special tax for support of county hospitals.

We have your supplemental letter relative to Conference Committee Substitute for House Committee Substitute for House Joint and Concurrent Resolutions, Nos. 2 and 3, and will prepare and forward to you ballot title, as requested by you in accordance with your supplemental letter, shortly.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG
Encs.

BALLOT TITLE:

For Constitutional Amendment of Article IV,
Section 47 for Joint and Concurrent Resolutions
Nos. 2 and 3, pertaining to pensions or assist-
ance to persons over sixty-five years of age,
to be submitted at November Election, 1938.

January 14, 1938

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Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

We have for attention your supplemental
letter of recent date requesting that this Department
prepare Ballot Title for Constitutional Amendment,
in which you enclosed typewritten copy of Joint and
Concurrent Resolution, viz.:

Conference Committee Substitute
for Senate Committee Substitute
for House Committee Substitute
for House Joint and Concurrent
Resolutions Nos. 2 and 3, pertain-
ing to granting of pensions or
assistance to persons over sixty-
five years of age.

In accordance with your request we are herewith
submitting ballot title based on the Joint and Concurrent
Resolution in accordance with your finding of what the
Legislative Journals show with reference to said resolu-
tion.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

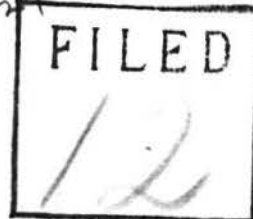
J. E. TAYLOR
(Acting) Attorney-General

CRH:EG
Enc.

COUNTY COURTS:

May take possession of rooms vacated
by prosecuting attorney and may require
personal property of county to be returned
to the courthouse. .

January 21, 1938



Mr. John B. Brooks,
Presiding Judge,
Grundy County,
Trenton, Missouri.

Dear Sir:

We have your letter of January 15, 1938, in which it
is contained a request for an opinion as follows:

"When Charles Hoover, the present Prosec-
cuting Attorney of Grundy County was
elected Prosecuting Attorney in the year
1936, over Rex H. Moore, the County Court
of Grundy County of which the writer is
Presiding Judge, had designated three
rooms on the Third Floor of the Court
House, well lighted, well heated, with
toilet facilities, and all reasonable
conveniences, as and for the office of
the Prosecuting Attorney of Grundy
County, which rooms had been occupied
by Rex H. Moore as Prosecuting Attorney.

Also, the County Court furnished a set
of Missouri Reports, a Life-Time Missouri
Digest, and a set of the Missouri Annotat-
ed Statutes, together with some other law
books, which Mr. Moore had advised us it
was our duty to purchase.

When Charles Hoover took charge of the
office of Prosecuting Attorney on the
first day of January, 1937, he (without
the consent of the County Court) moved
all of these law books out of the office
of the Prosecuting Attorney and out of
the Court House, and established himself
in another office, adjoining the office
of another Attorney, in a building across
the street from the Court House.

1/21/38

Charles Hoover also locked the three rooms formerly used as the office of the Prosecuting Attorney of Grundy County, has carried the key during all of the year 1937 and until the present day--claiming the right to lock and keep locked these three good rooms on the Third Floor of the Court House in Trenton--claiming that since these three rooms had been set apart as and for the office of the Prosecuting Attorney, he has a right to keep them empty and keep them locked merely by reason of the fact that he is the Prosecuting Attorney and that these rooms had been set apart as and for the office of the Prosecuting Attorney.

We have received some advice, That the County Court is not under any legal obligation to furnish any office to the Prosecuting Attorney anywhere. And, we have been further advised that even after we have set apart these three rooms as and for the office of the Prosecuting Attorney, he has only the right to occupy them-- and that if he does not occupy them and use them as and for the office of the Prosecuting Attorney, he has no right to lock the rooms and keep them locked--but, that the County Court has the right to designate the use of these vacant rooms (in the absence of and use by the Prosecuting Attorney) under the provisions of R.S. 1929, Sec. 2078.

The County Court would be glad to have your good opinion at your earliest convenience as to the rights of the County Court with reference to these three vacant rooms, in view of the fact that there has been demands for space in the Court House during the past year and even at present, and we desire to use these three vacant rooms rather than let them remain vacant and idle.

We would be glad to have your opinion on

this point separately from the other question presented by us on this date."

Section 2078 R.S. Mo. 1929 provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Under Section 8526 R.S. Mo. 1929 the sheriff or jailer should have the custody and keeping in charge of the jail. This section was upheld in the case of Kansas City Sanitary Company v. Laclede County, 269 S.W. 395, l.c. 398 in which the court held:

"***** Under section 12549 the jail is required to be kept in good and sufficient condition and under section 12551 the sheriff of the county has the custody, keeping, and charge of the jail. He therefore has full authority to purchase all supplies necessary to keep such jail in good and sufficient condition, which includes sanitary condition, and needed no authorization by the county court to render the county liable for purchases for such jail for such purpose. Harkreader v. Vernon County, 216 Mo. 696, 116 S.W. 523."

It has been a mooted question for sometime to state what the duties of the county court are in reference to furnishing offices janitor services, stationery, postage, and equipment for the county officers. The courts have been very liberal in their decisions in the furnishing of offices, etc., but the statutes do not set out very clearly what the county courts must do in furnishing such facilities.

In the case of Saylor v. Nodaway County, 159 Mo. 520,

under a statute providing that the necessary expenses incurred by the probate court, "for books, stationery, furniture, fuel and other necessaries shall be paid by the county", the court held that the county court was compelled to pay the probate judge for postage stamps in the discharge of his official duty.

In the case of *Ewing v. Vernon County*, 216 Mo. 681, 1.c. 692, involving what the recorder may have for equipment and expenses, the court said:

"***** There is not a word in the chapter (chap. 147), relating to providing chairs, desks, pens, ink, stationery, stoves, racks, tables, spittoons, or other office paraphernalia. There is even no word relating to a room in which to keep his office or fuel to heat it. But when we read other provisions of the general statutes relating to building a courthouse and heed the underlying theory that county offices should be kept there, all questions relating to a room vanish; and when we read in section 9057 that the recorder of deeds must give a bond conditioned that he will deliver up to his successor among other things 'the furniture and apparatus belonging to the office, whole, safe, and undefaced,' we but gather (what we knew before) that the furniture and apparatus do not belong to the recorder, but to the county, and under Revised Statutes 1899, section 1777, are under the control and management of the county court.*****."

In the companion case of *Ewing v. Vernon County*, 216 Mo. 698, the court held that the sheriff's office is entitled to janitor service at the expense of the county and it is the duty of the county court to reimburse the sheriff for outlay for such service.

In *Buchanan v. Ralls County*, 283 Mo. 10, the Supreme Court held that it was the duty of the county to furnish the county treasurer with suitable office space, heat, lights and furniture service under the statute. Section 12136 R. S. Mo. 1929 which provides that:

"*****. The county court shall provide said county treasurer with suitable rooms and secure a vault in the courthouse or other building occupied by county officers, *****."

In many instances there are no statutory provisions for certain county and state officers in what they shall have for expenses and office equipment, but we find that it has been the attitude of the Supreme Court that where there is an express grant of power, it carries with it special implied powers as are necessary to carry out the purposes of the authority granted.

In all of these cases the statutes have not been explicit on what should be furnished each county official yet the courts have adopted a liberal view in the interest of efficiency of the offices and the officers in the performance of their duties. The statute does not set out anything as to furnishing office equipment to the prosecuting attorney. According to your request several provisions were made for the prosecuting attorney and he has seen fit not to take advantage of them and it is our opinion that no further effort be made to have him use the rooms provided for him.

Under Section 2078 R.S. Mo. 1929 as above set out the county court not only has control of the county buildings, but also the control of the personal property of the county. The prosecuting attorney in removing the office fixtures and law library has done so without any authority from the county court and did render the personal property of the county void as to any blanket insurance held on the property by the court. In the case of State ex rel. Buckner, v. McElroy, 309 Mo. 595, the legislature of this state attempted to pass an act which would place the control of several of the county buildings under the parole board which consisted of circuit judges of Jackson County, Missouri. This act was in direct violation and unconstitutional and was so held by the court. It was unconstitutional for the reason that it violated Section 36 of Article 6 of the Missouri State Constitution which reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as

may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

The court in this case also held as follows:

"The gist of this case hovers around Section 36 of Article VI of the Missouri Constitution for 1875. This section reads: 'In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law.' By law these courts have been established so as to consist of a presiding judge (to be elected by the whole county) and two associate or district judges to be chosen by the electorate of their respective districts. But what we want to emphasize is the fact that the court is of constitutional origin, and its jurisdiction fixed by the Constitution. In the language of the organic law such court 'shall have jurisdiction to transact all county ***** business.' Other business may be added to its jurisdiction by law, but no law can take from it that which the Constitution expressly gives, i.e., that it shall transact all county business. By Section 2574, Revised Statutes 1919, such court is given control of all county property, both real and personal, and with it the added authority to purchase, lease and receive by donation any property, real or personal, for the county. Likewise we find the power to sell property belonging to the county, and to audit and settle all de-

mands against the county. Much of this section has stood for many years, and is and was a legislative construction of the Constitution when it speaks of transacting county business. The law-makers understood that the transacting of county business meant the control of all county property, whether such property was in the nature of either penal or eleemosynary institutions. The law-makers would have just as much power to place the county jail, or the poor farm under the control of a parole board, as they would have to place the three institutions mentioned in the pleadings herein. Or, to broaden the field, the divers state eleemosynary and penal institutions of the State could as well be placed in a board of supreme or circuit judges. The management of county and state property, having no direct connection with the work of the judges, should not be placed in the hands of the judges. It has been ruled that courts can appoint agents and officers connected with the court and look after the property wherein the courts are held, and many things incidental to the workings of courts, but such is not the case here. For that reason we do not discuss or pass upon such matters. Here the power is conferred, by the Constitution, upon the County Court of Jackson County to manage and control these institutions and no mere legislative act can thwart the Constitution.*****."

CONCLUSION

In conclusion it is the opinion of this office that the county court is the sole custodian of the courthouse but

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not that part of the courthouse used as a jail. In view of the fact that there have been demands for space in the courthouse during the past year and even at present, and the prosecuting attorney has seen fit to vacate the three rooms assigned to him, the county court has not only full authority to take possession of the rooms but also has authority to demand that the personal property of the county be returned to the courthouse.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

NEWSPAPERS: If newspaper moves from one town to another in a different county, in order to qualify for public advertisements, it must be published regularly for a period of three years or more at its last location.

February 7, 1938



Honorable Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your request under date of January 31st, last, relative to an opinion on the qualification necessary for newspapers to publish public advertisements, which letter is as follows:

I.

"Agreeable with our conversation of even date, I am reducing to a memo the substance of our conversation.

"The question has been raised concerning the status of a newspaper when moved from one seat of publication to another.

"You will recall that the General Assembly changed the law concerning the qualification of a newspaper for handling public notices or legal publications; changing the period of required continuous publication from one year to three years. Now the question is being raised whether or not a newspaper that is qualified can change its seat of publication and retain its standing as a qualified newspaper. It naturally follows that there is involved in this question that of the laws of retention of partial qualification.

"To use a purely hypothetical case, suppose the owner of the Mokane Missourian should conclude to cater to their present circulation

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from a publication seat in Jefferson City, and also develop a Cole County constituency. Of course, I think it follows that the paper would lose its qualification in so far as Callaway County is concerned, but on the other hand, would it continue to be a qualified publication in Cole County?

"Another question that is involved is presented in this hypothetical case. Suppose that the same Mokane Missourian had been published for only two years in Callaway County, and had accomplished only two-thirds of the required qualification, and should be moved. Would the paper in its new seat stand two-thirds qualified or lose the benefit of the time factor involved?"

We assume by reference to the hypothetical case you set out in the above letter that your inquiry is confined to what might be called the country press or newspapers published in the several counties of the state and not in cities of one hundred thousand population or more.

II.

The statute pertaining to this matter, as set forth in the Laws of Missouri, 1937, Section 13775, page 432, is as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the postoffice as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of

time. Provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week, on the same day of each week, and further provided that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this act. Provided, further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications prior to the effective date of this act. All laws or parts of laws in conflict with this section except Sections 13777, 13778, 13779, 7631, 7632, and 7633, Revised Statutes of Missouri, 1929, are hereby repealed." (Emphasis ours.)

The salient feature of the above section pertaining to this case is that the newspaper shall be published in the county where located.

III.

No apt decision, or decisions, from the Missouri courts relative to the precise question involved is to be found. However, the clearest and most pertinent meaning of the word "publish", in relation to a newspaper is found in the following two cases, namely:

In Age-Herald Publishing Co. v. Huddleston, (Ala.) 92 So. 1. c. 197, the court said:

"To publish a newspaper at any place is, according to common understanding, to compose, print, issue and distribute it to the public, especially its subscribers, at and from that place."

Again, in State v. Board of County Commissioners, et al., 77 Mont. 316, 1. c. 324, the court said:

"We have heretofore held that the word "published", as used in the statute, evidently means printed and published. It refers to a newspaper having its home in the county (Strange v. Esval, 67 Mont. 301, 215 Pac. 807), and, whether such declaration was or was not necessary to a decision in that case it correctly interprets the statute and expresses the legislative intent in its passage. To hold otherwise would defeat the purpose of the Act by permitting a large concern situated in a city within the state, or even without the state, to control the county printing in any number of counties by establishing therein and furnishing such offices with papers for distribution within the counties."

Hence, in your first hypothetical question, we agree with you that if the owner of the Mokane Missourian should move its publication seat to Jefferson City, in Cole County, and compose, print and issue the paper therefrom, then, even though circulated in Callaway County, such paper would lose its qualification in so far as Callaway County is concerned, but we will answer the further part of your question, namely, would such paper continue to be a qualified publication in Cole County, in the negative.

IV.

Answering your further question in your hypothetical case, namely, supposing that the Mokane Missourian had been published for only two years in Callaway County, then if the paper moved its publication seat to Jefferson City, would the paper in its new seat be allowed the benefit of the two years' time spent while located in Callaway County, we would say no, because the aforesaid Section 13775 makes no provision for partial qualification, but, on the other hand, clearly states that the newspaper shall be published in the county where located, and shall have been published regularly and consecutively for a period of three years. As the statute reads, there is nothing more nor nothing less so far as the time factor is concerned.

2/7/38

If anything more is needed, an analagous case is found in the case of *In re Miller*, (Calif.) 113 Pac. 690, wherein the court held that a paper could not qualify because it was not published in the city where the advertisement or notice was given, or made, for a period of one year, but was only published at such place for a part of the year. Our statute requires a three-year period in place of a one-year period, but the analogy is pertinent in that if a paper was published for a less period than three years, the same situation would arise as under the California statute providing for a one-year period.

CONCLUSION.

1. A newspaper, in order to qualify to print public advertisements, must be composed, printed and issued to the public and its subscribers from and in the county where its business or printing office is located.

2. There is no so-called partial qualification with respect to time of location of publication, but the period required is a full three-year period at the publication seat.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

JWB:HR

NOTARY PUBLIC:

Notary public may hold one commission at a time.

Only one notary public commission may be issued to a person during any one four-year period.

February 21, 1938

Honorable Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This is to acknowledge receipt of yours of February 15, 1938, requesting an official opinion from this department which is as follows:

"We are today in receipt of a letter from a notary who was commissioned for St. Louis City but who also desires to qualify in St. Charles County.

Will you please give us an opinion as to whether or not we can issue two commissions to one person. Thanks."

Notaries public are officers appointed by the governor by virtue of the provisions of Section 11738 R.S. Mo. 1929, which is as follows:

"The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. Each such notary shall hold office for four years, but no person shall be appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state. It shall be the duty of every such notary when he performs an official act outside his or her own county to state in his or her certificate that the county in which such act is performed adjoins the county within and for which he was appointed and commissioned."

2-23
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12

While this section does not specifically provide that a person cannot hold two notary commissions, Section 11741 R.S. Mo. 1929 sheds some light on this question, which section reads as follows:

"Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words 'notary public,' the name of the county or city, if appointed for such city, in which he resides and has his office, and the name of the state; shall designate in writing, in any certificate signed by him, the date of the expiration of his commission. No notary public shall change his seal during the term for which he is appointed, and he shall authenticate therewith all his official acts, and the record and copies, certified by the proper custodian thereof, shall be received in evidence."

In arriving at the full meaning of the Notary Public Act, both of these sections should be read together.

In construing statutes relating to one subject matter, the provisions of such statutes should be construed together and construed so as to harmonize to effectuate all the provisions if possible. *Blyston-Spencer v. United Railways Company of St. Louis*, 152 Mo. App. 118.

Said Section 11738 provides that each notary public shall hold office for four years and Section 11741 requires the notary to obtain a seal, showing the county or city, if appointed in such city, in which he resides. From a reading of the foregoing sections, it appears that the lawmakers intended that a notary public should be in possession of only one commission at a time and that for a period of four years; and as a person can have only one residence, it is evident that lawmakers intended for the notary public to possess only one commission at a time because said Section 11741 provides that the seal of the notary public should state the county of his residence and that he should not change the seal during his term.

Prohibiting the notary public from changing his seal during his term further evidences the fact that he would not be authorized to hold two different commissions at the same

February 21, 1938

time for if he did it would necessitate the changing of his seal for the second commission. Such seal for the second commission showing the county to which it was issued and the residence of the party to whom it was issued which would be in conflict with the information shown on the seal used under the first commission. In other words, one or the other of the seals could not state the true facts as to the residence of the notary.

CONCLUSION

This office is, therefore, of the opinion that no person is authorized to hold at the same time notary public commissions issued to him for different counties in the state of Missouri.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

CONSTITUTIONAL ~~EMENDMENT~~: Ballot title.

July 8, 1938

7-12



Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

In answer to your request of July 7, 1938, submitting to this office the initiative petition containing proposal to amend various sections of Article IV of the Constitution, we submit herewith the following as a valid title for said measure in accordance with Section 10706 R. S. Missouri 1929:

"Proposed constitutional amendment relating to legislative proceedings, apportionment of senators and representatives, their qualifications, election, compensation, tenure, redistricting, limiting number of legislative employees, creating Statute and Revision Commission, home loan bank, authorizing bond issue, allocating one-third of revenue to schools, two per cent to state parks, requiring 35,000 miles of rural roads, providing for granting public moneys, for pensioning firemen, their widows and children, the blind, and persons over sixty-five years, and providing the initiative and referendum except as to public matters declared to be an emergency by the legislature and authorizing the earmarking of taxes for special purposes."

Respectfully submitted,

APPROVED:

FRANKLIN E. REAGAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

FER:MM

BALLOT TITLE: For Constitutional Amendment to Article X,
Constitution, providing plan of assessment,
valuation and taxation; appropriating bond money;
prohibiting local property tax on motor vehicles;
providing State maintained school system.

July 11, 1938.

Honorable Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Attention Mr. Holman, Chief Clerk.

Dear Sir:

Pursuant to your request of recent date,
we are enclosing Ballot Title for Initiative Petition
No. _____, proposing to amend Article X of the Con-
stitution of Missouri.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR



CONSTITUTIONAL

AMENDMENT

No. _____

Amendment to Article X, Constitution, providing
plan of assessment, valuation and taxation; appropriating
bond money; prohibiting local property tax on motor vehicles;
providing State maintained school system.

BALLOT TITLE: For constitutional amendment repealing
Section 10, Article IX, of Constitution, and
enacting new section in lieu thereof, pro-
viding Sheriffs and Coroners may be eligible
to succeed themselves in office.

July 12, 1938

7-12



Honorable Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Attention Mr. Holman, Chief Clerk.

Dear Sir:

Pursuant to your request of July 7, 1938,
we are enclosing to you Ballot Title prepared by
this department in connection with the Initiative
Petition proposing to amend Section 10, Article
IX, of the Missouri Constitution, and adopting
a new section in lieu thereof.

Yours very truly,

COVELL R. HEWITT,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

CRH:HR

Encs.

CONSTITUTIONAL

AMENDMENT

No. _____

(Submitted by Initiative Petition)

Amendment repealing Section 10, Article IX,
of Constitution, and enacting new section in lieu
thereof, providing Sheriffs and Coroners may be
eligible to succeed themselves in office.

BALLOT TITLE - For Constitutional Amendment amending
Article IV by addition of Section
44aa

August 19, 1938

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri



Attention of Mr. Holman, Chief Clerk

Dear Sir:

On July 12, 1938, pursuant to your request, we submitted to you ballot title in connection with the amendment to Article IV of the Missouri Constitution, proposing a new section to be added between Section 44a and 44b, to be known and numbered as Section 44aa.

Since that time we have discovered that the ballot title should have used the words 'motor fuel tax' instead of 'gasoline tax.'

We are, therefore, submitting a new ballot title for said proposed amendment which is hereto attached.

Yours very truly

J. E. TAYLOR
(Acting) Attorney General

JET LC

Inclosure

CONSTITUTIONAL

AMENDMENT

No. _____

(Submitted by Initiative Petition)

Amending Article IV, Constitution, by adding
new section concerning state highways, fixing
motor fuel tax, prescribing powers relating thereto
of General Assembly and State Highway Commission.

COUNTY OFFICES: Tenure of office of persons appointed to fill various offices; tenure when elected to fill unexpired term.

November 21, 1938

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri



Dear Mr. Brown:

This Department acknowledges receipt of your request for an opinion, dated November 1, 1938; said request being as follows:

"In keeping with our telephone conversation to today, we are asking for an opinion concerning a sheriff-elect; whether the Secretary of State Department will issue him a commission to take charge of the office immediately after the General Election on November 8, 1938, upon due notice from the county clerk that the vote has been canvassed and the result made known.

"In this particular case the sheriff now serving was appointed by the county court to fill an unexpired term of a sheriff, deceased.

"Also in this connection please advise whether a probate judge, who is filling an unexpired term by an appointment by the Governor, will hold office until January 1, 1939, or if the man elected will be entitled to his commission upon proper certification from the county clerk of the county from which he is elected. Then too, would this apply to a county clerk, a circuit clerk, the judges of the county court, prosecuting attorney and collector of revenue."

As your request asks for rulings on various offices and as the statutes governing the same must be applied to each individual office, it is necessary that we rule separately on each office.

I.

Sheriff Elected to Fill an Unexpired Term.

Section 11523, R. S. Mo. 1929, relates to vacancies in the office of sheriff, and is as follows:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified; but while such vacancy continues, any writ or process directed to the said sheriff and in his hands at the time such vacancy occurs, remaining unexecuted, and any writ or process issued after such vacancy, may be served by any person selected by the plaintiff, his agent or attorney, at the risk of such plaintiff; and the clerk of any court out of which such writ or process shall issue shall indorse on such

writ or process the authority to such person to execute and return the same, and shall state on such indorsement that the authority thus given is 'at the request and risk of the plaintiff;' and the person so named in said writ or process may proceed to execute and return said process, as sheriffs are by the law required to do. Such election shall be held within thirty days after the vacancy occurs, and the county court shall cause notice of the same to be published in some newspaper published within the county, and if there should be no newspaper published in said county, shall then give notice, by ten written handbills, posted up in ten of the most public places in the county, for twenty days prior to the day of holding such election. Upon the occurrence of such vacancy, it shall be the duty of the presiding justice of the county court, if such court be not then in session, to call a special term thereof, and cause said election to be held in pursuance of the provisions of this section, and the election laws regulating general elections in this state."

Assuming that the person elected to the office of sheriff at the last General Election, which was November 8th, to fill the unexpired term, or that the vacancy occurred more than nine months and that a special election was held, we think the results in either event would be the same, and are of the opinion that the person elected either at the General Election or special election, according to the terms of the statute quoted supra, could assume the duties of the office as soon as proper certification of the results of the election are obtained and said person can duly qualify.

II.

Probate Judge.

The statutes relating to probate judge and vacancies are Sections 2047 and 2048, R. S. Mo. 1929. Section 2048 is as follows:

"When a vacancy shall occur in the office of Judge of probate, it shall be the duty of the clerk of the circuit court to certify the fact to the governor, who shall fill such vacancy by appointing some eligible person to said office, who, when qualified, shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

Appointment to vacancy in the office of probate judge is authorized under Section 10216, R. S. Mo. 1929. Section 10216 is a general section empowering the Governor to fill different offices in cases of vacancies and when the statute governing the particular office relating to vacancies does not fix the time or refer to the time the appointee is to hold the office, then said Section 10216 governs the tenure of office. Section 2048, quoted supra, states that the person who is appointed by the Governor "shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

We think that section fixes the time when the person elected to fill the unexpired term can assume office, and we are therefore of the opinion that a person elected to fill the unexpired term of the probate judge can assume his duties as soon after the general election as the official vote is ascertained and said person qualifies.

The above ruling with reference to probate judge relates only to the time of assuming office when a person is elected to fill an unexpired term. Therefore, it would be necessary to further rule on the question as presented in

your letter, as to the tenure of office of a person who fills an unexpired term, if the vacancy occurred during the last two years of the regular term.

The election to fill the office of probate judge is held every four years. This being the year of 1938, the office of probate judge throughout the State was included in the various offices for election. Section 2047, supra, makes provision for the election of a probate judge every four years and states that the person so elected "shall enter upon the discharge of his duties on the first day of January ensuing his election and continue in office for four years and until his successor shall be duly elected and qualified."

Assuming therefore, after the General Election of 1938, a person is appointed to fill the vacancy in the office of probate judge, the question arises, would such person hold the office until the November Election of 1938 or until January 1, 1939? The question of a short term and a long term election is to be considered. As the statute uses the expression, "shall continue in office until the next general election, when a successor shall be elected for the unexpired term," it might be argued that the unexpired term is the short term of approximately two months and that at the regular time for the election of probate judge, and such a condition exists, there should be a candidate for the short term and likewise a candidate for the long term.

A similar question relating to a vacancy in the office of the Prosecuting Attorney of the City of St. Louis was before the court in the case of State v. Schweitzer, 258 S. W. 435. We quote extensively from the opinion, as it will have a bearing on a number of other offices which are included in your inquiry, (l. c. 438-439):

"Said section authorizes the Governor to fill the vacancy until the next regular election for prosecuting attorney. Such regular election can mean only

the election for the full term of four years. State ex rel. v. Roach, 269 Mo. loc. cit. 508, 192 S. W. 745. If the vacancy and relator's appointment thereto had occurred prior to the election of 1920, there is no authority found under section 782 to elect any person for the remaining two-year term, because the election of 1920 would not have been the next regular election for said office. Only by holding that section 4786 applies in such case could the remainder of the regular term have been filled at the 1920 election. It is apparent that all of said sections must be construed together.

"The regular election for prosecuting attorney was for the four-year term, beginning January 1, 1923. Sections 702, 730, R. S. 1919. The prosecuting attorney elected in 1918 would have been entitled to hold office until midnight December 31, 1922. The person elected for the succeeding regular term would not have been entitled to take office, under ordinary conditions, until January 1, 1923, unless the fact that the appointee to fill the vacancy could only hold until the next regular election to fill such office would authorize the person elected for the regular term to take over said office prior to January 1, 1923. This is a question which is not before us, and upon which we express no opinion.

"It is exceedingly unlikely that the Legislature intended to provide for a separate election to fill an unexpired term of less than two months,

and such should not be held to have been its intention, unless the Legislature has clearly said so. Quite the contrary intent is evidenced in section 4786. Note how broad and sweeping is the language, 'Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office,' except, etc., such vacancy shall be filled by appointment of the Governor until the first Monday in January following. But, if the vacancy occurs prior to the election coming on before the regular election to fill such office, the vacancy from January 1st, following such prior election, to the end of the regular term shall be filled at such prior election. The section is all comprehensive in its scope and meaning, and no vacancy in any office not specifically excepted from its application can be filled in any other manner. Outside of the offices of lieutenant governor, state senator, representative, sheriff, and coroner, no offices are specifically excepted by the language of the section. The Constitution itself makes full provision in the case of vacancies in the offices named. Unless a clear contrary provision has otherwise been made by the Legislature, section 4786 applies to vacancies in all state and county offices to be filled by election. Such clear exception is noted in section 2374, R. S. 1919, whereby a vacancy in the office of judge of any court of record may be filled by appointment of the Governor until the next general election held after such vacancy occurs, 'when the same shall be filled by election for the residue of the unexpired term.' Said section and

section 4786 were construed together in State ex inf. v. Amick, 247 Mo. 271, loc. cit. 291, 152 S. W. 591. Section 2111 makes a similar provision as to filling vacancies in the office of clerks of courts of record."

The above decision indicates that there is no such thing as a short term when applied to the facts which we are assuming, but states that the question is not before the court and express no opinion. However, the expression by the court, "It is exceedingly unlikely that the Legislature intended to provide for a separate election to fill an unexpired term of less than two months, and such should not be held to have been its intention, unless the Legislature has clearly said so," is highly significant that there should not be an election for a short term. The test appears to be in the wording of the statute relative to filling the vacancy in the particular office. The court in the Schweitzer decision states:

"Such clear exception is noted in section 2374, R. S. 1919, whereby a vacancy in the office of judge of any court of record may be filled by appointment of the Governor until the next general election held after such vacancy occurs, 'when the same shall be filled by election for the residue of the unexpired term.'"

The statute relating to vacancies in the office of probate judge having a similar provision, we are of the opinion that when a person is filling an unexpired term for the last two years of the regular term of probate judge, said person holds the office until after the general election and relinquishes the same to the person who is elected to the short term. But if no person files for the office of probate judge for the short term, then said person so holding the appointment would not relinquish the office until January 1st, at which time the regularly elected person would assume office.

III.

County Clerk.

The section dealing with vacancies in the office of county clerk, is Section 11665, R. S. Mo. 1929, which is as follows:

"When any vacancy shall occur in the office of any clerk of a court of record by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

Section 10216, R. S. Mo. 1929, is a general section relating to the powers of the Governor to fill vacancies when there is no specific statute governing vacancies in a particular office.

Assuming as we did in the case of the probate judge in the first instance, that the vacancy occurred in the first two years after the regular election to fill the office of county clerk, it is our opinion that the person appointed will hold the office until the next general election, which will be approximately the middle of the term, and according to the terms of Section 11665, supra, the person elected to fill the office for the unexpired term can assume office as soon as the vote is determined and such person can qualify. But if the vacancy occur in the last two years of the regular term, then, according to the same logic as applied in the case of probate judge and according to the exception in the Schweitzer decision, there would be created the long and short term question. If no one filed for the short term, under the phrase, "for the remainder of the term," the person

so appointed would hold until January 1st, at which time the regularly elected county clerk would assume his duties, but if a candidate filed for the short term, being the time between the November Election and January 1st, the person elected for the short term could assume office immediately after the vote is ascertained at the November Election and as soon as he could qualify.

IV

Judges of County Court.

Vacancies in the county court are filled under Section 2075, R. S. Mo. 1929. The phrase "who shall fill such vacancy as provided by law," contained in Section 2075, refers to the power of the Governor under Section 10216, supra. Said section contains the following clause:

"* *; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election --at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: * *"

Under Section 2073, R. S. Mo. 1929, it is provided that two district members of the county court shall be elected every two years and hold office until their successors are duly elected and qualified and that a presiding judge shall be elected every four years. Because Section 2075, R. S. Mo. 1929, relating to the vacancies in offices of county judges, uses the expression, "who shall fill such vacancy

as provided by law," and contains no other provision as to the tenure of office of county judges appointed, the provision for the tenure of office must be determined by Section 10216, quoted supra.

Applying the logic of the decision in the Schweitzer Case, we are of the opinion that in the case of two district judges holding appointments, that said district judges would continue in office until January 1st of the year in which the regularly elected judges would assume office. In the case of a presiding judge, if the vacancy occurred in the first two years, the person appointed by the Governor would hold office in accordance with the provisions of Section 10216, R. S. Mo. 1929, until the first Monday in January next following the first ensuing general election, at which time the person elected to fill out the unexpired term could qualify and assume office. It is our further opinion that the person elected for the unexpired term in accordance with the provisions of Section 10216 would hold office until January 1st, at which time the regularly elected presiding judge would assume office.

V.

Prosecuting Attorney

Section 11363, R. S. Mo. 1929, contains the provisions for filling vacancies in the office of prosecuting attorney, and is as follows:

"If any vacancy shall happen from any cause in the office of the attorney-general, circuit attorney, prosecuting attorney or assistant prosecuting attorney, the governor, upon being satisfied that such vacancy exists, shall appoint some competent person to fill the same until the next regular election for attorney-general, prosecuting attorney or assistant prosecuting attorney, as the case may be."

The office of prosecuting attorney is for a term of two years. Section 11363, quoted supra, uses the expression, "shall appoint some competent person to fill the same until the next regular election."

From the decision of State v. Schweitzer, from which we quoted extensively in our opinion relating to the office of probate judge, we are of the opinion that no short term exists between the November election in the case of a vacancy in the office of prosecuting attorney and appointment by the Governor and January 1st of the regular term, at which time the regularly elected prosecuting attorney assumes office. We base our conclusion on the following statement of the court in the Schweitzer Case, l. c. 439:

"It is our conclusion that no short or unexpired term existed between the November, 1922, election and January 1st following; that relator was appointed for the term expiring December 31, 1922, and thereafter until his duly elected and commissioned successor had qualified."

VI.

County Collector.

Section 10216, R. S. Mo. 1929, referred to frequently throughout this opinion, contains the following provisions:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such

appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

We are unable to locate any specific section dealing with the appointment of a person to fill the unexpired term of a vacancy in the office of collector. Therefore, the general section relating to vacancies, quoted supra, governs the situation.

Section 9883, R. S. Mo. 1929, relates to the tenure of office of the collector, and is as follows:

"The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified; Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

Nov. 21, 1938

The expiration of the term is governed by Section 9902, R. S. Mo. 1929, which contains the following provision:

"The terms for which collectors are elected shall expire on the first Monday in March of the year in which they are required to make their last final settlement for the tax book which was to be collected by them."

This being the year in which a regular election is conducted for the filling of the office of collector, and Section 10216, supra, contains the provision:

"Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date.",

therefore, we are of the opinion that a person appointed to fill the unexpired term of the collector would hold such office until March 1, 1939.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

MOTOR VEHICLES: Municipal courts are not required to report violations of city ordinances in reference to motor vehicles to the Commissioner of Motor Vehicles.

December 21, 1938

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Attention Mr. V. H. Steward
Commissioner of Motor Vehicles

Dear Sir:

We have your letter of December 20, 1938, requesting an opinion from this department, which reads as follows:

"We would appreciate receiving an opinion from your office in connection with Paragraph b, of Section 17, Missouri State Drivers' License Law.

"It is quite often the case that the operators of motor vehicles are arrested and arraigned in police or municipal courts and charged with offenses which are included in Section 18. These offenses are either felonies or graduated felonies, but it appears that practically all of the cities have ordinances which provide for the prosecution and conviction in their courts of defendants charged with this sort of violation. We would like to know if this Drivers' License Act requires that these municipal courts report to the Commissioner of Motor Vehicles convictions upon these violations.

"It would most certainly seem to be reasonable that they should either report these convictions or that the disposition of such cases be referred to the prosecuting attorneys having jurisdiction."

12-22
FILED

12

Section 7780, Session Laws of Missouri, 1935, page 294, reads in part as follows:

"(b) Municipalities may, by ordinance, make additional rules of the road or traffic regulations to meet their needs and traffic conditions; * * *

"(c) * * * Provided, however, that municipalities may * * * require operators of motor vehicles residing within their limits to submit to reasonable examinations and investigation as to their physical fitness and competency to operate motor vehicles, and to obtain a license to so operate such motor vehicles and pay a fee therefor of not more than fifty cents (50¢) for two (2) years."

Under the above partial sections, municipalities have been authorized to regulate the rules of the road and provide for the issuance of city drivers' licenses, but such rules and regulations are governed and regulated either by city charters or by municipal ordinances.

Section 17, paragraph (b), Session Laws of Missouri, 1937, page 376, reads as follows:

"Every court having jurisdiction over offenses committed under this act or under the provisions of any statute of this State regulating the operation of motor vehicles on highways, or any felony in the commission of which a motor vehicle is used, shall forward to the commissioner a record of the conviction of any person in said court for a violation of any of said laws, and every such court, except justice of the peace courts, and courts of criminal correction in the City of St. Louis shall have the power of suspending or revoking the license of any licensee under this act or the certificates of registered chauffeurs or registered operators under Sections 7765 and 7766, Revised Statutes

of Missouri, 1929, and amendments thereto, and shall certify to the commissioner a record of such suspension or revocation. Every justice of the peace and each judge of the courts of criminal correction of the City of St. Louis shall forward to the commissioner a record of the conviction of any person in his court for a violation of any of said laws for which he shall receive a fee of fifty cents to be taxed as costs in the case, and may recommend to the commissioner a suspension or revocation of said person's license or the certificate of such chauffeur or registered operator. The commissioner may suspend or revoke the license or certificates of any of the persons convicted as aforesaid."

Section 18, Session Laws of Missouri, 1937, page 377, reads as follows:

"The commissioner shall forthwith revoke the license of any operator, registered operator or chauffeur upon receiving a record of such operator's, registered operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

"1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle;

"2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;

"3. Any felony in the commission of which a motor vehicle is used."

Under Section 17, paragraph (b), the law prescribes that "every court having jurisdiction over offenses committed under this act or under the provisions of any statute

of this state regulating the operation of motor vehicles on highways, or any felony in the commission of which a motor vehicle is used, shall forward to the commissioner a record," etc. Under this paragraph the state law specifically says that every court having jurisdiction over offenses committed "under this act or under the provisions of any statute of this state" --and does not say "under any city ordinance or city charter"--"shall forward to the commissioner a record," etc. It will also be noticed under this paragraph that after a record of the conviction has been sent to the commissioner of motor vehicles under said paragraph, the commissioner may revoke the license, which means it is merely directory and not mandatory.

Under Section 18 as above set out, which provides for the revocation of the license of any operator upon conviction of either of the two graded felonies or the felony as set out, the commissioner shall forthwith revoke the license, etc. Under this section it is mandatory that the commissioner revoke the license.

Paragraph 1 of Section 18 reads as follows:

"Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle."

Under this paragraph manslaughter is a graded felony and is punishable in accordance with Section 3997, R. S. Mo. 1929, which reads as follows:

"Persons convicted of manslaughter shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years, or by imprisonment in the county jail not less than six months, or by both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months."

Paragraph 2 of Section 18 reads as follows:

"Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug."

The violation of this paragraph is a graded felony as set out in paragraph (g) of Section 7783, R. S. Mo. 1929, which reads as follows:

"Driving in intoxicated condition:
No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."

Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug is a graded felony and is punishable according to Section 7786, paragraph (c), R. S. Mo. 1929, which reads as follows:

"Any person who violates paragraph (a) of section 7781, paragraph (a) of section 7782 or paragraph (f) or (g) of section 7783 shall be deemed guilty of a felony and on conviction thereof shall be punished by imprisonment in the penitentiary for a term not exceeding five years or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars (\$100.00) or by both such fine and imprisonment."

Paragraph 3 of Section 18, which states:

"Any felony in the commission of which a motor vehicle is used,"

is strictly a felony and not a graded felony, the minimum punishment for which is two years in the state penitentiary.

Under the above three paragraphs of Section 18, Laws of Missouri, 1937, page 377, a justice court or a municipal court would not have jurisdiction to accept a plea of guilty on account of having jurisdiction of felonies or graded felonies. Municipal courts have no jurisdiction over the violation of any state law and only have jurisdiction over the violation of city ordinances, which would not be the violation of Section 17, Laws of Missouri, 1937, page 376.

CONCLUSION

In view of the above authorities, it is the opinion of this department that police courts or municipal courts are not compelled by Section 17 or Section 18 of the Laws of Missouri, 1937, pages 376-377, to report convictions to the commissioner of motor vehicles for the violation of city ordinances which, if prosecuted under the state law, would be a violation of Section 17 or Section 18 of the Drivers' License Law of 1937.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

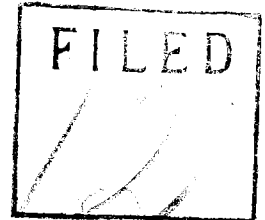
J. E. TAYLOR
(Acting) Attorney General

WJB:HR

SCHOOLS: (1) In district having average daily attendance of less than 10, Board of Education has authority to provide for transportation of pupils to another district; (2) such closing of school and transportation of pupils to another district does not cause a forfeiture of the district's corporate existence.

December 30, 1938

Mr. R. R. Brock
Superintendent of Schools
Liberty, Missouri



Dear Mr. Brock:

This Department is in receipt of your letter of December 21st, wherein you request an opinion embracing the following questions:

"I would like to have your opinion upon the following school law.

A rural school district having an average daily attendance of approximately six students desires to close its school and transport its students into Liberty.

In order to do this, is it necessary for the voters to vote in favor of transportation, or can the Board of Education transport those pupils to a town school?

If the rural school closes its doors and transports its students, does the rural school lapse as corporate body, or can they re-open their rural school in the future?

Does the State pay on the transportation of those pupils?"

There are a number of sections in the Statutes dealing with transportation of pupils and the procedure relating thereto. The school in question being a rural district we think there are two sections which should be considered in arriving at our ultimate conclusion. What was formerly 9354 R. S. Mo. 1929, was amended in 1933, Laws 1933, page 388, so that the pertinent part of said section now reads as follows:

"The question of transportation of pupils may be voted upon at the special meeting

above provided for, if notice is given that such a vote will be taken. If transportation is not provided for in any school district formed under the provisions of sections 9351 to 9358, inclusive, it shall then be the duty of the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district: Provided, transportation of pupils or the maintenance of elementary schools within three miles and a half of each child of school age in the district shall not be required in consolidated districts now or hereafter organized under the provisions of sections 9351 to 9358, inclusive, where such consolidation has not placed said children further from an elementary school than they were prior to said consolidation: Provided however, no transportation shall be furnished if there be any school within three and one-half miles of such pupil but assignment shall be made as provided by Section 18 of an act of the 56th General Assembly, found on Page 344, Laws of Missouri, 1931. Provided further, that when the average attendance in any elementary school for any month falls below ten, the school board shall have authority to close such elementary school for the remainder of the term and provide transportation for the pupils of such elementary school to some other elementary school or schools in said district. Such transportation shall be paid for out of the incidental funds of the district: Provided further, that if transportation is not provided for, any consolidated district, may by a majority vote at any annual or special meeting, decide to have all the seventh and eighth grade work done at the central high school building, provided fifteen days' notice has been given that such vote will be taken. Such seventh and eighth grade work at the central high school may be discontinued at any time by a majority vote taken at any annual or special meeting.

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We think that under the third proviso quoted supra, the authority is to be found as follows:

"That when the average attendance in any elementary school for any month falls below ten, the school board shall have authority to close such elementary school for the remainder of the term and provide transportation for the pupils of such elementary school to some other elementary school or schools in said district. Such transportation shall be paid for out of the incidental funds of the district:"

By the terms of the above quoted section we are of the opinion that the Board of Education has authority to provide for the transportation of the pupils in the district which you mentioned in your letter.

In 1931 the Legislature passed Section 20, page 346, Laws of Missouri, 1931, which provides as follows:

"If any district in this state shall have an average daily attendance of less than 15 pupils as shown by the records of the last previous school year, the state superintendent shall, in lieu of such state aid, after investigation that convinces him that it would be to the best interests of all concerned, require the board to provide for the transportation of the pupils of such district to other public school or schools, provided that the total expense, including transportation and tuition paid by the state, shall not exceed the amount that the state would have otherwise paid to such district."

The above section is called to your attention for the reason that the State Superintendent might assist the district in the transportation of its pupils in the event that the district is entitled to or draws sufficient state aid. You will note that in the event the transportation is provided for by the board under Section 9354, R. S. Mo. 1929, same is to be paid from the incidental fund and likewise Section 20, quoted supra, provides the method for paying for the transportation.

Your attention is further called to Section 9197, R. S. Mo. 1929, which provides for either the board of directors or an election to be held to vote on the question of free transportation. Said section being as follows:

"Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the school-house, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district: Provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in section 9228. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district."

The above section, however, is eliminated from consideration of the question which you present for the reason that it contains the provision, "of pupils living more than one-half mile from the school house for the whole or part of the school year."

You further present the question as to whether or not in the event the school closes and transportation is provided for, the school loses its corporate existence. Section 9195 relates to a forfeiture of a school district and provides as follows:

"Whenever any school district of this state, now organized or that may be hereafter organized

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under the laws of this state, shall fail or refuse, for the period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body, and the territory theretofore embraced within such lapsed district shall be deemed and taken as unorganized territory, and the same, or any portion thereof, may be attached to any adjoining district or districts for school purposes, in the same manner as is now provided in section 9273. Provided, that no school district shall be deemed to have lapsed where the failure to make the needed provision for the eight months of school results from the irregular or void proceedings had for that purpose: Provided, that in any district enumerating fewer than twenty-five children the board may, from year to year, arrange with the board or boards of other district or districts for the admission of all children of school age in said district containing fewer than twenty-five children enumerated, and, if desired, arrange for transporting children to and from school. And, when ratified by a two-thirds vote of the qualified voters of said school district, voting at a special meeting, such arrangements shall be final, and the board will be authorized to issue warrants upon the teachers' fund for payment of tuition, and upon the incidental fund for the payment of cost of transporting pupils."

The above quoted statute does not provide that in the event the school district closes and transports its pupils to another district shall cause a forfeiture of the corporate existence. We are of the opinion that the corporate existence of the school district remains in tact and continued regardless of the fact that the school is not used under the conditions which you have presented.

Respectfully submitted,

OWN:rw
APPROVED:

OLLIVER W. NOLAN
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney-General

TAXATION AND : 1. Interpretation of Section 9950, Senate Bill
REVENUE : #94, as to compromise of taxes.
2. Redemption. Resale.

March 7, 1938.

3/14



Mr. John G. Burkhardt
Associate City Counselor
and Tax Attorney
St. Louis, Missouri

Dear Mr. Burkhardt:

We wish to acknowledge your request for an opinion of March 1st, which is as follows:

"As you know, the Jones-Munger delinquent tax law has caused the City of St. Louis considerable concern. We have had to call upon your office for opinions several times since this law has been enacted, and are forced to do so again.

The specific inquiries we have are these:

I.

Section 9950 provides that the County Court, or proper officer, may compromise back taxes if it appears that the delinquent property "is not worth the amount of taxes, interest and costs due thereon * * * or if the same would not sell for the amount of such taxes, interest and costs."

What yardstick is the proper city official (the Comptroller) to use in determining whether the property would or would not sell for the amount of such taxes, interest and costs? Is it what the property would bring at a forced sale, or is it what the property would bring at a forced sale for taxes, or is it what the property would bring at a sale where the owner is willing to sell, but does not have to sell, and the purchaser is desirous

of buying, but does not have to buy? Or, should the Comptroller use the Assessor's assessment as a criterion of the worth of the property and as a further criterion of what it would sell for?

II.

Section 9954a, R. S. 1929, (Laws of Missouri, 1933, p. 434,) provides that the purchaser at a sale is entitled to possession one year from the date of sale, but that the owner or occupant may retain possession by making an assignment of rents in an amount sufficient to discharge the bid of the purchaser with interest.

If the owner or occupant assigns to the City of St. Louis rents upon property purchased by the City at a Jones-Munger delinquent tax sale, is that actual redemption? If so, doesn't the owner or occupant have to pay any balance of taxes that might be outstanding as being the difference between the City's bid and the delinquent taxes?

Section 9953b, R. S. Mo. 1929, (Laws of Missouri, 1933, p. 432,) provides, in part, as follows:

'* * * * but in the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax (sale of lands for delinquent taxes) for all delinquent taxes, penalty, interest and costs not paid by such sale.'

We construe this Section as meaning that if at a third sale of certain property the purchaser of tax certificate bids \$5.00, while the outstanding delinquent taxes at the time amount to \$100.00, the person redeeming must

pay the \$5.00 to the purchaser, plus interest, and must pay the county collector the balance of the taxes, or \$95.00. This view is in conformity with a previous opinion of your office.

However, the question arises as to just what procedure the collector is to take if the balance of the taxes "not paid by such sale" are not paid by the redemptioner. Does the collector have one sale, or does he have three sales? If he has one sale, does the property have to be bid in at the amount of the taxes, or will the highest bid purchase the property?

An opinion upon these questions as soon as the convenience of your office may make possible would be appreciated."

I.

Under the above section 9950, referred to in your letter, the proper officer may compromise taxes with the owner under the following conditions:

1. When any tract of land or town lot is not worth the amount of taxes, interest and cost due thereon as charged in "back tax book" or recorded list of delinquent land and lots in the Collector's office.

2. Where the same would not sell for the amount of such taxes, interest and cost.

The second prerequisite of said section comprehends the first, and is plain and unambiguous. In State ex rel. Publishing Company vs. Hackman, 314 Mo. 33, in passing on this question, the Supreme Court en banc, said:

"The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for conclusion."

CONCLUSION

Therefore, it is the opinion of this department, that the proper officer should compromise said taxes if in his opinion said land and lots would not sell, at public sale, at Court House door for the amount of such taxes, interest and cost.

II.

Section 9953b of the 1933 Laws of Missouri, at page 432, is as follows:

"Such lands may be redeemed from such sale upon the same terms and conditions as other lands may be redeemed from delinquent tax sales, as provided herein; but in the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and costs not paid by such sale."

Section 9954a thereof is, in part, as follows:

"The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time after one year from the date of sale be entitled to the immediate possession of the premises so purchased during the redemption period provided for in this act, unless sooner redeemed; provided however, any owner or occupant of any tract or lot of land purchased may retain possession of said

premises by making a written assignment of, or agreement to pay, rent certain or estimated to accrue during such redemption period or so much thereof as shall be sufficient to discharge the bid of the purchaser with interest thereon as provided in the certificate of purchase. * * * Any rent collected by the purchaser, his heirs or assigns, shall operate as a payment upon the amount due the holder of such certificate of purchase, and such amount or amounts, together with the date paid and by whom shall be endorsed as a credit upon said certificate, and which said sums shall be taken into consideration in the redemption of such land, as provided for in this act. Any purchaser, heirs or assigns, in possession within the period of redemption against whom rights of redemption are exercised shall be protected in the value of any planted, growing and/or unharvested crop on the lands redeemed in the same manner as such purchaser, heirs or assigns would be protected in valuable and lasting improvements made upon said lands after the period of redemption and referred to in section 9956c."

Section 9956a, is as follows:

"Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the

party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

Section 9956d, is as follows:

"When lands sold for taxes, or any portions thereof, shall be redeemed, the county collector shall insert a memorandum of such redemption on the record of the certificate of purchase applicable thereto, stating the quantity or description of the portion redeemed, if not the whole, the date thereof, and by whom made, and sign the same officially, and shall likewise give a certificate thereof to the person redeeming. The person redeeming shall then present to the county clerk the certificate of redemption and the county clerk shall then enter on his record of sales of land for delinquent taxes the recital of such redemption, the date thereof, and the person redeeming."

Under the provisions of Section 9953b, supra, in event of redemption of any land from any sale, the land so redeemed shall be liable to resale at the next or any subsequent sale of lands for delinquent taxes not paid by such sale.

Payment of such taxes, not paid by the sale to the certificate holder, is not a prerequisite to redemption; but a resale must be had at the next or any subsequent sale, therefore, to pay the sum, which clearly indicates one offering for sale.

If the legislature had intended that the procedure for resale follow the procedure for the original sale, the bill would have provided for a first, second and third sale. The language of said section plainly expresses that one sale is intended and consequently there is no room for construction.

In State ex rel. Barrett vs. Boeckler Lumber Company, 301 Mo. 445, 532, in speaking of whether a statute means what it says when it is plain, the Supreme Court en banc, said:

"Nor is it within our province to give the statute any other meaning than its language imports. Our duty to apply the statute as it is written, is as plain as the language of that statute, and in that language there is no ambiguity."

Under the provisions of Section 9954a, supra, after one year from the date of sale, the purchaser shall be entitled to the immediate possession of the land purchased thereunder, but the owner or occupant may retain possession thereof by making a written assignment of, or agreement to pay rent that may accrue during the redemption period or so much thereof as may be necessary to pay the amount of the certificate and interest thereon. Any rent collected by the purchaser, shall operate as a payment on the certificate of purchase and endorsed as a credit thereon, which said sums shall be taken into consideration in the redemption of such lands.

The primary purpose of Senate Bill #94 is not in the transfer of ownership, but to collect taxes and, whether taxes be paid in cash or rent, such payments shall be applied on the amounts set out in the certificate of purchase. When said amount is paid, together with the interest shown in the certificate, either by cash or rent, during the period of redemption, the Collector shall give notice of redemption as provided in Section 9956a supra, and make the records of redemption as required by Section 9956d. That constitutes actual redemption.

CONCLUSION

Therefore, it is the conclusion of this department that when taxes are not all paid at a third tax sale, the land must be resold for such unpaid taxes, after redemption, and that the payment of such unpaid taxes is not a prerequisite for redemption. That after redemption said land shall be liable to resale at the

Mr. John G. Burkhardt,

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March 7, 1938.

next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and cost not paid by such sale.

It is, further, our opinion that after one year the certificate holder shall be entitled to immediate possession of the premises unless the owner or occupant, thereof, assign the rent as provided in Section 9954a, supra, but that in event of such assignment of the rent, the certificate holder must endorse, as a credit upon the certificate, the amount so paid as rent, which sums shall be taken into consideration in the redemption of such land. The certificate holder is entitled to the amount shown by this certificate and the interest thereon and when said sums are paid in full, either by cash or rent, it becomes the duty of said Collector to give notice of such payments for redemption and, thereupon, make the records of the redemption as provided in said Section 9956d. That such procedure constitutes actual redemption.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

SVM:LB

TAXATION:
COUNTY COURT:
REFUNDING ILLEGAL LEVIES:

Moneys collected from illegal taxes levied may be refunded by the county court only when such tax money is either in the county treasury or under the control of the county court.

March 14, 1938

Mr. N. Elmer Butler,
Attorney at Law,
Galena, Missouri.



Dear Sir:

This is to acknowledge receipt of yours of March 10, 1938 requesting an official opinion from this office which is as follows:

"Will you please give me an opinion on the following: Several years ago some county school land got on the tax books erroneously and was sold for taxes. At that time it was bid in by a Mr. Craig. He paid taxes on it for about fifteen years, but I am informed that someone told him shortly after he bought it that it was school land. Mr. Craig has since died and now his widow finding that she could not give a title to it, asks that the County Court reimburse her for the taxes she has paid. Can the County Court legally do this?"

It appears from your request that the taxes on the land in question have been voluntarily paid for a period of fifteen years and that the owner now wants to know whether or not the county court may reimburse her for such payments. From my research on this point I find that if the county court has authority to reimburse anyone for taxes, it would be on account of an illegal levy of such taxes. Section 9981 R.S. Mo. 1929 provides as follows:

"Wherever, in any county in this state, money has been collected under an illegal levy, the county court of such county or counties is hereby authorized to refund the same by issuing warrants upon the fund to which said money had been credited, in favor of the person

or persons who paid the same as shown by the collector's books: Provided, that should the person in favor of whom any warrant or warrants are issued be dead or unable to appear in person, then the same shall be paid to his heirs or legal representatives: Provided, further, that said county court or courts may, in their discretion, refund, in addition to the money collected, interest which may have accrued upon the same, not to exceed six per cent. Provided further, that before any levy shall be considered illegal, it shall have been so declared by the supreme court of the state of Missouri: Provided further, that the provisions of this section shall only apply to those counties in which the money collected under said illegal levy is either in the county treasury or within the control of the county court: Provided further, that the county court so refunding said money shall specify the time in which said money shall be refunded, and all warrants left on hand after the expiration of such time shall be by said county court canceled, and the money and interest turned into the school fund of the county."

And by Section 1262, page 984 of Volume 61 Corpus Juris, it is provided:

"It is generally held that an action may be maintained against a county, town, or other municipal corporation for the recovery of taxes illegally exacted only while the fund so raised remains in the possession of defendant. Hence, if a county has collected general taxes, part of which are for itself and part for the state or for townships, school or road districts, or the like, no recovery can be had after the funds have been divided up and paid over to the several treasurers or receiving officers, where no claim is filed before distribution." * * * * *

In the case of State ex rel. v. Chicago & Alton Ry. Co., 165 Mo. 597, 611, the Court said:

"But appellant is advised that by the Act of March 27, 1891, now section 1809, Revised Statutes 1899, the county court was given authority to refund money collected under an illegal levy and for that purpose to draw warrants upon the fund into which it had been paid. Just what kind of an illegal tax that statute contemplates, whether the illegality has reference only to the subject of the tax itself, or embraces also taxes otherwise lawful but assessed in a manner not authorized by law, we need not now inquire. The statute itself provides that it shall apply only when the money is in the county treasury or under the control of the county court. If this had been money collected for general county purposes, its place would be in the county treasury, and it would be under the control of the county court, subject of course to the restrictions that the law imposes on that control. But here the money was collected for a particular purpose and the county court had no control of it except to devote it to that purpose. The tax was levied for a lawful purpose, imposed on property liable to the same and was within the limits of the law, but it was an illegal levy because it was not imposed in the manner prescribed by law. Still, when the taxpayer comes voluntarily to the collector and pays the money on that account, and it is by the county court set apart to that purpose, the rights of the creditor, for whose debt the tax was levied, attaches, and the county court no longer has control of the fund." * * * * *

By said Section 9981, supra, the county courts are authorized to refund taxes provided the money for such taxes is in the county treasury or within the control of the county court. As soon as these taxes have been distributed to the state and its subdivisions for which they are collected they pass out of the treasury and from under the control of the county court and the county court after that time has no

March 14, 1938

authority to refund any taxes. Said section also provides that the tax levy shall not be considered illegal so as to authorize a refund until it has been so declared by the supreme court.

From your letter it does not appear that the supreme court has ever passed upon the legality of the levy of the tax in question. That being true, the taxpayer referred to in your letter could not get the relief she seeks under this section until the tax has been declared illegal by said court. The county court merely acts as an agent for the state in administering the laws and its authority is limited by statutes. We fail to find any law except Section 9981, supra, which authorizes the county court to refund any taxes.

CONCLUSION

This office is, therefore, of the opinion that the county court is not authorized to refund any of the taxes paid on the lands mentioned in your request nor is it authorized to reimburse the taxpayer for such taxes.

1..Because the levy for said taxes has not been declared illegal by the supreme court and

2. Because the moneys for such taxes has long since passed out of the county treasury and from under the control of the county court.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

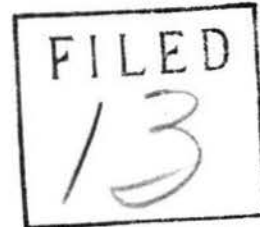
J. E. TAYLOR
(Acting) Attorney General

TWB:DA

TAXATION:

Redemption resale made to highest bidder. Sale thereunder extinguishes the tax lien for all taxes for which the third sale was enforced.

March 23, 1938



Mr. John G. Burkhardt
Associate City Counselor
St. Louis, Missouri

Dear Mr. Burkhardt:

We desire to acknowledge receipt of your letter of March 21 wherein you make the following inquiry:

"I wish to thank you for your opinion of March 7, 1938, with reference to the Jones-Munger delinquent tax law.

On pages 7 and 8, under conclusion, you state as follows:

'Therefore, it is the conclusion of this department that taxes not paid at a tax sale, must be resold for such unpaid taxes, after redemption, and that the payment of such unpaid taxes is not a prerequisite for redemption. That after redemption said land shall be liable to resale at the next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and cost not paid by such sale.'

You have advised that this provides for one sale. However, may we inquire as to whether or not the Collector may sell for the highest bid, or whether he is obliged to secure a bid equal to 'all delinquent taxes, penalty, interest and cost not paid by such sale?'

If a bid was received at this sale for the balance of the taxes not paid by the previous sale, are the taxes then outlawed?"

Section 9952a of Senate Bill 94, 1933 Session Acts is in part as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this Act **."

Section 9953a is as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

Section 9953b is as follows:

"Such lands may be redeemed from such sale upon the same terms and conditions as other lands may be redeemed from delinquent tax sales, as provided herein; but in the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and costs not paid by such sale."

Under the provisions of Section 9952a supra, tax sales, under the Jones-Munger Law, shall be executed "to discharge the lien for said delinquent and unpaid taxes."

Whenever such lands and lots are submitted for sale at a first and second sale as provided in Sections 9952c and 9953 and no person shall bid therefor a sum equal to "the then delinquent taxes, interest, penalty and costs," the procedure must be followed as provided in Section 9953a supra.

This section provides for a third sale for delinquent taxes, interest, penalty and costs and that such sale shall be made to the highest bidder, who, upon the payment of the bid as provided in Section 9953c, shall receive a certificate of purchase under the provisions of Section 9953d.

A sale of lands and lots under the above procedure would extinguish the above delinquent taxes, interest, penalty and costs except such as provided in Section 9953b supra.

Said Section 9953b supra provides that in the event the bid at the third sale were for less than the amount of

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delinquent taxes, penalty, interest and costs, and there were a redemption of such delinquent lands, all lands so redeemed "shall be liable to resale by the county collector at the next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and costs not paid by such (third) sale." (Parenthesis ours).

Therefore, a redemption resale under said Section 9953b would extinguish the tax lien against the lands and lots for all taxes, penalty, interest and costs for which the third sale was enforced.

CONCLUSION

Therefore, it is the opinion of this department that at a redemption resale under Section 9953b, had for delinquent taxes, penalty, interest and costs not paid by the third sale, the lands and lots included in the third sale must be sold to the highest bidder and that such redemption resale would extinguish the tax lien against the property from all such taxes, penalty, interest and costs.

Respectfully submitted,

S. V. MEDLING,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SVM/w

**LIQUOR CONTROL ACT:
BUILDINGS USED AS PLACES
OF RELIGIOUS WORSHIP:**

Buildings used by various religious denominations for religious worship which denominations do not have managing boards to manage such buildings, are not buildings regularly used as places of religious worship, as provided in Sec. 44-a-14, Laws of Mo. 1935, p. 285.

August 17, 1938

Mr. A. L. Burns
City Attorney
Marceline, Missouri



Dear Sir:

This is in response to yours of August 15th requesting an opinion from this department based upon the following question:

"A petitioner prays a license to sell 5% beer in Marceline. There is located within the prohibited distance provided by statute and by ordinance from the place at which the license is applied for a regular undertaking parlor and connected with it is a chappel used for funeral service. There has also for several months last past, been held preaching, praying, bible study and song service. The question is raised that this constitutes a building in which religious service is regularly held. The undertaking business has been located in this building for several years, and the service and worship for several months. The service is had by many denominations and is apparently not restricted to any particular church or creed. What I desire is an opinion as to whether this is a building in which worship is regularly held within the provisions of the statute."

Section 44-a-14, Laws of Missouri, 1935, page 285, provides as follows:

"No license shall be granted for the sale of intoxicating liquor, as defined in this act, within one hundred (100) feet of any school, church or other building regularly used as a place of religious worship, without the applicant for such license shall first obtain the consent in writing of the majority of the Board of Directors of such school, or the consent in writing of the majority of the managing board of such church or place of worship. The Board of Aldermen, City Council or other proper authorities, of any incorporated City, town or village, may by ordinance, prohibit the granting of a license for the sale of intoxicating liquor within a distance as great as three hundred (300) feet. In such cases, and where such ordinance has been lawfully enacted, no license of any character shall issue in conflict with such ordinance while such ordinance is in effect."

Upon the question that you have submitted, we fail to find where this statute has been construed, or where a statute with similar provisions in it relating to the location of liquor sales places near churches and schools has been construed. It seems that your question may be determined by what is meant in the act by the term "other building regularly used as a place of religious worship."

Vol. 15 R. C. L., Sec. 137, page 373, states the rule as to what constitutes a church as follows:

"In applying the prohibition against sales near churches, great liberality is exercised, and the rule of construction usually adopted is said to favor the religious institutions and not the traffickers in liquors, to the end that the protection be extended to all the multifarious denominations and societies, irrespective of their particular tenets or creed, and no matter with what ceremony or lack of it their faith may be evinced."

Any structure used principally for religious worship and Bible study is included although some of its rooms may be used by societies incidental to the church, or closely allied to its principles, or by individuals connected with or peculiarly eligible to membership in the church; and it is not necessary that the organization be incorporated. In the application of such legislation, however, the courts properly refrain from including what in reason cannot and in common conception ordinarily is not regarded as a church. The restraint is usually held not to apply to places used occasionally for preaching, or a building used by an organization devoted to the reformation of fallen women, unconnected with any church, or a building occasionally used for entertainments for the benefit of a church, or used by an unorganized body as a mission for Bible study and meetings, when most of the building is used for residential and commercial purposes. Furthermore it is held that such a provision does not apply to church property on which the construction of an edifice has been begun but not completed, although it is intended to be occupied as a church, except where the statute expressly names the church; and premises leased, but not yet occupied for church purposes, are especially beyond the operation of the statute, when the saloon in question was licensed before the leasing of the premises. But it has been held that the creation of a 'dry' area surrounding a named church attaches the prohibition to that area, and that the operation of the act is therefore not affected by the removal of the church."

This question is also treated in the case of *In re Finley*, 110 N. Y. S. 71, 73, wherein the court said:

"While I believe that the liquor tax law should be liberally construed in favor of schools, churches, and homes, and the liquor trafficker strictly held to the provisions which permit him to carry on such business in our midst, yet the court is bound to give those provisions a reasonable interpretation, and not construe them beyond their fair meaning or extend prohibitions to cases and situations which the law has not covered. In other words, the court can and should merely declare and enforce what the statute has enacted. Section 24, subd. 2 (Laws 1896, p. 66, c. 112, as amended by Laws 1897, p. 225, c. 312), specifying the places in which traffic in liquor shall not be permitted, includes any place which shall be on the same street and within 200 feet of a building occupied exclusively as a church or schoolhouse. On Seventy-Sixth street, and within 200 feet of the Fifth avenue entrance to this saloon, is a building purchased in July, 1907, by the Bay Ridge United Presbyterian Church for church purposes. It is for me to determine whether this building is used exclusively as a church within the meaning of the above statute. The house was built for and has been used as a frame dwelling house very much like the other homes and dwelling houses to be found in the suburbs, and its structure has not been changed since the purchase. The parlor floor is used for the services of the church and Sunday school, while the pastor or minister in charge lives with his family on the second floor, keeping house with the usual accommodations and conveniences for that purpose. The third floor is occupied by a woman with her children, who more or less looks after the work to be done on the premises. The building was built for a dwelling house, not for a church, and its construction has not been changed. Two families now live in it, and although the property is owned by a church organization and the parlor floor used for the usual and

regular church and Sabbath school services, yet it is as much a dwelling as a church, and cannot be considered as used exclusively for the latter purpose without twisting the word 'exclusively' from its usual meaning. The word 'exclusively' means something, as was said in the Matter of Rupp, 55 Misc. Rep. 314, 106 N. Y. Supp. 483, which recognized that, when a building was used part as a church and part as a dwelling, the protection of the statute did not apply to it."

We also find that in the case of *In re George et al. v. Board of Excise of City of Elizabeth*, 63 Atl. 870, this question was discussed. Although the facts in that case were not like the facts in this case, yet the case is pertinent to the question here submitted, and the court held:

"The fact that an organized body of persons known as 'Faith Curists,' who believe in God and Christ, hold meetings and Bible study and the religious and secular instruction of the young in a building, the upper part of which is occupied as a dwelling and the downstairs rear portion of which is used for storage purposes, does not constitute such building or such body of persons 'a church,' within the meaning of P. L. 1905, p. 42, Chap. 21, so that an inn and tavern may not be licensed as 'a new place' within the limit of 200 feet 'ascertained by measurement from the nearest point of the church edifice.'"

The Missouri act requires the applicant for a license to obtain the consent, in writing, of the managing board of a church or place of worship which is within the prohibited zone, before he can be granted the license.

Your statement of facts indicates that the building in which the religious services are conducted is primarily used as an undertaking parlor; that for the past few months the services have been held in this building by many

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denominations, and its use is not restricted to any particular church or creed.

As to what the lawmakers meant by the term "regularly used as a place of religious worship," we are unable to determine from the statute. However, the term "regularly" is defined in Words and Phrases, (3 Ed.), Vol. 6, page 651, as follows:

"Implying uniformity, continuity, consistency, and method, and excluding the idea of occasional, accidental, incidental, or casual use."

Your request indicates that the religious worship in this building is conducted by many denominations. The act requires the applicant to obtain the consent of the managing board of such church or place of worship. This clause contemplates that the building regularly used as a place of worship shall be used by a church organization which has a managing board. Your letter does not indicate whether or not such a board exists, but as the building is primarily used as an undertaking parlor, we conclude that there is no managing board, but that the owner of the premises permits the services to be held in this building by various denominations when such services do not interfere with his undertaking business. From the facts which you have submitted, it also appears that the religious services are not continuously, consistently and methodically conducted in the building by any one religious denomination, but that such building is used occasionally or casually by the various denominations.

It is a well known fact that on account of crowded conditions in church buildings, the Sunday School and Bible classes are sometimes held in courthouses or other buildings about a city, but we do not think that the lawmakers contemplated that such building would be classed as a building used regularly as a place of religious worship, which would prohibit locating a place of selling intoxicating liquor within a certain distance therefrom. We think that the lawmakers had in mind, when they referred to "other building regularly used as a place of religious worship," such building as a particular religious denomination may have control over and which building is governed through its board of managers. We do not think that the building and the use

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thereof which you have described in your request comes within that class.

CONCLUSION

We are, therefore, of the opinion that the use of the building mentioned in your request is not such a continuous and consistent use for religious worship that it could be classed as a building regularly used for religious worship, but that such use is more in the class of occasional or casual use. That being the case, the applicant for the license to sell intoxicating liquor would not be required to obtain the written consent of the board of managers, if any, of those worshipping in the building which you have mentioned in your request.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

SCHOOL: Debts contracted in excess of anticipated revenue are void; revenue for one year cannot be used to pay debts of subsequent year and treasurer is liable if he pays warrant of prior year out of subsequent years revenue.

December 21, 1938



Honorable N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 10, 1938, which reads as follows:

"Will you please give me an opinion on the following:

"There is a common school district in this county, that during the school term of 1937 and 1938 drew warrants for all the anticipated revenue of that school year and for possibly a few dollars more, but part of this money was tied up in a closed bank that was the county depository, and part of it not yet paid in, by reason of the fact that there is still delinquent taxes unpaid.

"The trouble existing is that these warrants drawn on the 1937 and 1938 school year were brought in and paid out of the money, state and otherwise, that was appropriated for this year (1938 and 1939) school year. Who is responsible, if any one, for this money. If the School Board exceeded the revenue for that year, are they responsible?"

We shall consider your last question first in this opinion.

Article 10 Section 12 of the Missouri Constitution provides, "No * * * * school district * * * * of the State shall be allowed to become indebted in any manner or for any pur-

pose to an amount exceeding in any year the income and revenue provided for such year", except of course, the indebtedness on bond issues assented to by a two-third majority of the voters.

In Clarence Sp. School District, Shelby County U. School District No. 67, 107 S. W. 2nd 5 (Mo. Sup.) it is said:

"Under this section (Section 12, Art. 10) * * * * (defendant) might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding * * * * to the extent of the revenue provided for that year, but not in excess of it." (Our italics) Failure to collect during any year all taxes levied therefor does not invalidate debts which were within the amount levied when contracted."

Following this ruling it is clear any debt contracted by a school district which makes the school districts whole indebtedness exceed the anticipated revenue for that year, is void and not a binding obligation on the school district. In determining the validity of such a debt it is to be remembered that the indebtedness is incurred when the contract is entered into, and not when the warrants are issued. Trask v. Livingston County, 210 Mo. 582; See also the Clarence School District case, supra.

Concerning the liability of the Board of Directors for any debt contracted in excess of the anticipated revenue we will say that our research has disclosed no decided case by the courts of this state which would seem to conclusively settle this question. It appears from the knowledge we have of the facts that any controversy on this point would be one concerning only the holder of a warrant representing indebtedness contracted in excess of anticipated revenue and members of the School Board as private individuals - not as members of the board. The situation being thus it is not our duty to attempt to prejudge these private individuals' private liabilities. However we refer you to some authority

which is indicative of the attitude of the courts on this question. *Jacquemin v. Andrews*, 40 Mo. App. 507; 87 A. L. R. 273 Notes.

The remaining question which you present is: May revenue levied and collected to pay obligation of the 1938 and 1939 school year, be applied to retire obligation contracted in the 1937, 1938 school year, and the responsibility, if any, of those who caused such to be done if it is illegal?

Section 9233 R. S. Mo. 1929, applicable to all classes of schools, provides:

"All moneys arising from taxation shall be paid out only for the purpose for which they were levied and collected; * * * *."

Section 9214 R. S. Mo. 1929, provides:

"The board of directors of each district shall, on or before the fifteenth day of May of each year, forward to the county clerk an estimate of the amount of funds necessary to sustain the schools of their district for the time required by law, * * * *."

The "time required by law" appears in Section 9229 R. S. Mo. 1929, where it is provided:

" * * * the school year shall commence on the first day of July and end on the thirtieth day of June following."

and in Section 9195 R. S. Mo. 1929 requiring at least eight months of school during said school year.

Reading the above statutes together it is clear that the law requires all school moneys arising from taxation to be paid out only for the purpose it was collected. That the estimate and levy made by this common school district on May

15, 1938 (for the 1938 and 1939 school year) was to pay obligations for the ensuing school year, that is from July 1, 1938 to June 30, 1939 and that the application of the money thus raised to obligations of the 1937 and 1938 school year (July 1, 1937 to June 30, 1938) is not a use of these funds for the purpose they were collected.

Section 9266 R. S. Mo. 1929 makes the treasurer of each county, not under township organization such as Stone County, the custodian of all moneys for school purposes belonging to the different districts and requires a bond of him conditioned:

"for the faithful disbursement, according to law, of all such money as shall from time to time come into his hands."

In School District No. 45 of Pemiscot Co. v. Correll, 286 S. W. 136 (Mo. App.) the court had occasion to pass upon the liability of the county treasurer under this statute. That suit was one brought by the School District to recover a certain sum wrongfully and illegally paid out of school funds by the treasurer. The facts in the case are somewhat different from the facts here and were as follows: The treasurer had paid out of the school districts funds, money on warrants which were not ordered issued by the school board or signed by the president thereof. This being in violation of Section 11202 R. S. 1919 (now Section 9311). In that case for some reason the treasurer had not entered into the bond required and the court permitted the suit to be maintained in the name of the school district instead of by the county clerk as required under Section 9266, supra, when a bond is given.

We set out these facts so there will be no misconstruction as to the application we are making of what is said in said case, on the instant question. The application of this case, here, lies in the fact that the court held the treasurer liable to the school district for funds illegally paid out by him.

Also it is to be noted that Section 9266, supra, conditions the treasurers' bond for the disbursement of said funds "according to law". In order for the disbursement to

be according to law said money must have been applied to the purpose for which it was collected. This purpose, with reference to the taxes for the 1938 and 1939 school year, was to pay the obligations of that year and not of a prior year. Not being so applied then it was not paid out "according to law" and the treasurer is liable therefor.

Therefore, it is our opinion that debts contracted in excess of the anticipated revenue of a common school district are void and the school district is under no obligation to pay a warrant representing such a debt. That revenue collected to pay the obligations of a particular school year can not be used to pay obligations of a prior school year and if the county treasurer pays a warrant representing a debt contracted for a prior school year out of funds collected to maintain the school in a subsequent school year, he is liable for such illegal disbursement of said money.

We wish to make clear that we are not attempting to decide, by this opinion, whether a surplus of a subsequent year can be applied to debts of prior years, because that is not the question here.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting Attorney-General)

LLB:LB

COUNTY COURTS: County court must pay publication of county financial report when compiled according to law.

September 19, 1938. 9/24

Honorable J. P. Campbell
Representative, Ripley County
Doniphan, Missouri



Dear Sir:

This is to acknowledge receipt of your request for an opinion dated September 10, 1938, which is as follows:

"Where the county court, under section 12166, Laws 1937, page 420, authorizes the county clerk to prepare the financial statement and to publish same, can the court legally refuse to pay the printing bill on the theory that there was too much of the statement and the cost of the printing or publication is too much?

"I would be very glad to have your opinion as to the interpretation of this section, together with the other sections relative to financial statements of counties and their publication."

Section 12166 as amended, Session Laws of 1937, page 420, reads as follows:

"The statement shall be set in the standard column width measure that will take the least space and the publisher shall file two proofs of publication with the county court and the court shall forward one proof to the state auditor and shall file the other in the office of the court. The county court shall not pay

the publisher until said proof of publication is filed with the court and shall not pay the person designated to prepare the statement for the preparation of the copy for said statement until the state auditor shall have notified the court that said proof of publication has been received and that it complies with the requirements of this Section. The statement shall be spread on the record of the court and for this purpose the publisher shall be required to furnish the court with at least two copies of said statement that the same may be pasted on the record. (For the preparation of the copy for the statement the court may allow a sum not less than ten cents and not to exceed thirty cents for every hundred words and figures, which sum, if allowed to the clerk of the court, shall be in addition to the salary or fees allowed him by law), and no pay shall be allowed for pasting a printed copy in the record. In submitting bill to the county court the person preparing the statement and the publisher shall itemize the amount as properly chargeable to the several funds and the county court shall pay out of each fund in the proportion that each item bears to the total cost of preparing and publishing said statement and shall issue warrants therefor. Provided, any part not properly chargeable to any specific fund shall be paid from the fund from which officers salaries are paid. The state auditor shall notify the county treasurer immediately of the receipt of the proof of publication of the statement in this act required. After the first of April of each year after the effective date of this act the county treasurer shall not pay or enter for protest any warrant for the pay of any judge of any county court until notice is received from the state auditor that the proof of publication herein

provided for has been filed. Any county treasurer paying or entering for protest any warrant for any judge of the county court prior to the receipt of such notice from the state auditor shall be liable on his official bond therefor. Within twelve months after the effective date of this act the state auditor shall prepare sample forms for financial statements and shall mail the same to the county clerks of the several counties in this state, but failure of the auditor to supply such form shall not in anywise excuse any person from the performance of any duty imposed by this act. If the county court shall employ any person other than a bonded county officer to prepare the financial statement herein required the county court shall require such person to give bond with good and sufficient sureties in the penal sum of one thousand dollars for the faithful performance of his duty. If any county officer or other person employed to prepare financial statement herein provided for shall fail, neglect, or refuse to, in any manner comply with the provisions of this act he shall, in addition to other penalties herein provided, be liable on his official bond for dereliction of duty."

This section amends Section 12166 as set out in the Session Laws of 1933, page 356, the only difference being that that part of the section parenthesized in the 1937 Session Laws changes the method and mode of payment for the preparation of the financial statement.

Section 12165 as set out in the Session Laws of 1933, page 353, is a section which amended Sections 12165 and 12166, R. S. Mo. 1929. This section as set out in the Session Laws of 1933 is too lengthy to set out in this opinion, but part of this section reads as follows:

"On or before the first Monday in March of each year after the taking effect of this act the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not by notices posted in at least ten places in such county, a detailed financial statement of the county for the year ending December 31, preceding. * * *

Section 12165, as partially set out above, was not amended by the Session Laws of 1937. This section sets out specifically the contents of the financial statement either prepared by the county clerk or by some other person designated by the county court to prepare such statement for the purpose of publication. Under this section you will also notice that it is mandatory that the county court prepare and publish in some newspaper of general circulation published in such county, a detailed financial statement. It is mandatory for the reason that until this publication is made and said publication has been filed in the state auditor's office and in the office of the clerk of the county court, the county court or county treasurer would be liable on their official bond for the payment or the issuing of any warrants whatsoever. The financial report should contain that which is set out in Section 12165 as amended by the Session Laws of 1933, and no more.

Section 2962, R. S. Mo. 1929, reads as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties

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thereto, or their agents authorized by law and duly appointed and authorized in writing."

Section 2963, R. S. Mo. 1929, reads as follows:

"In every case of contract entered into by any county, city, town, village, school township, school district or other municipal corporation, or by any officer or agent on their behalf, duplicate copies of the same shall be executed as above provided, one of which shall be filed in the office of the clerk of the county court of the proper county, or in such office or with such officer of the city, town, village, school township, school district or other municipal corporation as may be charged with the keeping of the contracts thereof, and shall not be taken thence except to be used for the purposes of evidence in some legal matter or cause; and in case of variance between such copies, the one on file shall control in the construction of the contract."

According to McShane v. District, 70 Mo. App. 624, Saleno v. Neosho, 127 Mo. 627, and Blades v. Hawkins, 133 Mo. App. 328, the above section is directory and the duplicate execution of a contract is not a condition precedent to its validity.

Section 13771, R. S. Mo. 1929, reads as follows:

"When any notice or advertisement relating to any cause, matter or thing in any court of record shall be required by law or the order of any court to be published, the same, when duly published, shall be paid for by the party at whose instance it was published, which payment, or so much thereof as shall be deemed reason-

able, may be taxed as other costs, or otherwise allowed by the proper courts, in the course of the proceedings to which such advertisement relates."

Section 13772, R. S. Mo. 1929, reads as follows:

"When any such advertisement shall be made by a public officer, thereunto authorized by law, the reasonable expense thereof shall be allowed and paid out of the county treasury, as other demands and charges of a like nature."

Section 13773, R. S. Mo. 1929, reads in part as follows:

"When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be published in any newspaper for the state, or for any public officer on account of or in the name of the state, or for any county, or for any public officer on account of, or in the name of any county, there shall not be allowed for such publication a higher rate than one dollar per square of two hundred and fifty ems for the first insertion, and fifty cents for each subsequent insertion; and for fractional squares and parts of squares in the same proportion: Provided, that in estimating, measuring and calculating the number of squares or parts of squares, the matter contained in said law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be estimated, measured and calculated as if set 'solid,' or without spacing between the lines, and the total number of ems shall be ascer-

tained by multiplying the number of
ems per line of the type used by the
number of lines printed. * * * *

When any law, proclamation, advertise-
ment, nominations to office, proposed
constitutional amendments, or other
questions to be submitted to the people,
order or notice, shall be required by
law to be published in any newspaper,
the rates herein specified shall prevail,
and all laws or parts of laws in conflict
herewith, except sections 13777, 13778
and 13779, R. S. 1929, are hereby re-
pealed."

Under this section, which provides for the minimum
and maximum amount to be charged the county for publica-
tion, the court in Pendleton v. Asbury, 104 Mo. App. 723,
decided that a contract entered into between two publishers,
whereby they should divide the business among the two
publishers and that each should make a bid of the highest
legal rate as set out in the above section, was immoral
and not enforceable as being against public policy.

Section 12107, R. S. Mo. 1929, reads as follows:

"The county court may, by an order
entered of record, appoint an agent to
make any contract on behalf of such
county for erecting any county buildings,
or for any other purpose authorized by
law; and the contract of such agent,
duly executed on behalf of such county,
shall bind such county if pursuant to
law and such order of court."

Under the above section, the county court may by an
order entered of record appoint the county clerk to enter
into a contract with the publishing company.

Section 12109, R. S. Mo. 1929, reads as follows:

"If a claim against a county be for work and labor done, or material furnished in good faith by the claimant, under contract with the county authorities, or with any agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such work, labor and material, though such authorities or agent may not, in making such contract, have pursued the form of proceedings prescribed by law."

Under the above section, even though the agent, which in this case would be the clerk of the county court, had not pursued the form of proceedings prescribed by law in publishing the financial report, yet the county would be liable under the contract.

The court in the case of Anderson v. County, 181 Mo. 46, held that this section would not be applicable to contracts of great magnitude, that is of building a courthouse.

If there were facts not required to be printed as set out in Section 12165, Session Laws of 1933, page 353, then the court would be justified in refusing to pay that which was not required by law to be published. It was so held in an analogous case, Deubler v. Iron County, 93 S. W. (2d) 899, the facts of which and the holdings of the court are as follows:

"An action to recover the value of personal services and expenses, the former rendered, the latter incurred in the making of an audit of the records of certain county officers of Iron county.

"May 10, 1926, a petition signed by more than 300 taxpaying citizens of Iron county was filed with the state auditor requesting that officer to make an audit of the records of certain county officers of Iron

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county pursuant to the provisions of section 13302, R. S. Mo. 1919 (Mo. St. Ann. sec. 11478, p. 7825). The petition requested that the audit cover the period from 1915 to 1924, inclusive. In compliance with this petition and mandate of the statute (section 13302, supra), the state auditor dispatched plaintiff and two associates, all duly appointed examiners, to Iron county to make the audit. Later another examiner participated in the work. Plaintiff testified that the three examiners arrived at Ironton, the county seat, and began the work on August 26, 1926. The examiner in charge of the audit stated that he, plaintiff, and the third examiner began the work on August 17, 1926. The county court was in session on August 17. On the latter day the county court called upon the prosecuting attorney for an opinion advising what period of time the audit should cover. Based upon the opinion of the prosecuting attorney, the court entered an order of record dated August 17, 1926, stating that it would not pay the expense of making an audit covering any year or years prior to 1921, but that it would pay the per diem salary of the examiners and their expenses at the rate of \$2.50 per day for the making of an audit covering the years 1921 to 1924, inclusive.

* * * *

"A jury was waived and the cause submitted to the court. There was a judgment for defendant, from which plaintiff appealed.

* * * *

"But the fatal weakness in appellant's case lies in the fact that the evidence was amply sufficient to justify the conclusion by the trial court, which occupied the posi-

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tion of a jury in determining the facts, that the audit was made for the period from 1915 to 1924, inclusive, and there was no proof that the audit for that period was necessary or that it was the judgment of the state auditor that it was necessary. The evidence fully justified a finding that the only reason on the state auditor's part for ordering the making of the audit for the period from 1915 to 1924 was his construction of the Attorney General's opinion to the effect that an audit for that period was required. The opinion of the Attorney General was not properly susceptible to that construction. It expressly held that the determination of the extent of the audit was not to be made by the county court or the petitioners, but lay within the exercise of the sound discretion of the state auditor. Since the chief examiner testified on one occasion that the making of the audit from 1915 to 1918, inclusive, took from the middle of October to the 20th of November and the state auditor in his letter to the county court dated October 12th stated that the audit for the five years prior to 1926 was almost completed, the trial court was justified in concluding that the expense of the audit for the five-year period (which it was agreed should be covered) was fully paid when the court paid all of the expenses up to November 1, 1926. Absent proof that it was necessary to make an audit for a longer period than that for which the county agreed to pay, or proof that the state auditor acting in his official capacity as a ministerial officer determined that the more extensive audit was necessary, there could be no recovery therefor from the county. It follows that the judgment should be affirmed. It is so ordered."

Honorable J. P. Campbell

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CONCLUSION

In view of the foregoing, it is the opinion of this department that the county court cannot legally refuse to pay the printing bill for publishing a county financial report as set out in Section 12166, Laws of 1937, page 420, where the publisher and the county clerk have complied with all the requirements as set out in the above authorities.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

TAXATION:
REDEMPTION - PARTIAL
REDEMPTION PRORATED BY
COUNTY COLLECTOR:

County collector proportions the
part of tax that shall be paid in
redeeming part of land sold for taxes.

September 28, 1938



Honorable Henry Cain
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Sir:

This is in reply to yours of recent date request-
ing an official opinion from this department based upon
the following statement:

"At the November offering of Tax
Certificates, by the Collector of Stoddard
County a large tract of land belonging to
a party designated as A, was offered for
sale and the Tax Certificate upon the
entire tract was purchased by a party
designated as B. It so happens that only
a small portion of this land is valuable
and at the present time A is seeking to
redeem the small valuable portion of the
tract and refuses to redeem the entire
tract as a whole and A contends that under
the above numbered sections (9955B and
9955C, Session Acts of 1933) he is en-
titled to redeem any portion of the tract,
regardless of however small and pay only
the amount for redemption in direct pro-
portion as the number of acres sought to
be redeemed bears to the entire tract of
land embraced within the tax certificate.
In other words if there was 120 acres em-
braced within the tax certificate A con-
tends that he would have the right to
redeem any 40 acres and pay just one-third
of the total taxes embraced within the tax
certificate regardless of the fact that
nine-tenths of the value of the 120 acres
accrued or is the result of the value of
the 40 acres. The entire tract embraced

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within the certificate is worth more than the amount of the tax certificate but the tract of land which A refuses to redeem is worth far less than the proportionate amount or share of the tax certificate. In other words the holder of the tax certificate will lose money if A is permitted to redeem the portion he seeks to redeem and not be compelled to redeem the entire tract.

"Since the beginning of the controversy A has, by deed, conveyed to C the desirable portion of the tract and C now contends that he is entitled to redeem this desirable fractional portion of the tax certificate. The conveyance from A to C was made under an attorneys advice and for the specific purpose of being placed in a better position to compel the partial redemption. C is the son of A. Please advise me what, in your opinion is the right of A and C in the matter, assuming in the first place that A had not conveyed and in the second place what is the right of C after the conveyance, as of course C would have no right before the conveyance to him."

The right of redemption of delinquent lands sold for taxes is purely statutory. In *State ex rel. Stogsdell v. Evans*, 53 Mo. App. 1. c. 667, the court said:

"The right of redemption from such a sale is purely statutory, and in absence of a statute must rest upon a valid agreement."

Under the Jones-Munger Act, the provisions for the redemption of delinquent lands sold for taxes are set out in Sections 9955a, 9955b, 9955c, and 9955d, Laws of Missouri, 1933, page 436, as follows:

"Sec. 9955a. Any person claiming an undivided part of any land sold for taxes may redeem the same on paying such proportion of the purchase-money, interest, penalty and subsequent taxes as he shall claim of the land sold."

"Sec. 9955b. Any person claiming an undivided share in any land out of which an undivided part shall have been sold for taxes, may redeem his undivided share by paying such portion of the purchase-money, interest, penalty and subsequent taxes as he claims of the land sold."

"Sec. 9955c. Any person claiming a specific part of any lands sold for taxes may redeem his specific part by paying such proportion of the purchase-money, interest, penalty and subsequent taxes as his quantity of ground shall bear to the whole quantity sold."

"Sec. 9955d. Any person claiming a specific part of any lands out of which an undivided part shall have been sold for taxes charged on the whole tract or lot, may redeem his specific part by paying such proportion of purchase-money, interest, penalty and subsequent taxes as his quantity of ground shall bear to the whole quantity taxed."

Where a partial redemption of such lands is desired, then the provisions of Section 9956, Laws of Missouri, 1933, page 437, apply. This is section is as follows:

"In every case where a partial redemption is asked for, pursuant to the preceding four sections, the county collector, upon the application of the redemptioner, after notice to the holder of the certificate, shall determine the proportion to be paid by the party applying to redeem, and his decision shall be final thereon. For his services in stating the proportion, the redemptioner shall pay him fifty cents; and in every case of a partial redemption,

pursuant to either of the said sections, the quantity sold shall be reduced in proportion to the amount paid on such partial redemption, and the county collector shall convey accordingly."

Following the rule as stated above that the rights of redemption are purely statutory, in order for the owner of the entire tract to redeem a specific portion of the delinquent lands sold for taxes, he must point out the statute authorizing him to do so.

Section 9955a, supra, authorizes any person claiming an undivided part of the land sold to redeem.

Section 9955b, supra, authorizes any person claiming an undivided share in any land out of which an undivided part has been sold for taxes to redeem.

Section 9955c, supra, authorizes any person claiming a specific part of any land sold for taxes to redeem.

Section 9955d, supra, authorizes any person claiming a specific part of any land out of which an undivided part shall have been sold for taxes charged on the whole tract or lot, to redeem.

The lawmakers have in the plain terms set out above stated who may redeem parts of tracts of land which are sold for taxes, and as they have not included within that class the person who owns the entire tract, then it would follow that such owner would not be authorized under the act to redeem a portion of the land sold for taxes. The maxim, "The expression of one thing is the exclusion of another," is applicable here, especially since the rights of redemption by certain persons are prescribed by the statute.

Next, your question is, has the person who has purchased from the owner a portion of the delinquent lands, and after they have been sold for taxes, a right to redeem, and if so, how is the amount arrived at which he shall pay to redeem the portion he purchases?

If such owner of the entire tract, by a bona fide conveyance, has conveyed a specific part of the delinquent

lands, then the purchaser of such specific part of such lands may redeem by following the provisions of Sections 9955d and 9956, supra. However, if the conveyance is not a bona fide conveyance and made for the purpose of avoiding payment of taxes, then the collector is not bound by such conveyance and he would not be required to recognize an application for redemption of the part of the lands so conveyed.

A question of prorating taxes analogous to yours is raised when a person pays taxes on a part of a tract of land before they become delinquent. When a party pays taxes on a part of a tract of land, the collector shall enter on his books a record of that part of the lands upon which the tax is not paid, and if necessary prorate the taxes on such part. Such payments are authorized by Section 9913, R. S. Mo. 1929, which is as follows:

"Whenever any person shall pay taxes charged on the tax book, the collector shall enter such payment in his list, and give the person paying the same a receipt, specifying the name of the person for whom paid, the amount paid, what year paid for, and the property and value thereof on which the same was paid, according to its description on the collector's list, in whole or in part, as the case may be, and the collector shall enter 'paid' against each tract or lot of land when he collects the tax thereon. The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes: Provided, the persons paying such tax shall furnish a particular specification of the part, and if the tax on the remainder of such lot and parcel of land shall remain unpaid, the collector shall enter such specification in his return, to the end that the part on which the tax remains unpaid may be clearly known. If payment is made on an undivided share of real estate, the collector shall enter on his record the name of the owner of such share, so as to designate upon whose undivided share the tax has been paid."

Sept. 28, 1938

By an opinion from this department to Hon. Sam A. Baker, Collector of Bollinger County, under date of December 14, 1935, written by Mr. Harry G. Waltner, Assistant Attorney General, I find that the provisions of the foregoing section have been discussed in the following language:

"By this section specific authority is given to pay the taxes which may be charged on the tax books against a part of a tract, but it is required that the party paying the taxes furnish a specific description in detail of the tract of land upon which he desires to pay taxes. This section does not provide the manner in which the County Collector shall determine what proportion of the taxes assessed against the whole tract shall be distributed to the portion of the tract which has come into the hands of a new owner and who desires to pay the taxes upon his portion of the tract. However, this issue has been before the Supreme Court of the State of Missouri in the case of State ex rel. Realty Company et al. vs. Koeln, 255 Missouri 301. In this instance the taxpayer proposed to pay the taxes on a portion of a tract which it had purchased and offered to pay that portion of the total tax bill as was represented by the area of the portion upon which the taxes were sought to be paid. The Court in this case stated, l. c. 303:

"On April 28, 1910, the relators tendered to the defendant five hundred and ten dollars, the full amount of all taxes, interest, penalties and costs for the taxes for the year 1909 on that part of the land not condemned for the street, computing the amount due by taking such proportion of the whole tax, interest, penalties and costs as the uncondemned land bore to the whole tract prior to such condemnation, according to area. * * * *

"It is contended that the various parts of such tract may not have a value in proportion to the area, and that the collector has no such powers as the assessor, and cannot apportion the value of the different parts of a tract which has been assessed in solido. There is no showing in this case that a payment in proportion to the area is not equitable and fair. Whether such proportion should be used in all cases we will not now decide."

"From the foregoing ruling of the Supreme Court it is apparent a division of the tax based upon area will be approved if such division operates fairly and equitably. On the other hand the words of the Court throw a doubt upon a division based upon area if such division would be unfair and inequitable and therefore it would appear that in the event a person sought to pay taxes on the basis of area when such basis did not afford a fair and equitable proportion of the taxes, such a division might not be upheld by the Courts. It should be kept in mind that we are referring to those cases which properly fall within the provisions of Section 9913 and not those cases which fall within the provisions of Section 9955d, page 436, Laws of Missouri 1933.

"It would therefore be the opinion of this office that the County Collector is required to use judgment and discretion in proportioning the amount of taxes due against a part of a tract, that such division should be upon the basis of area, unless such a division would result in an unfair and inequitable division of taxes, in which latter event, the collector should make the division on some equitable and fair basis."

Sept. 28, 1938

CONCLUSION

We are, therefore, of the opinion that the owner of the entire tract of delinquent lands sold for taxes is not authorized under the statute to redeem a specific part of such lands, but he may redeem the entire tract.

We are further of the opinion that a bona fide purchaser of a specific part of delinquent lands, purchased after said lands have been sold for taxes, may redeem same, and that the collector, following the provisions of Section 9956, supra, is required to proportion the taxes to be paid on said part of the lands purchased, and his apportionment shall be based upon area, unless such division would result in an unfair and inequitable division of the taxes either to the taxing authorities or to the owner of the original tract or to the person paying the taxes on the portion he has purchased, in which latter event the collector should make a division on some equitable and fair basis as is provided in Section 9956, supra, and his findings thereon are final unless he has acted arbitrarily and unfairly in performing this duty.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

OFFICERS - The office of mayor of the city of the fourth class and the office of presiding judge of the county court may not at the same time be held by one person. The acceptance of the latter office will forfeit the former

December 9, 1938

Honorable J. P. Campbell
State Representative
Doniphan, Missouri



Dear Sir:

This will acknowledge your letter of recent date requesting an opinion from this Department, reading as follows:

"The mayor of this city of the fourth class has been elected presiding judge of the county court.

"Can he hold both offices, or when he takes the oath of office as judge of the county court will he not automatically cease to be mayor of the city? "

No doubt your request for an opinion was prompted because of your knowledge of the constitutional provision which prohibits the holding of more than one office by the same person at the same time in this state. This is Section 18, of Article IX, of the Constitution of Missouri, and reads as follows:

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city,

or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

In the case of Nickelson v. City of Hardin, 282 Mo. 198, 203, the Supreme Court of Missouri had occasion to consider this constitutional provision, and said:

"We are of opinion that the proper construction of the section is that it applies only in counties and cities having more than two hundred thousand inhabitants."

Obviously, the constitutional provision above referred to does not prohibit the holding of more than one office at the same time by the same person, in cities or counties having less than two hundred thousand inhabitants. Thus, in a city of your class and county, a person may hold an office in the county and also an office under the city, the only limitation in this respect is that the holding of the two offices by the same person shall not be incompatible with one another, that is to say; that no conflict in the duties required by the respective offices should arise so as to make such holding of offices incompatible with one another.

As to whether or not the mayor of the city of the fourth class may at the same time hold the office of presiding judge of the county court, to which he has been recently elected, depends upon whether or not the offices are incompatible with one another.

The general rule in this state with respect to incompatibility of offices has been laid down in the case of *State ex rel Walker v. Bus*, 135 Mo. 325, 338, as follows:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge FOLGER, in *People ex rel. v. Green*, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations

to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law. ' "

From these considerations, it necessarily follows that we must examine the duties imposed upon the offices of mayor of the city of the fourth class and presiding judge of the county court, to determine whether or not such offices would be inconsistent with one another and that no incompatibility exists so that the acceptance of the one would vacate the other. In this respect your attention is directed to Section 6953, of Revised Statutes Missouri 1929, relating to the duties of the mayor of the city of the fourth class,

"The mayor shall have a seat in and preside over the board of aldermen, but shall not vote on any question except in case of a tie, nor shall he preside or vote in cases when he is an interested party. He shall exercise a general supervision over all the officers and affairs

of the city, and shall take care that the ordinances of the city, and the state laws relating to such city, are complied with. "

Section 6958, of Revised Statutes Missouri 1929, provides as follows:

"The mayor shall be active and vigilant in enforcing all laws and ordinances for the government of the city, and he shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty; and he is hereby authorized to call on every male inhabitant of the city over eighteen years of age and under fifty, to aid in enforcing the laws."

Section 2089, of Revised Statutes Missouri 1929, provides, in part, as follows:

"No judge of any county court in the state shall, * * * * * act as director in any railroad company in which such county or any township, part of a township, city or incorporated town or village therein is a stockholder, * * * * *."

Attention is also directed to Section 7165, relating to when streets may be vacated in any town or city in this state. This section of the statute is found in Article 10, of Chapter 38, of the Revised Statutes of Missouri 1929 relating to provisions applicable to all

cities, towns and villages in this state. This section of the statute reads as follows:

"Whenever any person or corporation interested in any town or city in this state may desire to vacate any lot, street, alley, common, public square or part thereof, in such town or city, such person or corporation may petition the county court for the proper county, giving a distinct description of the property to be vacated, and the names of the persons to be affected thereby; which petition shall be filed with the clerk of said court thirty days previous to the sitting thereof, and notice of the pendency of said petition shall be given for the same space of time, either in a public newspaper printed in said town, or by written notices thereof set up in three of the most public places in said town or city."

Section 7166, of Revised Statutes Missouri 1929, reads, in part, as follows:

"If no opposition be made to such petition, the county court may vacate the same, with such restrictions as they may deem for the public good; but if opposition be made, such application shall continue until the next term of the court, when, if the objector consent to such vacation, or if two-thirds of all the real estate holders of the town or city petition therefor, the court may grant the prayer of the petition.* * * *"

Section 7076, of Revised Statutes Missouri 1929, relating to cities of the fourth class, provides as follows:

"All real estate owned by a county and situate within the corporate limits of any city of the fourth class shall be subject to the provisions of all ordinances of such city which relate to the erection and maintenance of hitching posts, sidewalks, guttering, curbing, fences along streets and alleys, and the paving and macadamizing of streets to the same extent as that of private citizens of such city."

Section 7077, of Revised Statutes Missouri 1929, provides:

"It shall be the duty of the county court whenever any of the improvements of the property set out in section 7076 is required by ordinance, to forthwith make such improvement fronting or abutting any real estate owned by the county and lying within the corporate limits of the city, and included in the terms of the ordinance, in compliance with the provisions of such ordinance, and pay for such improvements out of the general fund of the county."

Section 7078, of Revised Statutes of Missouri 1929 provides:

"If the county court shall fail, neglect or refuse to comply with the provisions of any ordinance providing for the improvement of property as herein provided, for a period of sixty days after notice has been served on the county clerk, of the requirements of the ordinance and the kind and nature of the improvements to be made, the city shall proceed to make such improvements in the same manner as is provided by ordinance for the making of similar improvements by private citizens, and shall issue special tax bills for the costs of all labor and material necessary in making such improvements, and such special tax bills shall be a valid claim against such county, and it shall be the duty of the county court at its next regular meeting after the completion of said improvements to audit, allow and pay out of the general fund of the county the cost of making said improvements or the special tax bills issued therefor."

From these statutory considerations you will have noticed that many times some inconsistencies can arise in the functions required of the two offices of mayor of the city of the fourth class and of presiding judge of the county court. The relations existing between the two offices in view of the respective duties of such offices would necessarily create an inconsistency and repugnancy, so that the offices, when held by one person, would be incompatible.

Without attempting to detail the numerous inconsistencies that would arise by reason of the holding

of the two offices of mayor of the city of the fourth class and presiding judge of the county court, it is sufficient to say, from the statutory considerations, it is clearly indicated from the nature and relations of the office of the mayor of the city of the fourth class and presiding judge of the county court to each other that such offices should not be held at the same time by the same person, because, as you will notice from the statutory considerations, it would be impossible for one person to hold the two offices and faithfully and impartially discharge the duties of both offices. Frequently the occasion might arise, from the statutory considerations noticed, where the duties of one office would interfere with the duties imposed upon the other.

CONCLUSION

In view of the above, it is the opinion of this Department that the office of the mayor of the city of the fourth class and the office of presiding judge of the county court may not at the same time be held by one person, and, further, that the acceptance of the latter office will operate as a forfeiture of the first office.

Respectfully submitted

RUSSELL C. STONE
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

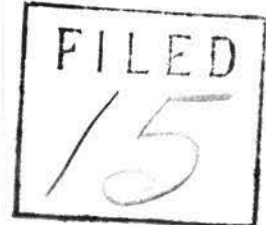
RCS LC

CRIMINAL LAW:
MASTER AND SERVANT:
MOTOR TRUCK LAW VIOLATIONS:

Owner of motor buses liable to punishment for violation of criminal laws by drivers when such act is done under the employer's command and within the scope of his employment and done for the employer by his knowledge and consent.

January 6, 1938

Mr. E. M. Casteel,
Superintendent and Colonel,
Missouri State Highway Patrol,
Jefferson City, Missouri.



Dear Sir:

This office acknowledges receipt of your request dated January 3, 1938, for an official opinion which is as follows:

"This Department from time to time is compelled to arrest various bus drivers throughout the State. The motor bus and truck law allows a bus to operate on the highways at a maximum speed of 40 miles per hour. In some instances the State Public Service Commission has issued permits and the bus companies have advertised in their schedules that they are operating over their routes at a speed as high as 39 miles per hour. In order for a bus operator to maintain this schedule it is necessary for him between stops to exceed the maximum speed allowed by the motor bus and truck law.

The policy of the Department has been to allow the bus drivers to exceed the speed of 40 miles an hour up to 50, unless in operating the bus, the driver does so in a reckless and careless manner.

Under the present procedure where arrests are made the summons is against the operator of the vehicle, and employers require the employee

to pay any fine assessed by the court, therefore the employer is not penalized and has no reason to decrease their speed requirements.

I will appreciate an opinion from your office as to whether or not we can also make the owner a party to arrests of this kind."

This request involves the question of the liability to punishment by the master for the criminal acts of the servant performed within the scope of authority of the servant.

Volume 16 Corpus Juris, page 123, Section 106, the rule is stated as follows:

"The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. Therefore, the mere relation of principal and agent or of master and servant does not render the principal or master criminally liable for the acts of his agent or servant, although done in the course of his employment; it must be shown that they were directed or authorized by him. Moreover a clear case must be shown."

Sub-section A, note 21, paragraph 106, page 123 of Volume 16 Corpus Juris, the rule as to the liability of the master for the wrongful acts of the agent is stated as follows:

"A principal is liable for the violation of the criminal law by his agent only in three cases namely, first, where the

agent acts directly under the principal's command; second, where the agent, although without specific instructions, is acting at the time within the scope of his employment; and third, where the act is done for defendant (master) by his knowledge or consent."

In the case of State v. Lackman, 12 S.W. (2d) 424, 425, the court approved the following instructions given in said case on the question of parties jointly engaged in a criminal offense:

"All persons are equally guilty who act together with a common intent in the commission of a crime, and a crime so committed by two or more persons jointly is the act of all and each of them so acting.

"To make a person equally guilty with others who act together with a common intent in the commission of a crime, it is not necessary that all of the persons so acting together with a common intent in the commission of a crime be personally present at the commission thereof.

"If a person, tho not actually pr sent when a crime is committed, before the commission thereof, advises, procures or encourages another person or persons to commit the same, then such person or persons who advise, procure or encourage the commission of such crime are equally guilty with the person or persons who actually commit such crime.

"Where, however, two or more persons enter into a conspiracy, agreement or common design to commit a felony, such as manufacturing moonshine whisky, then the act of one of them proceeding according to the

to the common plan, is in law the act of each, and each of them will be held responsible therefor in the law, as tho he himself had committed the physical act, and this, notwithstanding that he may have taken no part in the commission of the physical act himself."

In the case of Carleson v. State, 254 N.W. 744, 749, the court in discussing the same question, said:

"If one procures another to commit an offense, he may be prosecuted and punished as principal."

And in the case of State v. Parker, 24 S.W. (2d) 1023, 1026, in discussing the liability of the person who hired another to commit a crime, the court said:

"The proof did not show that the defendant broke into the Kroger store, but that he was accessory before the fact; that he hired other men to do the breaking in and to steal the sugar. Appellant complains that the defendant was not charged as an accessory but as a principal, and the proof did not sustain the charge. Section 3687, Revised Statutes 1919, provides that an accessory before the fact in the commission of a felony 'may be charged, tried, convicted and punished in the same manner, as the principal in the first degree.' This statute has been construed to cover just such cases as this. State v. Rennison, 306 Mo. loc. cit. 484, 267 S.W. 850; State v. Millsap, 310 Mo. loc. cit. 513, 514, 276 S.W. 625."

Mr. B. M. Casteel

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January 6, 1938

CONCLUSION

Following the foregoing authorities, this office is of the opinion if a servant, while operating a motor vehicle, violates the speed laws of the state, if such act is done directly under his employer's command, and although without specific instructions, he is acting at the time within the scope of his employment, and if the act is done for the employer by his knowledge and consent, then, all of these elements being present, the employer is equally liable for the violation of the law and subject to arrest and prosecution in the same manner that the servant is.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

MOTOR VEHICLES:

"Homemade" trailers must obtain a distinguishing number from the Secretary of State in compliance with Section 7781, R.S. Mo. 1929.

April 20, 1938



Mr. B. Marvin Casteel,
Superintendent and Colonel,
Missouri State Highway Patrol,
Jefferson City, Missouri.

Dear Sir:

This is to acknowledge your request dated April 16, 1938, for an official opinion from this office, which request is as follows:

"Inclosed correspondence for your information.

Request a ruling relative to serial numbers or weight capacity on homemade trailers."

"3. We want it understood that we are not so much interested in the little homemade trailers as used by the individual but in homemade trailers used by the large transport companies. For instance, one concern in Kansas City has ten semi-trailers, capacity ten tons, which are homemade and are bearing serial number fifty-one (#51). These trailers are all licensed and titled in the name of the owner, but in lieu of a serial number the words 'home made' are used. These semi-trailers are all capable of carrying ten tons but are licensed for lesser capacities."

Section 7774, R.S. Mo. 1929, paragraph c, among other things, reads as follows:

"(c) Certificate of ownership: No certificate of registration of any motor vehicle or trailer, or number plate therefor, shall be issued by the commissioner unless the applicant therefor shall make application for and be granted a certificate of ownership of such motor vehicle or trailer, or shall present satisfactory evidence that such certificate has been previously issued to the applicant for such motor vehicle or trailer. Application shall be made upon a blank form furnished by the commissioner and shall contain a full description of the motor vehicle or trailer, manufacturer's or other identifying number, together with a statement of the applicant's source of title and of any liens or encumbrances on the motor vehicle or trailer.

The Commissioner shall use reasonable diligence in ascertaining whether the facts stated in such application are true, and, if satisfied that the applicant is the lawful owner of such motor vehicle or trailer, or otherwise entitled to have the same registered in his name, shall thereupon, issue an appropriate certificate over his signature and sealed with the seal of his office, procured and used for such purpose. The certificate shall contain a description, manufacturer's or other identifying number, and other evidences of identification of the motor vehicle or trailer, as the commissioner may deem necessary, together with a statement of

any liens or encumbrances which the
application may show to be thereon."
* * * * *

Section 7781, R.S. Mo. 1929, paragraph b, reads
as follows:

"(B) No person shall sell, or offer
sale, or shall own or have the custody
or possession of a motor vehicle, trail-
er or motor vehicle tire on which the
original or manufacturer's number or
other distinguishing number has been
destroyed, removed, covered, altered,
or defaced, and no person shall sell,
offer for sale, own or have the custody
or possession of a motor vehicle or
trailer having no manufacturer's number
or other original number, or distinguish-
ing number:" * * * * *

Section 7781, R.S. Mo. 1929, paragraph e, reads
as follows:

"(e) In designating special numbers
for motor vehicles, trailers or motor
vehicle tires, the commissioner shall
designate the number of same consecu-
tively beginning with the number one
(1) preceded by the letters 'C.M.V.'
and followed by the letters 'Mo.,'
for each and every make of motor vehi-
cle, trailer or motor vehicle tire, or
if the make be unknown, the number shall
also be preceded by the letter 'X.'"

In 59 Corpus Juris, page 952, it is said:

"The intention of the legislature is to
be obtained primarily from the language

used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning."* * citing Gendron v. Dwight Chapin & Co., (App.) 37 S.W. (2d) 486; Betz v. Kansas City So. R. Co., 284 S.W. 455, 314 Mo. 390; Grier v. Kansas City C.C. & St. J. Ry. Co., 228 S.W. 454, 286 Mo. 523.

In Betz v. Columbia Telephone Co., (App.) 24 S.W. (2d) 224, the Court said:

"To get at the true meaning of the language of the statute the court must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made."

According to the authority, Section 7781, R.S. Mo. 1929, paragraph b can only be construed in plain language of the paragraph that:

"No person shall sell, offer for sale, own or have the custody of possession of a motor vehicle or trailer having no manufacturer's number or other original number or distinguishing number."* * * *

The fact that the statute sets out "distinguishing number" means a number distinguishing the trailer from any other trailer. Section 7781, supra, is a penal statute and should be strictly construed. The punishment for the violation of paragraph b of Section 7781, supra, is set out in Section 7786, R.S. Mo. 1929, paragraph d, which reads as follows:

"(d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

Section 7781-A, Laws of Missouri, 1935, states:

"* * * Whenever the original or manufacturers' number or other distinguishing number on any motor vehicle, trailer or motor vehicle tire has been destroyed, removed, covered, altered or defaced, the owner of such motor vehicle, trailer, or motor vehicle tire may apply to the Secretary of State, at Jefferson City, Missouri, for, and upon receipt of such application together with a fee of \$1.00 the Commissioner shall issue to said applicant, a certificate authorizing the owner to make or stamp or cause to be made or stamped on the motor vehicle, or motor or engine thereof or motor vehicle trailer or motor vehicle tire a special number to be designated by the Commissioner and when such number has been placed upon such motor vehicle or motor or engine thereof or trailer or motor

vehicle tire such new number shall become and thereafter be the lawful number of the same, for the purpose of identification and registration and for all other purposes under the provisions of this article, and the owner thereof may thereafter sell and transfer such property under said special number and no person shall destroy, remove, cover, alter or deface any such special number; provided that in connection with such application for such new number the owner of such motor vehicle, trailer or motor vehicle tire shall produce satisfactory evidence that he is the owner thereof."

I am referring you to paragraph (b) of Section 7781, which has not been repealed but which has been affected by additional Section 7781-A, in the Session Laws of 1935. In this section the Legislature provided for the registration of trailers on which the serial number had been destroyed, removed, covered, altered or defaced.

Section 7781, Revised Statutes Missouri 1929, provided that trailers as set out, should be registered within thirty (30) days from the taking effect of the article, which time has elapsed.

Section 7781-A was an additional section to provide for the registration where trailers had been defaced since the act of section 7781. The penalty under Section 7781, Revised Statutes of Missouri 1929, is covered by Section 7786, paragraph (d).

The statute, 7781, is not ambiguous in any respect and prescribes a penalty, so it is not necessary to interpret the construction of same. *Betz v. Kansas City Southern Railway Company*, 284 S.W. 1.c. 462.

This section, along with other sections, has been

passed on by the Supreme Court as to the legal effect and constitutionality in the case of Star Square Auto Supply Co., et al. v. Gerk, et al. 30 S.W. (2d) 447.

Section 7781, R.S. Mo. 1929, paragraph b, and Section 7781, paragraph e, should be read in connection with 7781-A, Laws of Missouri, 1935, page 300. In passing Section 7781-A, Laws of Missouri, 1935, page 300, it was not the intention of the legislature to repeal Section 7781, R.S. Mo. 1929, but merely was to provide a method for the obtaining of duplicate numbers for trailers which may become mutilated after thirty days after the taking effect of Article I, chapter 41, section 7781, paragraph b, of the Revised Statutes of Missouri, 1929.

It is also the general rule that interpreting a statute other sections which apply to the same manner shall be read together with the section subject to interpretation. This was so held in the case of State ex rel. Columbia National Bank of Kansas City. v. Davis, Judge et al., 284, S.W. 464, l.c. 470, where the court held:

"Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law."

CONCLUSION

According to the above authorities, it is the opinion of this department that the owners of so-called "homemade" trailers may be prosecuted for not obtaining distinguishing numbers from the Secretary of State as

Mr. B. M. Casteel

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April 20, 1938

provided in Section 7781, R.S. Mo. 1929.

It is also the opinion of this department that Section 7781-A, Laws of 1935, page 299, is only applicable where a trailer has a number or has been given a number by the Secretary of State in his certificate of title and which number has been destroyed, removed, covered, altered or defaced. Under Section 7781, R.S. Mo. 1929, one who has possession of a trailer which has no manufacturer's number or number given by the Secretary of State, can be prosecuted on a misdemeanor.

It is also unlawful for an owner to have more than one trailer bearing the same number, which if properly obtained, could not lawfully be duplicated. Owners of "homemade" trailers cannot give a distinguishing number, but must obtain distinguishing number through the Secretary of State as provided by Section 7781, R.S. Mo. 1929.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

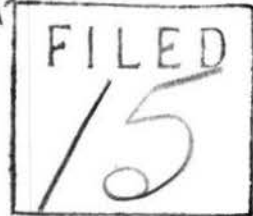
J. E. TAYLOR
(Acting) Attorney General

WJB:DA

CITIES: May not erect buildings with the primary object
of renting same when completed.

September 2, 1938

Mr. Joe Martin Carter, Sec.
Chamber of Commerce
Doniphan, Missouri



Dear Mr. Carter:

We wish to acknowledge your request for an
opinion under date of August 17, 1938, as follows:

"The City Council, backed by the Chamber
of Commerce, is considering submitting
a bond issue (within the legal limit)
for a hospital within the Doniphan City
limits.

"It is possible to get a P.W.A. Loan and
Grant for this purpose, if bonds can be
voted. On completion, the hospital will
be rented for enough to make it almost
self-liquidating, but not entirely so.

"Please advise us if a fourth class city,
such as Doniphan, can legally vote bonds
for this purpose. If not, we will go no
further because, of course, the bonds
would not be saleable."

From your request, the only question presented
is whether Doniphan, Missouri, a city of the fourth class,
has the power to vote bonds for a hospital and supplement
it with a Federal grant for the purpose of building a hos-
pital and renting to private interests.

McQuillin on Municipal Corporations, Vol. 3,
Section 1218, page 721, points out that a municipal corpora-
tion cannot erect a building as an investment as follows:

"If it has more room in such a building than is needed for municipal purposes, it may rent out a portion of it; though a municipal corporation cannot erect buildings as an investment. And where a town erects a new municipal building, thus leaving useless an old one, it may repair the old one for the purpose of renting it. While it would be legal if the primary purpose were to invest money in a building to rent, the town having no longer any use for the building need not sacrifice it, but may do what one might prudently do with such a building."

And in the case of *Bates vs. Bassett*, 60 Vt. 530, 15 Atl. 200, 1.c. 202, the court, in pointing out that a town has no right as a primary purpose to erect buildings to rent, said:

"The town has no right as a primary purpose to erect buildings to rent; but if, in the erection of its hall for its proper municipal uses, it conceives that it will lighten its burdens to rent part of its building, whereby an income is gained, no sound reason is suggested why it may not do so. The true distinction drawn in the authorities is this: If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense, which, standing alone, would not be lawful. But if the primary object is not to subserve a public municipal purpose, but to promote some private end, the expenditure is illegal, even though it may incidentally serve some public purpose. This is the test where good faith is exercised in making the expenditure. If a public purpose is set up as a mere pretext to conceal a private purpose, of course the expenditure is illegal and fraudulent."

Mr. Joe Martin Carter

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September 2, 1938

From the foregoing, we are of the opinion that Doniphan, Missouri, a city of the fourth class, may not vote bonds for a hospital and supplement it with a Federal grant for the purpose of building a hospital which, when constructed, would be rented to private interests.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:FE

MOTOR VEHICLES: Finance company, under chattel mortgage with provision of power for sale, can repossess without filing suit.

September 20, 1938 9/24

Colonel B. M. Casteel, Supt.,
Missouri State Highway Patrol,
Jefferson City, Missouri.



Dear Sir:

We acknowledge receipt of your letter of September 16, 1938, requesting an opinion from this office, in compliance with a request to your department made by Capt. Lewis B. Howard, Commanding Officer of Troop "D", Springfield, Missouri, which reads as follows:

"1. A number of automobile finance companies in this district have always made it a practice when payments on automobiles which are mortgaged to them have become delinquent to take possession of these automobiles where ever they happen to find them, without any process of law whatever.

"2. They justify this action under the terms of the standard chattel mortgage, a copy of which is attached hereto for the information of the Attorney General.

"3. The question for opinion is whether or not these finance companies have the right under this chattel mortgage to summarily take possession under the terms of this chattel mortgage of a properly registered motor vehicle, the owner of which has been issued a Missouri certificate of title."

Under chattel mortgages which do not include the power of sale, a foreclosure can only be had by filing a petition in the office of the circuit court. This procedure should follow Section 3060, R. S. Mo. 1929, which reads as follows:

"All mortgagees of real estate or personal estate, including leasehold interests, when the debt or damages secured amounts to fifty dollars or more, may file a petition in the office of the circuit court against the mortgagor and the actual tenants or occupiers of such real estate, or persons in possession of personal property, setting forth the substance of the mortgage deed, and praying that judgment may be rendered for the debt or damages, and that the equity of redemption may be foreclosed, and the mortgaged property sold to satisfy the amount due."

The above section does not include chattel mortgages where the amount involved is less than one hundred dollars. The procedure for the foreclosure of chattel mortgages where the amount does not exceed one hundred dollars is set out in Section 3074, R. S. Mo. 1929, which reads as follows:

"In all mortgages in which personal estate alone is conveyed, and the debt secured thereby, exclusive of interest, shall not exceed one hundred dollars, the mortgagee or his personal representatives, upon default being made in the payment of the mortgage debt by the mortgagor or his legal representatives, may sell the mortgaged property or so much thereof as will satisfy his debt, giving the mortgagor, after default in the payment of the debt, sixty days' previous notice, in writing, that the mortgaged property will be sold, unless the debt secured by it is paid, and

giving thirty days' notice of the time and place of sale; the notice to be published in the same manner as a sheriff's notice of the sale of real estate."

Where the power of sale is included in the chattel mortgage and where the amount of the loan may be any amount of money, the procedure of foreclosure is governed by Section 3075, R. S. Mo. 1929, which reads as follows:

"All mortgages of real or personal property, or both, with powers of sale in the mortgagee, and all sales made by such mortgagee or his personal representatives, in pursuance of the provisions of such mortgages, shall be valid and binding by the laws of this state upon the mortgagors, and all persons claiming under them, and shall forever foreclose all right and equity of redemption of the property so sold: Provided, that nothing herein shall be construed to affect in any way the rights of a tenant to the growing and unharvested crops on lands foreclosed as aforesaid, to the extent of the interest of such tenant under the terms of contract or lease between such tenant and the said mortgagor or his personal representatives."

According to the copy of the standard form of chattel mortgage attached to your request, the procedure of foreclosure is therein set out and also the method of private or public sale upon the default of the debt secured by the mortgage. This mortgage is the standard form used by most finance companies. The part referred to in the standard chattel mortgage blank is as follows:

"If the mortgagor shall make default in the payment of any installment of said note, or commit a breach of any of the covenants or agreements hereof, or if said mortgagee, its regular repre-

sentatives, successors, or assigns shall deem said mortgage, or said chattel, or said debt, or said security, unsafe or insecure, then and in that event the mortgagee, its regular representatives, successors, or assigns shall be immediately and forthwith entitled to the possession of the personal property hereinbefore described, and may immediately take possession of the same, with or without notice or demand, notice and demand being expressly waived.

* * * * *

"Said mortgagee is hereby authorized to enter upon the premises where said property may be found without liability for trespass in so entering, and remove and sell the same, either at public auction or private sale in such manner and at such time and place as the mortgagee, or assigns, shall deem best, without demand for performance, or notice of sale, and the mortgaged property may be sold without being physically present at said sale, said demand and notice and the presence of said property at the place of sale being hereby expressly waived, and out of the proceeds of said sale, pay the cost of foreclosing this mortgage, and the expense of pursuing, taking, keeping, and selling said goods and chattels including the attorney's fee provided for in the note hereinbefore described, and apply the residue therefrom toward the payment of said indebtedness or any unpaid part thereof in such manner as said mortgagee may elect, rendering the surplus, if any, unto said mortgagor upon demand, and said mortgagee may purchase at any such sale in the same manner and to the same effect as any person not interested therein."

Under this authority granted in the above standard chattel mortgage, the mortgagee may enter upon the private premises of the mortgagor and repossess the automobile in any manner and sell the same. It is customary for finance companies, when they loan money on an automobile and take a chattel mortgage, to require a blank assignment of the certificate of title for the reason that the chattel mortgage in itself is the same as a sale from the mortgagor to the mortgagee, which will become final upon the default of any payments, etc., or may become void upon the payment of the debt set out in the chattel mortgage.

According to Day v. National Bond & Investment Co., 99 S. W. (2d) 117, 1. c. 118 and 120, the court said:

"It being conceded that the defendant, at the time it took the automobile from plaintiff, held a valid subsisting mortgage lien on the automobile, and that plaintiff, at the time, was in default, having failed to make payment provided for in said note and chattel mortgage, the defendant as mortgagee was entitled to possession of the automobile. The recognized rule is that after condition broken the mortgagee of personal property, at least for the purpose of possession and due foreclosure, is regarded as the absolute owner. Lange v. Midwest Motor Securities Co. (Mo. App.) 231 S. W. 272; Meyer Bros. Drug Co. v. Self, 77 Mo. App. 284; Robinson v. Campbell, 8 Mo. 365. As was pointed out in the case of Meyer Bros. Drug Co. v. Self, supra, 'the mortgagee does not need the consent of the mortgagor to take possession after condition broken. He can take possession as he may. He can replevin the property. He may take it wherever he finds it. It is his property.'

* * * * *

Sept. 20, 1938

"We concur in the rule as quoted by plaintiff, respondent, in his brief, as follows: 'It is well settled that, after condition broken, the legal title to mortgage chattels vests in the mortgagee. The right of the mortgagee to seize mortgaged chattels after condition broken is a license coupled with an interest, which cannot be revoked by the mortgagor. It is a part of the consideration of the mortgage, and to allow the mortgagor to revoke it would be a fraud upon the rights of the mortgagee, and would very much impair the value of chattel mortgages as securities. The right to seize carries with it by necessary implication the right to do whatever is reasonably necessary to make the seizure, including the right to peaceably enter upon the premises of the mortgagor. There is one restriction, however, which the law imposes upon this right. It must be exercised without provoking a breach of the peace.' Willis v. Whittle, 82 S. C. 500, 64 S. E. 410, cited with approval in Lange v. Midwest Motor Securities Co. (Mo. App.) 231 S. W. 272, loc. cit. 274."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the finance company has the right under the chattel mortgage, as set out in the standard form attached to your request, to summarily take possession under the terms of this chattel mortgage of a properly registered motor vehicle, the owner of which has been issued a Missouri certificate of title. Under no circumstances can the mortgagee take possession of a properly registered motor vehicle under the terms of a chattel mortgage which

Col. B. M. Casteel

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Sept. 20, 1938

provides for power of sale where the mortgagee in repossessing would be compelled to provoke a breach of the peace. In that case it would be necessary to file a court proceeding, which is usually a replevin suit.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

COUNTY TREASURER:

Treasurer appointed under Section 12130, Laws of Mo. 1937, p. 425, will hold office until January 1, 1939, or until his successor is elected and qualified.

November 18, 1938

Honorable Worth Caughron
Treasurer
Christian County
Ozark, Missouri



Dear Sir:

This Department is in receipt of your letter of November 10th wherein you make the following request for an opinion:

"I was appointed County Treasurer of Christian County in compliance with the act of the legislature as given in 1937 Sessions Acts, Section 12130 page 425. My understanding of this Section is that I will hold office until January 1, 1939.

"Since I was defeated in the November 8th election I would appreciate very much an opinion from your office as early as possible."

The office of county treasurer was abolished by the 1935 General Assembly, and the law became effective on January 1, 1937. The office was recreated by the General Assembly in 1937, and Section 12130, page 425, made the office when created effective immediately after the act was approved; said section being as follows:

"There is hereby created in the several counties of this State, now or hereafter having a population of less than 40,000 inhabitants according to the last Decennial

Nov. 18, 1938

United States Census, a county treasurer, to be appointed by the Governor, and to take office immediately after the effective date of this Act and who shall enter upon the discharge of the duties of his office after his said appointment and qualification and who shall hold his office for a term ending on the first day of January, 1939, and until his successor is elected and qualified, unless sooner removed from office. Provided, that nothing in this section shall apply to counties under township organization."

The section providing for the filling of vacancies or appointments is Section 10216, R. S. Mo. 1929. The provisions of that section, we do not think are applicable for the reason that the Legislature in recreating the office of treasurer treated the same as a new county office. Therefore, the provisions of the act which created the office, being complete within itself, is the future guide relative to the filling of vacancies or appointments until a legal election can be held. The rule relative to special statutes taking precedence over general statutes is in the instant case applicable.

As Section 12130, supra, specifically provides that the person who is appointed shall serve for a term ending on the first day of January, 1939, and until his successor is elected and qualified, we are of the opinion that you, as County Treasurer, will hold office until January 1, 1939, and until your successor is elected and qualified.

Yours very truly

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney-General

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

SCHOOLS: Notice to change school district boundaries
and persons qualified to vote

February 7, 1938

Honorable C. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri



Dear Sir:

This is to acknowledge your letter dated January 24, 1938, wherein you request our opinion concerning a change of boundaries of two consolidated school districts located in Cass and Bates counties. Your letter is quite lengthy and we will not re-copy it in its entirety. Three paragraphs in your letter present the questions as follows:

"(2) The village of Archie, Missouri, is the nucleus of a consolidated district, which district lies along the boundary line between Cass and Bates Counties. There is a proposition to change the boundary line on the South of the said town district and extend over into a consolidated district which lies south of the Archie District and in Bates County. Question number one - - if proper notice is given in the districts, would the district making the extension and only the part of the district included in the Bates County territory proposed to be annexed be allowed to vote on the same?

"(3) Section 9342, Revised Statutes Missouri 1929, provides that where a district or a part thereof desires to be annexed to a town district that due notice be given after the required petition is presented that a majority of the votes casted in favor of the annexation would entitle them to be annexed; therefore, it is my conclusion that the whole district would have a vote in the matter. Am I right?

"(6) The Superintendent is particularly apprehensive that the provision might not apply where the districts are consolidated districts and lie in two different Counties. None of the cases that I have examined raise that point, but it would seem that since the statute deals with districts that the fact that the part proposes to be annexed lies in an adjoining County would not be obnoxious to the statute."

I

The question presented in the sixth paragraph of your letter has been previously answered by us by an opinion dated February 7, 1938, to Mrs. May Bowlin, Superintendent of Schools, Harrisonville, Missouri, of which we are enclosing herewith a copy. The said opinion concludes that the boundary lines of school districts could be changed, even though territory to be annexed is situated in a different county. See also State ex inf. v. Schuster, 285 Mo. 399; 227 S. W. 60.

II

We agree to the conclusion reached by you that the notice to be given should be in both districts, and all persons in said districts be permitted to vote, for the reason that the changing of boundaries affects both districts.

It must be borne in mind in the interpretation of school laws that the same should be given a liberal construction, as stated by the St. Louis Court of Appeals in *State ex rel. School District v. Bergeman, et al.* 2 S. W. (2) 111:

"In the latter case, this Court held that it is our policy not to require extreme technical compliance of the school laws, but only a substantial compliance with the statutes, and that the efforts of laymen who carry into effect the laws pertaining to schools is accomplished when a substantial compliance has been had."

In the cases in which a review was had before the appellate courts and the question of changing boundaries was submitted to all of the voters. *State ex rel. v. Bergeman, supra*; *State ex rel. School District v. Ingram*, 2 S. W. (2) 113; *Farber Consolidated School District No. 1 v. Vandalia School District No. 2, et al.*, 280 S. W. 69.

In the *Farber* case, *supra*, the syllabus reads:

"In election affecting boundaries of three adjoining districts, voters in all districts must vote on identical propositions."

Honorable C. R. Chamberlin

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February 7, 1938

From the above it is our opinion that identical notices should be posted in both districts and that all voters in said districts would have a right to vote upon the proposition, and if such is done it will substantially comply with Section 9275, Revised Statutes Missouri 1929.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

JLH LC

Enclosure

TAXATION:--County liable under Section 9952b, Laws of Missouri 1935, p. 403, for the expenses of printing delinquent lists of lands and lots even though they fail to sell at the collector's sale in November.

February 10, 1938

Hon. Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri



Dear Mr. Chitwood:

This Department wishes to acknowledge your request for an opinion under date of February 1, 1938, wherein you state as follows:

"In 1933 the Missouri Legislature passed a law relating to the sale of delinquent tax land, commonly called the Jones-Munger Act.

Section 9952b, page 430, Mo. Laws of 1933, relating to the advertisement of such lands for taxes provides in part as follows:

'*****The county collector shall, on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify on said record immediately following such notice the name of the newspaper of the county in which such notice was printed and published and the dates of the insertions of such notice in such newspaper. The expense of such printing shall be paid by the purchaser or purchasers of the lands and/or lots sold and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed the legal rate for the entire notice, as such legal rate is fixed by Sec. 13773, which cost of printing at the rate specified shall be taxed as part of the costs of the sale of

any land or lot contained in such list and disposed of at such sale, and the total cost of printing such notice shall be prorated against all such lands or lots so sold or redeemed prior to any such sale."

According to my interpretation of this law, the printer publishing such notices only received pay of \$1.00 per lot or tract of land sold, and received nothing in event there was no sale, the county not being liable for any such costs.

In 1935, the legislature passed a law relating to the sale of delinquent property, Acts 1935, 402-3, in which they repealed, or rather amended above mentioned Sec. 9952b of 1933, by striking out the words of this act beginning 'The expense of such printing shall be paid by the purchaser' etc., and inserting in lieu thereof the following words: 'The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list* * *'

I understand that the purchaser was liable to pay the printing cost of \$1.00, under the first law before the 1935 amendment, the county not being liable for any costs of same, and as laid down by the Supreme Court of Missouri, in State vs. Bader, 78 S.W. (2d) 835, decided December 22nd, 1934.

Now the question arises, whether the legislature intended to so amend this act as to create a liability for costs of printing such notices, of tax land, which failed to sell at a collector's sale. I believe not, but am not certain as to what the law is in the matter.

I shall appreciate your opinion in this matter, particularly as to whether Reynolds County would be liable for the costs of printing the notices of delinquent lands offered for sale for taxes, by our collector last November."

As you have quoted the pertinent provisions of the Jones-Munger Law relative to the expense of printing delinquent lists of lands and lots as it was enacted in 1933 and as it was amended in 1935, we shall not repeat these provisions.

In an opinion rendered by this Department under date of January 30, 1936, to Hon. Henry M. Phillips, Prosecuting Attorney Stoddard County, a copy of which we are enclosing, the following statement appears with reference to the above two sections under consideration:

"With reference to your particular inquiry, it is advisable for us to consider this law as it existed before the amendment adopted in 1935. By referring to the original section 9952b, page 430, Laws of Missouri 1933, we find that under the provisions of that law the newspaper publishing the notice 'shall be paid by the purchaser or purchasers of the lands and/or lots sold'. Therefore, under the law as existed before the 1935 amendment, the printer was required to rely for his pay upon the land being sold and his printing costs being collected from the purchaser as a part of the costs of the sale. No provision was made in that law for the payment of this expense by the county. In view of the provisions of the law as first enacted, this office held in an opinion rendered shortly after the Jones-Munger Act became effective, that the County Court was not permitted or authorized to pay out of the general revenue fund the expense of printing, but that the printer had to rely solely upon receiving his compensation if and when the costs were paid. Under this old procedure it was the duty of the County Treasurer and Ex-officio Collector, to collect these costs and to pay them to the parties to whom they were due, and thus the newspaper publisher would receive his portion of the costs at the time they were paid. However, it

is clear that the Legislature intended to change this system and to make the County responsible to the newspaper for this cost of publication."

As pointed out in the above section, under the 1933 Law "the printer was required to rely for his pay upon the land being sold and his printing costs being collected from the purchaser as a part of the costs of the sale", the reason being "no provision was made in that law for the payment of this expense by the county." This is no longer true for "it is clear that the legislature intended to change this system and to make the county responsible to the newspaper for this cost of publication".

In the case of State vs. Bader, 78 S. W. (2) 835, which you cite in your letter, complaint was made that Section 9952b, Laws of Missouri 1933, page 430, supra, imposed "an obligation upon the collector to proceed to advertise real estate at a certain time and provided no fund for the compensation with respect to that subject matter". The Court said:

"It is said that the collector might be subjected to suit on his official bond for his failure to make publication of the notice provided, when such duty is impossible of performance because the newspapers might decline to accept the advertising under the terms imposed by the statute. In that connection respondents say: 'No doubt each party has a right to contract for himself with respect to such matters, and although it was within the power of the Legislature to regulate, it is certainly not within its power to impose a contractual obligation upon a party willy-nilly.* * *It overlooks the fact that newspapers are privately owned and privately operated, and are not subject to public control. They are not even quasi public corporations.'

It would seem that these are matters going more to what might be called the workability of the act rather than its constitutionality. Because newspaper might refuse to publish the advertisement on the terms and conditions prescribed by the statute, would not render the act unconstitutional and we, therefore, rule the point against respondents."

February 10, 1938

From the foregoing we are of the opinion that the Legislature in 1935 intended by the amendment of Section 9952b to create a liability for the expense of printing delinquent lists of lands and lots upon the county even though they failed to sell at the collector's sale last November.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

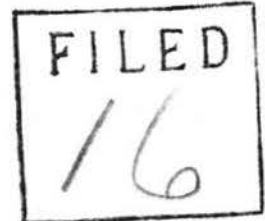
J. E. TAYLOR
(Acting) Attorney General

MW:MM
Enclosure.

CITIES OF THIRD AND FOURTH CLASS:

City may convey park property to a school district without a vote of the people providing the park property is not conveyed to the city by dedication.

March 15, 1938



Mr. J.G. Christy,
Member of the
House of Representatives,
Festus, Missouri.

Dear Sir:

This will acknowledge receipt of your request for an official opinion from this office, which is as follows:

"Am enclosing a question upon which we would like the decision of your department."

"About fifteen years ago the Festus Lions Club purchased several acres of land in the City of Festus and deeded about fifteen acres to the City of Festus for a park. About three or four acres of this land joins the two acre tract on which the Festus High School building is located.

The Lions Club would like to have this three or four acres deeded to the Festus school district now to enlarge the present school site to at least five acres so a two thousand dollar grant could be secured from the state public school fund if an additional building is erected. Can this be deeded by the City Council to the Festus School District without a vote by the people if it is agreeable to the City Council and the Board of Education?"

Section 6719 R.S. Mo. 1929 refers to powers of mayor and aldermen of cities of third class. Section 6946 R.S. Mo. 1929 refers to powers of mayor and aldermen of cities of fourth class. Both sections provide that a city of either class may purchase,

hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire. The sections do not provide for an affirmance of the sale by a vote of the people or residents of the cities.

You state in your request that the Festus Lions Club deeded about fifteen acres to the City of Festus for a park. We will answer your request on two theories. One theory being that the Lions Club deeded the fifteen acres outright without any reservations or particular description as the purpose of the conveyance to the city. The other theory will be that the Festus Lions Club conveyed the fifteen acres to the City of Festus for park purposes only. In all cases of a grant of lands for public purposes such as a park, in case of abandonment of the property, the title reverts to the original grantor. According to 18 Corpus Juris, page 38:

"Dedication is the appropriation or gift by the owner of land, or of an easement therein, for the use of the public."* *

If the property was conveyed by the Lions Club to the City of Festus for public purpose, it would not be considered a diversion if transferred by the city to the city school district for school purposes. In the case of Reid v. Edina Board of Education, 73 Mo. 295, the Court held:

"On one of the blocks laid down on a town plat were written the words 'Public Square.' In an explanatory memorandum attached to the plat this block was declared to be 'public property for the purpose of containing the court house should the town be selected for the county seat,' and in writing in the form of a deed upon the back of the plat, the grantor forever quitclaimed to the county, for public uses, this block, together with the streets and alleys indicated, 'according to the within plat or plan of said town, which shall be and remain the property of said county for the purposes aforesaid forever.' It was held that the block in question was dedicated to general public uses, and not simply to use as a courthouse square. The erection of a public school building

upon it was a legitimate use. Reid v. Edina Bd. of Education, 73 Mo. 295."

In the case of J.W. Gaskins et al. v. Ivey Williams et al., 235 Mo. 563, l.c. 574; 139 S.W. 117, the Court held:

"The vital question, therefore, is, has it become impossible to use this land for the purpose expressed by the donors in the dedication? The cases cited above refer to situations where there has been an abandonment of the specified use, such abandonment being held to be equivalent to an impossibility. Here we have a case where such use has never been effected or attempted. We do not doubt that when this plat was filed the fee in block 29 passed to the county in trust, to be used for courthouse purposes, and so long as the property might be so used the fee remained in the county as such trustee. It is not, however, as respondents contend, an absolute, unqualified ownership in the county. It cannot be such if, as stated above, the property may revert by a complete abandonment or impossibility of use. When this plat was filed, there was what appeared to the owners of the ground, and to the community, every indication that the county seat would be there located, and, of course, the dedication was made in consideration of such expected location; but when the county seat was permanently located at Caruthersville, did it not become impossible for the county to execute the trust by using this block for courthouse purposes? We think it did."* * * * *

The same finding was also held in the cases of Kansas City v. Scarritt, 169 Mo. 471 and Campbell v. Kansas City, 102 Mo. 326.

In the case of dedications of lands for public purposes it becomes necessary to look into the form of conveyance from the grantor to the city. If the conveyance from the Lions Club to the City of Festus transferred the title to the city for park purposes, the city could not convey same to the school

district for school purposes. This would be an abandonment of the property for park purposes and the property would revert to the Lions Club. If the fifteen acres was transferred by an ordinary deed not containing specific use of the property and did not contain terms of a dedication for park purposes, the city could transfer the property without an affirmance by the vote of the people and without consent of the Lions Club. The transfer to the school district could be made by virtue of the powers set out in Sections 6719 and 6946 Revised Statutes of Missouri, 1929. In the case of Town of Montevallo v. Village School District of Montevallo, 268 Mo. 217, property had been dedicated for a public square and the city transferred the property to a school district upon which a school was erected. The city attempted to have the property reverted back to the city on the ground that they had no authority to sell the public square to the school district for school purposes. The case was decided on the question of an estoppel and the school district was allowed to retain the property for the reason that the building had been on the public square for over thirty years, but the Court in rendering its opinion said:

"The grant for its public school use is decidedly more limited and restricted than the original dedication warranted, and the village was without authority to change the purpose of the original grant. It is going too far to say that in dedicating this property to a single public use, and particularly the use of another separate and distinct public corporation as is a school district the requirements of this original grant are complied with."

If the deed from the Lions Club to the City of Festus recited that the fifteen acres was a dedication for park purposes, the city may avert a reversion of the property by having the Lions Club quit claim their reversion interest in the fifteen acres or any part of the fifteen acres to the school district. But the Lions Club waived reversion interest and the city joining in the transfer, the school district could obtain a good title to the property contemplated to be conveyed.

CONCLUSION

In view of the above authorities, it is the opinion of

Mr. J.G. Christy

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March 15, 1938

this department that if the Lions Club did not have an interest in reversion, a deed could be given by the City of Festus to the Festus School District without a vote by the people of the city.

It is also the opinion of this office that if the Lions Club did have an interest in reversion it could waive their reversion interest by quit claiming that interest to the school district. After the Lions Club waived their interest in reversion to the school district, the city then could convey a good title to any part of the property waived on by the Lions Club to the school district.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

FISH AND GAME:
GIGGING:

When and what specie of fish maybe
gigged, speared, etc.

March 30, 1938



Mr. Paul N. Chitwood,
Prosecuting Attorney,
Reynolds County,
Centerville, Missouri.

Dear Sir:

This is to acknowledge yours of the 29th of March requesting an official opinion from this department which request is as follows:

"Recently, in this county a local game warden had a man charged (in February of this year) 'with having gigged two hog suckers out of season'. Since these are non game fish, it is my opinion that the legislature did not wish to protect these fish, since it expressly stated in another provision of the same law, that gar might be taken at any time. It is difficult to imagine why the legislature would make such a distinction. There appear to be many provisos in this law, and it is really difficult to understand just what was actually intended. Then too the law might be construed to make it a violation to fish with a gig at any time, out of season, even though it were for gar. In such event it might be very hard for defendants in such cases to show that they were only fishing for gar. Such an interpretation and enforcement would render this law vicious indeed.

Please let me have your opinion as to the meaning of this section of law, so that I intelligently advise the citizens of this

county, and the local game wardens, in order that greater respect may be had for the enforcement of the fish and game laws."

Your request particularly goes to the question of whether fish, other than game fish, may be giggered in this state and if so, when such may be done.

Section 8224, R.S. Mo. 1929 provides that the ownership of the fish and game not held by private ownership legally acquired is in the State of Missouri.

From this section and the various court rulings cited thereunder, there is no doubt that the state has authority to designate in what manner and by what means fish and game may be taken by the public. Pursuant to that authority, the Legislature has enacted various sections of the statute covering such regulations, namely: Section 8264, R.S. Mo. 1929 prohibits any one from prohibiting free passage of fish along the streams; Section 8265 prohibits contamination of streams; Section 8266 prohibits the use of explosives to kill fish; Section 8270 regulates the use of nets and other devices in catching fish.

Section 8271, R.S. Mo. 1929 was repealed in 1931 and a new section enacted in lieu thereof which is at page 226, Laws of Missouri, 1931, and is as follows:

"It shall be unlawful for any person to take, catch or kill, or attempt to take, catch or kill, or to have in possession when so taken, caught or killed, any game fish in the waters of this state with a gig, spear, snare, snagline or grabhooks: Provided, that non-game fish shall not be so taken, caught or killed during the months of February, March, April, and May of any year, nor shall any one person so take, catch or kill to exceed 25 pounds of non-game fish in any one day: Provided, however, that

any one fish may be excluded from this weight in order to comply with the total weight of fish so taken. Provided further, that it shall be lawful to kill gar at any time. It shall be unlawful for any person, firm or corporation to catch, kill, take, ship, convey or transport, or cause to be so done, any specie of game fish taken from the waters of this state for commercial purposes. The term 'game fish,' as used in this section, shall be construed as the same are defined by section 8275. Any person, firm, association or corporation violating the provisions of this section shall be guilty of a misdemeanor."

Section 8271, R.S. Mo. 1929 provided that it shall be unlawful to spear or gig fish during the months of February, March, April, May and June of each year. This section as reenacted in 1931 did not contain the clause, "prohibiting the gigging" as did the old section, but it did state that non-game fish shall not be so taken, caught or killed during the months of February, March, April and May of any year. Upon an examination of the old section and the section as amended, Laws of 1931, page 226, we find that the Legislature intended that no one should gig, spear, or snare non-game fish during the months of February, March, April and May of any year.

Your request indicates that someone has been arrested for gigging "hog suckers" and that in view of the fact that the Legislature authorized the gar to be killed at any time, you thought the "hog sucker" also could likewise be killed. Section 8272, R.S. Mo. 1929 provides as follows:

"Logging, rock or hand fishing.--It shall be unlawful for any person or persons to take, catch or kill any fish in any of the waters of this state by means of 'logging' or 'rock fishing.' Provided further, that

fish known as hickory shad and grinnell and gar may be killed at any time with a gig."

The specie of fish known as the "hog sucker" comes within the class of non-game fish.

Said Section 8272 was in effect while the law prohibiting spearing any fish during the months of February, March, April and May and when said Section 8271 was repealed and reenacted, Section 8272 was not changed, which permitted the gigging of gar, hickory shad and grinnell at any time. If the Legislature had intended to permit the gigging of "hog suckers" at any time, it could easily have included such fish within an amendment to said section 8272 at the same time that Section 8271 was repealed and reenacted in 1931.

By the amendment of the law of 1931, it is evident that the legislators intended to prohibit the gigging, spearing, snaring, snag lining or grab hooking any game fish at any time, and to prohibit the catching or killing of any other fish in such a manner during the months of February, March, April and May of any year.

CONCLUSION

From the foregoing sections, this office is of the opinion that only that specie of fish known as hickory shad, grinnell and gar may be gigged, speared or killed at any season of the year; that fish classed as game fish shall not be gigged, speared or killed at any time of the year, and that non-game fish shall not be gigged, speared, snared, caught on grab lines or grab hooks during the months of February, March, April and May of any year.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

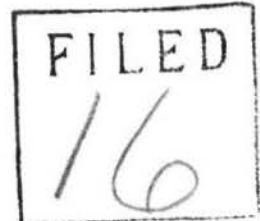
J. E. TAYLOR
(Acting) Attorney General

TWB:DA

LOTTERY: "Pay Nights" and similar schemes of awarding money in envelopes handed to customers of theaters.

April 6, 1938

Hon. G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri



Dear Sir:

We have your request for an opinion which is as follows:

"The local picture shows have a scheme which they are, as I understand, contemplating to inaugurate as follows: a system of trade inducement by placing in envelopes cash ranging from one cent to one dollar, and the envelopes then to be placed in order and each person who buys a ticket to get an envelope, that is, the first fellow who buys a ticket gets the first envelope, the second envelope, and so on.

It is claimed for that scheme that it is in the order of trade checks, that is, where a person buys merchandise he is given a trade check good for so much in cash, or credit on the bill."

The word "lottery" must be construed in its popular sense with the view of remedying the mischief intended to be prevented and to suppress all evasions for the continuance of the mischief. People vs. McPhee, 139 Mich. 687, 103 N.W. 174; 69 L.R.A. 505. State vs. Mumford, 73 Mo. 647, 650, State vs. Wersebe, 181 Atl. 299, 301.

April 6, 1938

The word is generic; no sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed but not quite within the letter of the definition given. People vs. McPhee, 139 Mich. 687; 103 N.W. 174; 69 L.R.A. 505. State vs. Clark, 33 N.H. 329. This is made apparent from an examination of a large number of cases in which various methods of distributing money or goods by chance are examined and discussed.

In Missouri a lottery is any scheme or device whereby anything of value is, for a consideration, allotted by chance. State vs. Emerson, 318 Mo. 633, 1 S.W. (2d) 109, 111; State ex rel. vs. Hughes, 299 Mo. 529, 253 S.W. 329, 28 A.L.R. 1305; State vs. Becker, 248 Mo. 55, 154 S.W. 769.

It is apparent from your request that the system outlined in your letter is the awarding of a prize for a consideration. The prize is the amount of money contained in an envelope handed to the customer. The consideration is the amount paid by the customer for the admission ticket to the theater. The only remaining element to be discussed is whether the prize is awarded by chance. There is no drawing in this plan. This does not relieve the scheme of its lottery feature.

There need be no actual drawing. In People vs. Hecht, 3 Pac. (2nd) 399, 1. c. 402, the court said:

"But it may be said that there is no element of chance because there is no drawing; that the management itself selects the beneficiary; but this factor does not purge the transaction of all element of chance. To the purchaser it is uncertain, as to him it is chance."

"Chance" as defined by Webster is a possibility or probability of an event happening. In the present case it is purely a matter of chance as to whether the theater patron receives one cent or one dollar in money. The element of time at which he buys his ticket and enters the theater, when compared with the order in which the envelopes containing the dollars are placed in the stack determined whether he gets one cent or one dollar. This time element is chance within the lottery law. State ex rel. vs. Hughes, 299 Mo. 529.

Hon. G. R. Chamberlin

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April 6, 1938

This office has previously advised theaters and prosecuting attorneys with reference to the operation of this scheme, in which the position has been taken that such is a lottery.

CONCLUSION

It is therefore the opinion of this office that the scheme as outlined in your letter, sometimes known as "Pay Nights" and sometimes by other names, is a lottery in violation of the criminal code of this state; that its operation is unlawful as being in violation of Section 4314 R. S. Missouri 1929.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

COUNTY CLERK: Clerk's duty to total columns of taxable property on Assessor's books under Sections 9800-9805, R.S. Missouri, 1929.

April 21, 1938

H-22



Mr. Richard Chamier
Prosecuting Attorney, Randolph County
Moberly, Missouri

Dear Sir:

This department is in receipt of your letter of April 16, 1938, in which you request an opinion as follows:

"I enclose herewith two sample sheets from the records of the Assessor. One is called the personal sheet, the other the land sheet.

"You will notice that the personal sheet lists live stock, farm machinery, household goods, money, motor vehicles and other personal property. The land sheet carries the real property owned by the tax payer and has the proper notations as to the value of the land and the amount of it. A dispute has arisen between the Assessor and the County Clerk. The Clerk contends that the Assessor's abstract is not complete unless he furnishes a tabulation at the bottom of each sheet of the abstract carrying the total of the columns on that particular sheet. The Assessor takes the position that under Section 9800 Revised Statutes of Missouri, 1929, that it is the duty of the Clerk of the County Court to furnish the footings of the different columns on the sheets.

"Please advise whether the Clerk or the Assessor should add the different columns on each sheet of the abstract for land and personal property."

April 21, 1938

We think the provisions of Section 9800 (which you cite) and Section 9805, R.S. Missouri, 1929, are decisive of this question.

Section 9800 is in part as follows:

"And the clerk of the county court shall immediately make out an abstract of the assessment book, showing aggregate footings of the different columns, so as to set forth the aggregate amounts of the different kinds of real and personal property and the valuation thereof, and forward the same to the state auditor, to be laid before the state board of equalization."

137.245

Section 9805 is in part as follows:

"The county clerk shall add up the figures showing the amount of such tax, in the proper columns, and the aggregate amount in each column shall be noted on each page. Said clerk shall test the accuracy of such additions by computing the amount of such tax on the aggregate amount of property on each page, that he may be certain that the tax has been correctly extended and added."

137-235

Section 9756, as amended, Laws of 1937, page 570, and Section 9780, R.S. Missouri, 1929, enumerate the items to be contained in, and the arrangement that the assessor is to follow in making up his tax books. These sections at no place require the assessor to total the value of each column of taxable property, nor do we find any other provisions in the law requiring him to do the same.

137.115

137.215
137.255

In *Cummins v. Kansas City Public Service Co.*, 66 S.W. 2nd, 1.c. 931, it is said:

"It is, of course, fundamental that where the language of a statute is plain and admits of but one meaning, there is no room for construction."

April 21, 1938

The provisions of Sections 9800 and 9805, supra, appear to be very plain, in that they make it the duty of the county clerk, when he extends the taxes on the assessor's books, to add up the figures showing the amount of the tax in the proper column and to note the aggregate amount in each column on each page, and further, to check the same to be certain these totals are correct.

CONCLUSION

Therefore, it is the opinion of this department that it is the duty of the clerk of the county court to add the columns mentioned in Sections 9800 and 9805, supra, in order that the total taxable value of the property extended on the assessor's books may thereby be reflected.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

SCHOOLS: District may not pay bonus to teacher when said bonus is not provided by contract.

April 23, 1938

4-25



Hon. Richard Chamier
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"The school directors in District #50, employed a teacher at \$75.00 a month for eight months. At the end of the eight month period the directors voted a bonus to the teacher of \$100.00. This was in addition to her salary. Her contract had no reference to any bonus.

"A tax payer has complained alleging the school district had no authority to pay the bonus. Please advise whether or not the action of the board in paying the bonus was improper."

Article IV, Section 47, of the Constitution of Missouri provides in part as follows:

"The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, * * * * *"

April 23, 1938

As stated in your request, this money is paid by the school district not under the terms of the contract of employment, but as a mere gratuity or "bonus". Therefore, these statutes relating to contracts between school teachers and school directors or boards of education (Sections 9209, 9210, R.S. Missouri, 1929) are not applicable to the situation at hand.

Under the above constitutional provision, no political subdivision of the state can grant public money to any individual. That a school district is a public subdivision is no longer open to question. State ex rel. McKittrick v. Whittle, 63 S.W. 2nd 100, State ex rel. School District v. Gordon, 231 Mo. 547, 133 S.W. 44. Therefore, for the officers of a school district to grant to a teacher money for the payment of which the district is not liable, and which is a mere gift and gratuity on the part of such directors, clearly comes within the inhibition of the above constitutional provision, and is, therefore, illegal and void.

There is another reason which would make such a gift void and of no effect. Article IV, Section 48, of the Constitution of Missouri provides as follows:

"The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

In Watts v. Levy District, 164 Mo. App. 263, the court said:

"While this constitutional prohibition does not literally cover the class of

April 23, 1938

officers or public agencies to which these drainage districts belong, it would seem that its spirit should cover them, and that spirit is against the allowance or payment."

While the above case deals with a drainage district, still the political status and nature of a school district are very similar to that of a drainage district and what was said in that case is equally applicable here.

CONCLUSION

It is, therefore, the opinion of this department that a board of directors of a school district may not grant a bonus at the end of a year to a school teacher, no mention of which is made in the contract of employment.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

AO'K:VAL

SCHOOLS: Meaning of the word "majority" in elect-
ing School Directors or voting on
propositions

May 12, 1938

5/18



Honorable Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"Section 9278 R. S. 1929, refers to the election of School Directors, and their qualifications. The time of their election is contained in sections 9283-4. The latter section provides that, (among other propositions to be voted upon at the annual school meeting) 'The qualified voters assembled at the annual school meeting, when not otherwise provided, shall have power by a majority of the votes cast:'

" 'Second- To choose by ballot, one director, who shall hold his office for the term of three years and until his successor is elected and qualified.'

"It will be noted that this law provided in most cases that the proposition voted upon must be carried by a majority of the votes cast at such election; and I believe this has been the opinion of your office in the past; but the question arises as to what

will be the result in the event no one candidate, or the proposition voted on does not receive such majority of the votes cast. Apparently the law does not define the word majority, and turning to Webster, we find that majority means more than half. If no one then receives more than half the votes, will it be necessary to keep voting at the same or subsequent elections, until the candidates, or propositions voted upon do receive such a majority of the votes cast?

"To hold this to be true as literally stated would probably work a hardship in many instances, and yet to hold otherwise might be without sanction of the law, I can find no decisions on this proposition here, and would like your opinion if you care to give same, on a matter which, technically at least, may not be directly in line with either yours or any official duties. Yet there is a situation existing in this county which is of public interest, and I have been consulted in the matter, and in turn have consulted you, in the emergency. If you care to give your opinion in this matter, it will be appreciated very much."

Section 9287, Revised Statutes Missouri 1929, vests the control of a district in a board of directors consisting of three members. Said section provides, in

part, as follows:

"Said directors shall be chosen by the qualified voters of the district at the time and in the manner prescribed in Section 9283 of this article, and shall hold their office for the term of three years, and until their successors are elected or appointed and qualified, except those elected at the first annual meeting held in the district under the provisions of this chapter, whose term of office shall be for one, two and three years, respectively,"

It will be noted from a reading of Section 9287, that directors hold office for a term of three years, except the first board of directors, and until their successors are elected or appointed and qualified. Therefore, it follows that once a person is elected to the board of directors that he holds his office until a successor is elected or appointed and qualified.

Section 9283 provides for the annual meeting, and, in part, reads as follows: "The annual meeting of each school district shall be held on the first Tuesday in April of each year, at the district schoolhouse, commencing at 2 o'clock p. m. " Provision is further made that in the event there is no schoolhouse, that then the place of meeting is designated by notice.

Therefore, the time and place of the annual meeting of the voters of the school district is fixed at a definite time and place. The matters and things which the voters pass upon is found in Section 9284, Revised Statutes Missouri 1929. Section 9284, supra, as pertinent to your inquiry, reads, in part, as follows:

"The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast:

"Second- - To choose, by ballot, one director, who shall hold his office for the term of three years and until his successor is elected and qualified."

The above statute is unambiguous and provides merely that the voters, when assembled at the annual meeting, may vote by ballot to choose a director, and when a majority of the voters thus assembled choose by ballot the director, such director will hold office for a term of three years, or until his successor is elected and qualified. As hereinbefore shown, at the first meeting in a newly organized district, the directors are elected for a term of one, two and three years, so that the next annual meeting would mean that the voters would have to elect a director to a three year term, occasioned by the expiration of the term of the person holding office for one year, and thereafter each year a director would be elected. The question presents itself, however, that if the voters failed and refused to elect a director to succeed the person whose term has expired, what would be the effect thereof? Section 9287, and Section 9284, in no uncertain terms provide that a director holds office until his successor is elected and qualified, and failure of the voters to elect a successor at an annual meeting by a majority vote leaves said director to hold over in office until his successor is elected and qualified. No provision is found for the election of a person to a directorship other than at the annual meeting unless there be a vacancy, and in the event of a vacancy Section 9290, Revised Statutes Missouri 1929,

provides how such is filled. The failure of the qualified voters to elect a successor would not create a vacancy, in our opinion. State ex rel Thurlo v. Harper, 336 Mo. 717, 80 S.W. (2) 849, 852. Having concluded that no vacancy exists by failure of the qualified voters at the annual meeting to elect a successor for the director whose term had expired by operation of law, the question arises as to how long the "hold over" remains a director. In other words, does the "hold over" director remain in office for a term of three years unless a vacancy occurs, as contemplated by Section 9290, Revised Statutes Missouri 1929? There is no question but what Section 9284, supra, provides for the choosing by ballot of only one director for a term of three years, and provision is made to fill a vacancy at the annual meeting if such vacancy is "caused by death, resignation, refusal to serve, repeated neglect of duty or removal from the district." However, there is no provision by statute to elect at the annual meeting a director to fill out an unexpired term unless such unexpired term is occasioned by a vacancy. Having held that no vacancy exists because of failure to elect a director whose term had expired, it follows that the director would enter upon a new term for three years, because of the failure of the electorate to provide a successor for him. As reasoning for our conclusion we quote from an opinion rendered by this department on March 1, 1937, to the prosecuting attorney of Chariton County, Keytesville, Missouri, wherein it is said (pages 5-8):

"An election to any office can only be held when provided for by law. As was said in the case of State ex rel. McHenry v. Jenkins 43 Mo. l. c. 265:

" 'Or if not, who is the present clerk? By the terms of the act creating the Kansas City Common Pleas, as well as by the constitutional provision, the clerk shall hold his term until the election and qualification of his

successor. Thus there is no vacancy, and Mr. Vincent holds over.

"In relation to relator's second claim, that the omission to hold an election in 1866 can be supplied by one in 1868, we can only say that it is a valid one if the law provides for any such election. But he has failed to show us any such provision, and it would be difficult to give legal validity to a volunteer election. No election can be had unless provided for by law. As the law makes no provision for the election of clerks in 1868, such election is wholly void and of no effect. This position has never been questioned. In the State v. Robinson, 1 Kansas, 17, a question was raised as to the validity of an election for governor and it was held that the election under consideration was not provided for by law, that the person elected could not take the chair, and that the previous governor should hold over until the next general election. No case has been known where a volunteer election has been held valid, even though the term of the incumbent had expired."

"Also, in the decision of State ex inf. v. Dabbs, 182 Mo. 1. c. 367:

"The act of March 25, 1901 (Laws 1901, p. 120), providing for an additional judge of the circuit court of Jasper county, under which defendant was appointed

and commissioned, provides, that 'he shall continue in office until the first Monday of January, 1903, and until his successor is elected and qualified.' His successor was elected at the general election held in November, 1902, but died before qualifying and it must follow that defendant is 'entitled to hold over until the next regular term for holding an election for that office.' "

"The legislature having provided for the election of treasurer, in the event that there is no vacancy had in mind uniformity as to time. As was said in the case of State ex inf. v. Smith, 152 Mo. 1. c. 521:

"In the case at bar Haughton was appointed under section 7 of the Act of 1891, to fill the unexpired term of Sheehan, which ended at the regular election in 1898, and until his successor was duly elected and qualified. The attempted election of his successor in 1898 failed by reason of a tie vote. No successor was then elected and hence none qualified. Therefore no vacancy existed or occurred in the office. The effect was the same as if no election for a successor had been held in 1898. There being no vacancy there was no power in the judges named to appoint defendant to the office, either by virtue of the Act of 1891 or of any other statute, and hence their action was a nullity and defendant had no title to the office. Inasmuch as the Act of

1891 provided that there should be an election for justice of the peace, in St. Louis, at the regular election in 1894 'and every four years thereafter,' and inasmuch as there was in legal intendment no election held in the fourth district in St. Louis for justice of the peace in 1898, there has been no successor yet elected for Haughton, and as the purpose of the law-makers in that there shall be uniformity in the time of electing all justices of the peace, and as there is no special statute covering cases like this, it follows that there can be no legal election held to elect a successor for Haughton until the regular election in the year 1902, and that he has a right to continue to hold the office of justice of the peace for the fourth district, in the city of St. Louis, until a successor is elected at that time, and thereafter duly qualifies, by virtue of his appointment until his successor is duly elected and qualified."

From the above and foregoing, it is our opinion:

1. That the director holds office until his successor is elected and qualified.
2. That the failure of a person to receive a majority of the votes cast at an annual meeting for director would continue in office the old director.
3. That no vacancy exists in a directorship merely because the assembled voters neglect by a

Honorable Paul N. Chitwood

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May 12, 1938

majority vote to elect a successor.

4. That no hardship is visited upon the district by the failure of the assembled voters by a majority vote to elect a successor, because the business transacted for the district by the "hold over" director does not inure to the detriment of the district because the acts of such director would be valid in all respects. *Eaker v. Common School District No. 73, of Butler County (Mo. App.) 62 S. W. (2) 778, 783.*

5. That such "hold over" director would continue in office for a regular term of three years.

Yours very truly

HARRY H. KAY
Assistant Attorney General

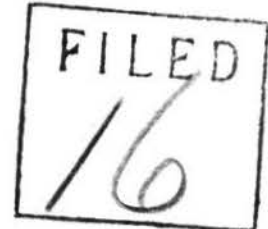
APPROVED

J. E. TAYLOR
(Acting) Attorney General

JLH LC

TAXATION: County court must make a levy under Section 7890, R. S. Mo. 1929. Moneys derived from levy under said section should not be placed in the budget but should be disbursed according to the terms of the statute.

May 18, 1938



Honorable Richard Chamier
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

This Department is in receipt of your letter of May 3d, wherein you request an opinion embodying the following facts:

"Section 7890, Revised Statutes of Missouri, 1929, requires counties of the size of Randolph County to levy at the May Term of the County Court, for the credit of the 'County Road and Bridge Fund' a levy not to exceed 20¢ per \$100.00 as a road tax.

"The budget law starting at page 340 of the Session Acts of 1933 provides that the County shall estimate the amount of money needed for various purposes and pass a levy sufficient to provide such fund. In this county the money needed for the county road work is included in the general levy.

"The County Court has asked that you advise whether or not it is necessary to follow the mandatory provision of Section 7890 after the budget law has been passed. If it is not necessary they propose to raise all funds necessary for county road work from the general levy and propose to not levy under the provisions of Section 7890.

Please advise them whether or not they must make this levy.

"If they must levy under Section 7890 the County Clerk desires to know whether he must maintain a 'County Road and Bridge Fund'; or whether the money raised by this levy should be distributed as county monies are required to be distributed by the budget law.

"It is the understanding of our County Court that Section 7891, Revised Statutes of Missouri, 1929, can be used to raise funds for the special road districts."

It is well to bear in mind the provisions of Section 7890, R. S. Mo. 1929, mentioned in your letter, and same is herewith quoted in full as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

The effect of the Budget Act has often been construed by this Department as not the complete repeal of the financial structure of a county but more for the purpose of promoting economy and efficiency in county government, and the Act has further been construed as repealing only such sections as are in direct conflict with it and cannot be harmonized with the spirit and purpose of the Budget Act. Section 22, Laws of Missouri, 1933, page 351.

Carefully construing the terms of Section 7890, supra, we cannot construe such terms to be in conflict with the terms of the Budget Act, but the effect of both the act and the section in carrying out the terms must be considered, and the questions are to the effect: (a) As to whether or not the county court must make a levy under Section 7890; and (b) if the county court makes the levy in accordance with the terms of Section 7890 are such funds so raised by the levy to be distributed in conformity with the terms of the Budget Act?

Under the general powers of the county court, given by the Constitution, Section 11 of Article X, the Legislature enacted Section 7890, quoted supra, as a part of the road taxing scheme. State ex rel. Kersey v. Land Cooperage Co., 317 Mo. 1. c. 45. We think that the statute is mandatory in its terms and has been so declared by the decision of State to the Use of Covington v. Wabash Ry. Co., 319 Mo. 1. c. 305, as follows:

"The prototype of this section was enacted by Laws 1899, p. 340 (Sec. 9436, R. S. 1899), by which it was provided that county courts may levy a road tax of not less than five cents or more than twenty cents on the \$100 valuation, to be deducted from the levy made for county purposes. The statute has come on down as Section 19, page 743, Laws 1909; Section 10481, Revised Statutes 1909; Laws 1913, page 667; Section 36, page 457, Laws 1917; Section 10682, Revised Statutes 1919; and Laws 1921 (Ex. Sess.) p. 172. The law of 1909 dropped the five cent minimum imposed by the law of 1899, and also omitted the specific provision that the road tax be deducted from the levy made for county purposes. The 1913 law put back a minimum of ten cents, which was carried in the statute until stricken out by the amendment in 1921. Now there is no minimum requirement, but the section

during all this twenty years, nearly, has been regarded as a mandatory statute requiring the levy of a road tax within the limit (or limits) specified from time to time."

Therefore, it becomes the duty of the county court to make a levy of some nature under Section 7890. Of course, the amount is discretionary with the county court.

Our answer to your first question being in the affirmative, it becomes necessary to refer briefly to certain terms in the Budget Act to answer your second question.

In Section 1, Laws of Missouri, 1933, page 341, the act uses the following expressions:

"* * * Whenever the term revenue is used in this act it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by this act regardless of the source from which derived. * * * The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year. * * *"

This would appear to include all forms of revenue which apparently would include the levy under Section 7890, as a levy under this section is considered a levy "for county purposes." State ex rel. v. Railroad, 319 Mo. 302.

But under Section 2, page 341, Laws of Missouri, 1933, the county court is directed to classify the expenditures in such a way as to preserve priority of each class. The first five classes are definite in their terms and set forth precisely the items which are to be classified. The only class which could be said by inference or reference to

include roads and bridges is Class 3, which is as follows:

"The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

However, this class refers to the upkeep, repair or replacement of bridges not on state highways or in special road districts. No provision is made for the upkeep or repair of roads. Class 6 merely attempts to provide for any excess money which the county court may have on hand after providing for the other five classes, and in order to have funds in this class it is necessary for the county to be solvent and not owing any outstanding warrants.

Thus, the situation resolves itself into the fact that the terms used in the first section of the Budget Act are broad enough to include funds derived under a levy provided for in Section 7890, but the Budget Act fails to offer any classification for such funds.

In view of the fact that the Budget Act in nowise provides for the use of funds derived under Section 7890 or the manner in which they shall be spent or classified, we are of the opinion that such funds do not come within the provisions of the Budget Act and as contained in Section 7890 they "shall be placed to the credit of the county road and bridge fund." And we are of the further opinion that they should be kept in said fund and expended independently of the Budget Act.

The last paragraph in your request is not sufficiently definite for us to determine the exact question. However, we assume that the county court desires to make an

May 18, 1938

additional levy under Section 7891, R. S. Mo. 1929, empowering said county court so to do for the purpose of raising funds only in a special road district, or can the county court use the funds levied by this section in a special road district?

In either event we think the statute is plain in the proviso therein contained, which is as follows:

"Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: "

Section 7891, supra, has been construed by the court in *State ex rel. v. Cooperage*, 317 Mo. 45, as not being a part of county levy, or, in other words, not a levy for current county expenditures.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

HEALTH: Persons violating rules promulgated in accordance with provisions of Art. I, Chap. 52, R. S. Mo. 1929, relating to the public health are guilty of a misdemeanor.

July 1, 1938.

Mr. Paul N. Chitwood,
Prosecuting Attorney,
Centerville, Missouri.



Dear Sir:

This will acknowledge your letter of recent date requesting an opinion from this office as to whether or not the Deputy Commissioner of Health appointed in accordance with the provisions of Section 9025 as amended, Laws of Missouri, 1933, at page 271, had authority under the provisions of the laws relating to public health vital statistics to make reasonable regulations for the prevention of smallpox, and prosecuting anyone for removing a quarantine card which has been placed upon the door of any person quarantined for smallpox.

At the outset we make the observation that your local deputy State Health Commissioner only was carrying into effect rules and regulations of the State Board of Health relative to communicable diseases.

Attention is directed to Sec. 9015, R. S. Mo. 1929, relating to the power and the duty of the State Board of Health with respect to the health of the public in this state. It reads as follows:

"It shall be the duty of the State Board of Health to safeguard the health of the people in this state, counties, cities, villages, and towns."

Under the provisions of Sec. 9016, R. S. Mo. 1929, the State Board of Health is given the authority to designate those diseases which are infectious, contagious, communicable or dangerous in their nature, as well as to promulgate rules and regulations to prevent the spread of such diseases. Said section reads as follows:

"The board shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate rules, regulations and procedures to prevent the spread of those diseases and to determine the prevalence of said diseases within the state."

Upon reference to the Missouri Public Health Manual, issued by the State Board of Health for the year 1935, at page 8, it is disclosed that the State Board of Health has designated diseases which are communicable and dangerous to the public health, among which the disease of smallpox is therein listed.

Under Section 4 of the Missouri Public Health Manual, page 13, relating to precautionary measures to be adopted, where a communicable disease exists in any community, it is provided on page 18 of said Manual that,

"Whenever communicable disease exists in any community, the health officer, in order to prevent the spread of such disease may order the closure of schools and other places of public assemblage for such time as may be necessary, and it shall be the duty of the school officers and other responsible persons to comply with such orders.* * *"

Under the same section of the Health Manual, it is further provided with respect to the quarantine of persons afflicted with a communicable disease, on page 18, that,

"Persons afflicted with communicable disease shall remain on the premises to which they have been confined until the restrictions have been terminated by the health officer or his permission given for their removal to another place."

These considerations of the rules and regulations promulgated by the State Board of Health would eliminate your observation that the local health officer of your community had promulgated the rules and regulations with respect to this communicable disease. Therefore, the local health officer was only enforcing such rules and regulations as had been promulgated by the State Board of Health.

It is provided under the provisions of Sec. 9030, R. S. Mo. 1929, as follows:

"Any person or persons violating, refusing or neglecting to obey the provisions of this article or any of the rules and regulations or procedures made by the state board of health in accordance with this article, or who shall leave any pest-house or isolation hospital, or quarantined house,

or place without the consent of the health officer having jurisdiction, or who evades or breaks quarantine or knowingly conceals a case of contagious, infectious, or communicable disease, or who removes, destroys, obstructs from view, or tears down any quarantine card, cloth or notice posted by the attending physician or by the health officer, or by direction of a proper health officer, shall be guilty of a misdemeanor."

The statutes above considered are plain and unambiguous and no need for construction exists.

CONCLUSION

In view of the above, it is the opinion of this department that all persons who violated the rules and regulations above noticed, made by the State Board of Health, in accordance with the provisions of Chapter 52, Article I of the Revised Statutes of Missouri, 1929, which rules and regulations were sought to be enforced by the Deputy Health Commissioner, were guilty of a misdemeanor.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS/LD

TAXATION:
BANKS AND BANKING:
FRANCHISE TAX
PREFERRED STOCK HELD
BY RFC:

Preferred stock of a bank owned by the Reconstruction Finance Corporation constitutes a part of the capital structure of such bank upon which the franchise tax may be based.

August 20, 1938

Mr. Richard Chamier
Prosecuting Attorney
Randolph County
Moberly, Missouri



Dear Sir:

Yours of June 27, 1938, and of July 19, 1938, pertaining to the franchise tax of The City Bank & Trust Company of Moberly, Missouri, have been referred to me for attention.

From your letters, I find that the question involved is the right of the State Tax Commission to assess the entire capital stock of a corporation for franchise tax when a part of the capital structure of such corporation is represented by preferred stock which is owned by the Reconstruction Finance Corporation.

The franchise tax is assessed and levied by the Tax Commission by virtue of the provisions of Section 4641, R. S. Mo. 1929, which is as follows:

"For the taxable year of 1929 and thereafter every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding capital stock and surplus, or if the capital stock of such corporation or any part thereof consists of no par value stock, then in that event, for the purposes herein contained such stock shall be considered as having a value of

\$5.00 per share unless the actual value of such shares should exceed \$5.00 per share, in which case the tax shall be levied and collected on the actual value and the surplus. If such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding capital stock and surplus employed in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located. Every corporation not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its capital stock and surplus employed in business in this state, or if the capital stock of such corporation or any part thereof consists of no par value stock, then in that event, for the purposes herein contained, such stock shall be considered as having a value of \$5.00 per share, unless the actual value of such shares should exceed \$5.00 per share, in which case the tax shall be levied and collected on the actual value and the surplus, and for the purposes in this article such corporation shall be deemed to have employed in this state that portion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located: Provided, that this law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this state, and insurance companies, which pay an annual tax on their gross premium receipts

in this state: Provided, bank deposits shall be considered as funds of the individual depositor, left for safe-keeping and shall not be considered in computing the amount of tax collectible under the provisions of this article. If this provision, exempting bank deposits shall be declared unconstitutional by the courts, then the legislature hereby declares that it is the intention that the remainder of this article shall be in full force and effect and further declaring that it would have passed this article irrespective of the said exempting provision."

Banking institutions are authorized to issue preferred stock by authority of Section 1, Laws of Missouri, 1933, page 406, which is as follows:

"Notwithstanding any other provision of the laws of this State governing the organization, incorporation, management, and control of corporations, and more particularly the organization, incorporation, management, and control of banks, trust companies doing a banking business, and other financial institutions organized, incorporated, and existing, under the laws of this State and subject to the jurisdiction of, and control by, the Finance Commissioner of the State of Missouri, any such corporation may, with the consent of all its stockholders, issue and sell its shares of preferred stock, of one or more classes, subject to the provisions of this act and the approval of the Finance Commissioner of the State of Missouri. Wherever the term 'corporation' is used in this Act, it shall be held to mean any trust company doing a banking business or banks in the state of Missouri."

Section 2 of said Act, Laws of Missouri, 1933, page 407, provides that the preferred shares of stock of a banking corporation may be issued as a part of the existing capital of the existing corporation or as an increase of its capital. In either event, such preferred stock is a part of the capital structure of the corporation issuing same and upon which the franchise tax is to be based.

It is because the Reconstruction Finance Corporation holds the preferred stock that the bank seems to claim such stock should not be included in the capital structure of the bank for the purpose of levying the franchise tax.

The Reconstruction Finance Corporation was organized January 22, 1932, by Act of Congress, Title 15, Section 81, U. S. Code Annotated, page 69, 1934 Cumulative Pocket Part. Section 602 of said Act provides that the capital stock is owned by the United States.

Section 10 of the Reconstruction Finance Corporation Act, page 86, provides in part as follows:

"The corporation, including its franchise, its capital, reserves and surplus, and its income, shall be exempt from all taxation now or hereafter imposed by the United States or by any territory, dependency, or possession thereof, or by any state, county, municipal or local taxing authority; except that any real property of the corporation shall be subject to state, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

An instrumentality or agency of the United States Government, being wholly owned by the United States, is not subject to taxation without the consent or express legislation of Congress. In *United States v. Coghlan*, 261 Fed. 425, 426, the United States District Court of Maryland said:

"It was shown that all the stock of the Fleet Corporation was owned by the government, and that all it did was done for government account, and that all the profits

which it made would inure to the government, which would have to stand all the losses. Under such state of facts, it is unnecessary to inquire whether for all purposes the Fleet Corporation is the government. It suffices that it is a governmental agency, exclusively employed in governmental work, and as such its property is not liable to state taxation."

On the question of deducting from the returns for the assessment of the franchise tax for the bank the amount of preferred stock owned by the Reconstruction Finance Corporation, we find that the Supreme Court of the United States has held that a state statute could assess to the stockholders shares of stock in a bank and measure the value of such shares by assets from exempt property. In the case of *Des Moines National Bank v. Fairweather*, 263 U. S. 103, (1923), the court said:

"The next contention--that the statute subjects securities of the United States to taxation contrary to exempting laws of the United States, in that it requires that the assessment be based on the aggregate of the capital, surplus, and undivided earnings, without any deduction or allowance on account of the investment in such securities--confuses the shares, which are the property of the stockholders, with the corporate assets, which are the property of the bank. It is quite true that the states may not tax such securities, but equally true that they may tax the shares in a corporation to their owners, the stockholders, although the corporate assets consist largely of such securities, and that in assessing the shares it is not necessary to deduct what is invested in the securities. The difference turns on the distinction between the corporate assets and the shares,--the one belonging to the corporation as an artificial entity and the other to the stockholders."

By your letter of July 19, 1938, you state that the bank thinks that there is a distinction between capital stock notes and preferred stock notes when same are held by the Reconstruction Finance Corporation. Capital stock notes and preferred stock both go in to make up the capital structure of the bank. Both are issued to increase the capital structure of such institution.

In the case of *Hilson County v. State Board of Assessors*, 82 N. J. 2, 1. c. 4, the court in discussing debentures, which are similar to capital notes, which were issued by the bank, said:

"I have no doubt that the act of the State Board of Assessors in treating these certificates as representing a part of the outstanding stock of the corporation for the purpose of determining the amount of franchise tax to be assessed against it was proper notwithstanding the fact that the certificates in their form exhibit a dual character, namely, a certificate of indebtedness and a certificate of stock ownership."

In the case of *Kansas City Ry. Co. v. Kansas*, 60 L. Ed. 617, 240 U. S. 227, 232, the court in discussing franchise tax, said:

"In examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the state court. We take it to be simply a tax on the privilege of being a corporation,--on the primary corporate franchise granted by the state. The authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power."

In the case of Home Ins. Co. of New York v. People of the State of New York, 33 L. Ed. 1025, the Supreme Court of the United States held:

"Where a state statute imposes a tax upon the 'corporate franchise or business' of a company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year, this is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection that it is a tax on United States securities, although a portion of its capital stock is invested in such securities.

"By the term 'corporate franchise or business,' as here used, is meant the right or privilege of being a corporation, that is, of doing business in a corporate capacity.

"The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. Its action in this matter is not the subject of judicial inquiry in a federal tribunal.

"The taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the Legislature may choose.

"Such tax cannot be affected in any way by the character of the property in which its capital stock is invested."

From the foregoing authorities, it is evident that it makes no difference who owns the stock, whether preferred, common, or capital notes, of a corporation in considering

August 20, 1938

the franchise tax of such corporation. The tax is based upon the amount of stock outstanding, regardless of its ownership. The tax is against the corporation for the privilege of doing business. This tax is not a property tax. It is in the nature of an excise tax.

CONCLUSION

From the foregoing, it is the opinion of this department that preferred stock of a banking corporation which is owned by the Reconstruction Finance Corporation or any other governmental agency shall be considered as representing stock issued and outstanding for the purpose of determining the amount of the franchise tax assessable against such corporation.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

TAXATION:
DELINQUENT LANDS:
ADVERTISEMENT:

Delinquent lands may not be sold for taxes to the highest bidder at the third time they are offered for sale unless they have been properly advertised at the first and second sales in which they are offered.

September 20, 1938

Hon. Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the following questions:

"1. What is the legal effect of a failure to advertise the delinquent land before sale, in succession as law provides; for example, if land is advertised for sale under this law one year and no bid is received; the same land is not advertised the second year, but is advertised the third year? Will the failure to advertise and offer the land for sale as provided by this law invalidate the sale?

"2. The third time the Collector offers the same land for sale for delinquent taxes, it is sold to the highest bidder for cash. Now is the record owner (or person who lets the land sell for taxes) entitled to bid on such lands, have them struck off to him for a very nominal sum, and then demand a Certificate of Purchase?"

On the second question, we find that this office on October 16, 1936, by an opinion to Mr. J. B. Greer, County Collector of Pettis County, covered the same subject, and we are enclosing a copy of this opinion for your information.

As to your first question, we find that the provisions of Section 9952b, Laws of Missouri, 1933, page 430, are applicable. This section is as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.; provided, however, that if a part or parts of any forty-acre tract or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated. To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered. The county collector shall, on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify on said record immediately following such notice the name of the news-

paper of the county in which such notice was printed and published and the dates of insertions of such notice in such newspaper. The expense of such printing shall be paid by the purchaser or purchasers of the lands and/or lots sold and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed the legal rate for the entire notice, as such legal rate is fixed by Sec. 13773, which cost of printing at the rate specified shall be taxed as part of the costs of the sale of any land or lot contained in such list and disposed of at such sale, and the total cost of printing such notice shall be prorated against all such lands or lots so sold or redeemed prior to any such sale."

This section specifically sets out the duties and the procedure for the county collector to follow in advertising delinquent lands for sale for taxes. Each and every step of this procedure must be followed by the collector before he can acquire jurisdiction to sell delinquent lands for taxes.

The rule is well settled in this state, and as stated in the case of *Spurlock v. Dougherty*, 81 Mo. 171, 1. c. 181, wherein the court in speaking of a notice of sale of delinquent lands for taxes said:

"The notice is the indispensable prerequisite, and without it the court had no jurisdiction. In *Large v. Fisher*, 49 Mo. 307, Judge Adams says: 'A regular notice published as the law requires, is the very foundation of the collector's authority to sell. In selling lands for taxes, he is executing a mere naked statutory power, and the rights of the citizen

to his property cannot be divested by this kind of sale, unless it appears affirmatively from the form of the collector's deed that all the prerequisites of the statute have been strictly pursued. This is the settled law of this State.' (Citing cases.) "

The rule for construction of such statutes is also set out in 26 R. C. L., page 394, Section 354, as follows:

"There is no presumption in favor of the validity of a tax title based upon a sale by a collector as an administrative act. One who claims title to the property of another by virtue of a sale for nonpayment of taxes is bound to show the existence of every fact necessary to give jurisdiction and authority to the officer who made the sale, and a strict compliance by him with all things required by the statute in carrying out the sale. * * *"

Section 9953, Laws of Missouri, 1933, page 432, provides as follows:

"If at the first offering of sale of any tract of land or lot under the provisions of this act no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact in his record of sale and the county collector shall note a recital thereof in his record containing the list of delinquent lands and lots, and said tracts of land or lots shall be again offered for sale, at the next sale of delinquent lands and lots as in this act provided, if such lands or lots be at such time delinquent. If at the second offering for sale no person shall bid therefor a sum equal to

the then delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact upon his record of the sale, and the county collector shall enter a recital of such fact in his record book containing the list of delinquent lands and lots."

This section definitely requires that the delinquent lands which are not sold at the first sale shall again be offered for sale at the next sale of lands and lots as in this act provided. As stated in Section 9952b, supra, of this act, it is necessary to advertise the lands each time they are offered for sale, and there is no doubt that the lawmakers, by the language of said Section 9953, intended that the procedure for offering the delinquent lands for sale the second time should be the same as prescribed for offering them for sale the first time. That is, the county collector, before he can legally offer delinquent lands for sale for taxes the second or third time, must at each time they are offered for sale have advertised them as provided by Section 9952b, supra.

26 R. C. L., page 397, Section 356, states the rule as follows:

"With respect to the proceedings of the collector in selling the property, no distinction is drawn between mandatory and directory requirements of law. Unless the collector acts as the law directs he acts without authority and the sale is invalid, even if the requirement which he failed to comply with was not imposed for the protection of the owner of the land assessed. * * * The validity of a tax sale depends wholly upon compliance with the statutes authorizing the sale. * * *."

Section 9953a, Laws of Missouri, 1933, page 432, provides as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

This section authorizes the collector to sell delinquent lands to the highest bidder when they have been offered for sale two years successively and they were not sold because of the insufficiency of the bid to pay the taxes, interest, penalty and costs.

CONCLUSION

From the foregoing, we are of the opinion that if the county collector fails to advertise delinquent lands for sale at the second time they are offered for sale, he has no jurisdiction or authority to make such offer and sale, and that all of his proceedings in connection with such offer and sale are null and void. We are further of the opinion that if the county collector offers for the third time delinquent lands for sale for taxes which have not been properly advertised for sale the first, second or third year in which they are offered, he is without jurisdiction to offer such lands for sale to the highest bidder as provided by Section 9953a, supra, and his acts and proceedings are null and void. However,

if at the third sale such delinquent lands have been properly advertised, they may be sold if the amount of the bid is enough to pay the delinquent taxes, interest, penalty and costs, even though the lands were not properly advertised at the first and/or second sale in which they were offered.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

TAXATION: County collector, by mandamus, can be compelled to accept a warrant for taxes for the same year.

October 3, 1938

Honorable Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of September 29, 1938, requesting an opinion from this department, which is as follows:

"Section 9911 R. S. Missouri, entitled 'What shall be received for Taxes', after enumerating gold and silver coin of the U. S., warrants on state auditor for state taxes, jury certificates for county taxes, bonds, etc., goes further and states * * * 'Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant * * * *'

"Now the question arises in Reynolds County, whether the Collector of Revenue can legally be made accept for county taxes, any warrant from the holder thereof, for his taxes due for the year for which the warrant was issued, by said county.

"Also, what is the remedy if the Collector refuses to so receive such warrant or warrants in payment of county taxes? Is mandamus the proper remedy in such instance. I take it that 'holder' of a warrant, as used in this section does not mean the person to whom the

warrant was originally issued, but includes every person legally coming into possession of same.

"Your opinion is earnestly requested in this matter, since there are many outstanding warrants against Reynolds County, and while the accepting them for taxes would of course decrease the actual cash revenue of the county each year, it would also help to reduce such outstanding warrants to a great extent, and in view of the facts I see no legal reason why the Collector should not be required to accept same in payment of county taxes."

Section 9911, R. S. Mo. 1929, in part reads as follows:

" * * * Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year."

It will be noticed that this part of Section 9911, R. S. Mo. 1929, provides that the warrant shall be received in payment. In other words, this section is mandatory and requires the county collector to perform only a ministerial act and in no way does the section allow him to use his discretion in accepting the county warrant.

Section 12171, R. S. Mo. 1929, reads as follows:

"No county treasurer in this state shall pay any warrant drawn on him unless such

warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

Section 12172, R. S. Mo. 1929, reads as follows:

"All warrants drawn on the treasurer of any county shall be assignable, and every assignment of any such warrant shall be in the following form:

For value received, I assign the
within warrant to A B, this _____ day of
_____, 19____.

(Signed) C D.

No blank indorsement shall transfer any right to a warrant, nor shall it authorize any holder to fill up the same."

According to Section 12172, supra, any person who has been given a warrant drawn on the treasurer of any county may assign the warrant providing he follows the form as set out in this section. This section also specifically prohibits the blank indorsement of the warrant. This form of assignment, if legally made, defines who shall be considered the legal holder as set out in Section 9911, supra. The legal holder, therefore, who is the owner of a warrant properly assigned, may use the warrant in the payment of taxes for the year in which the warrant is payable.

You will note that Section 9911, supra, was not repealed directly or by implication. Under the county budget law, Laws of Missouri 1933, page 351, Section 22, it is provided as follows:

"All laws or parts of laws and expressly sections 9874, 9985 and 9986 in so far as they conflict are hereby repealed."

Reynolds County, Missouri, is a county of less than fifty thousand inhabitants and should be governed by the first eight sections, inclusive, of the budget law.

In Section 8, Laws of Missouri, 1933, page 346, the following appears in parenthesis:

"This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand."

By this sentence the act should be interpreted that the intention of the Legislature was that warrants are to occupy the same position after the enactment of the county budget law as formerly.

Inasmuch as the county collector is only performing a ministerial act under a mandatory section in receiving the warrants for the payment of taxes under Section 9911, supra, the proper method for enforcing the section would be mandamus.

In the case of *Bakersfield News v. Ozark County*, 92 S. W. (2d) 603, 1. c. 605, the court said:

"If a public officer fails to perform mandatory ministerial duties, he may be compelled to do so by mandamus. If he 'be guilty of any willful or fraudulent violation or neglect of any official duty' (Mo. St. Ann. sec. 11202, p. 6143), he may be removed from office by the method provided in sections 11202-11209, R. S. 1929 (Mo. St. Ann. secs. 11202-11209, pp. 6143-6146). He would be subject to criminal prosecution under sections 3945-3950 and 10187, R. S. 1929 (Mo. St. Ann. secs. 3945-3950, 10187, pp. 2761-2763, 3695). Citizens also have recourse against public officials by suits for damages. 22 R. C. L. 478, secs. 151 and 161; 46 C. J. 1042, secs. 326-329."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county collector should accept for county taxes any warrant from the holder thereof for his taxes due for the year for which the warrant was issued by said county.

It is further the opinion of this department that the holder of any warrant legally assigned according to law may take advantage of Section 9911, supra, and use the same for the payment of his taxes.

It is further the opinion of this department that mandamus is the proper method to compel the county collector to accept lawful warrants that have lawfully been presented to him for the payment of taxes.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

CRIMINAL COSTS: State not liable for cost of hospitalization of persons committing crimes.

October 12, 1938

Hon. Richard Chamier
Prosecuting Attorney
Randolph County
Moberly, Missouri



Dear Sir:

This is in reply to your request for an opinion of this department, which reads as follows:

"About midnight, March 31, 1936, Junior Jackson, a negro, was seen leaving a grocery store in Moberly, Randolph County, Missouri, by a city policeman. He was challenged by the policeman, ordered to stop, and fled. The policeman fired at him and struck him in the right leg, shattering the bone and producing a multiple fracture.

"He was taken by the city police to the city jail at Moberly, questioned by the city police, and by the prosecuting attorney and deputy sheriff of Randolph County. His physical condition was such as to demand immediate medical attention. Randolph County maintains no County hospital and there are no facilities in the county jail for hospitalization.

"The defendant, shot by a city policeman, was sent to the McCormick Hospital at Moberly with the knowledge and agreement of the Chief of Police of Moberly, Deputy

October 12, 1938

Sheriff and Prosecuting Attorney of Randolph County. His condition was serious. He remained in the hospital from April 1, 1936 to June 11, 1936. During that time he was under constant supervision and control of city police and the county enforcement agencies. On June 11, 1936, he was transferred to the jail at Huntsville, Missouri.

"The case against Jackson was dismissed on August 3, 1936. There is some question as to whether or not the State is liable for the hospitalization. Defendant was charged with burglary and larceny.

It is our position that the State is liable for the costs. I enclose herewith certified copy of the cost bill in the above mentioned case and at your leisure would appreciate your advice and suggestions."

Based upon the statements of facts made in your letter, the following questions arise as to whether or not the hospital cost in question can be taxed as criminal costs in your case of State vs. Jackson, and we herein enumerate such questions:

I.

We note from your letter that Jackson was arrested and detained in the hospital from April 1st to the following June 11th without any criminal process having been issued. Under our statutes, an arrest can only be made by an officer upon the due issuance of a warrant by the filing of the proper affidavit. However, our State recognizes the common law rule of exception that where an officer sees an offense committed in his presence, he may arrest without warrant. However, there is no statutory nor common law authority for such officer, on making the arrest, to detain such person indefinitely without having the proper criminal process issued or obtained, to-wit, a warrant or a capias, and served upon such person so that legal detention or custody could thereafter follow. In point of fact, such detention beyond a period

of twenty hours is specifically prohibited under Section 3952, which reads as follows:

"All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense;
* * *

In your case there is no reason shown or given why the sheriff or other officer could not have with reasonable promptness following the arrest, filed or caused to be filed an affidavit before a Justice of the Peace upon which a warrant could have been issued and served upon Jackson so as to have some legal foundation for his lawful detention thereafter. Consequently, without such showing, we believe that such detention of Jackson in the hospital from on or about April 1st to June 11th, during which time the hospital bill accrued, being an unlawful detention, the cost or expense thereof could not be lawfully taxed against the State in the case thereafter commenced against Jackson.

II.

There are three statutes pertinent here relative to the circumstances under which costs in a criminal case can be taxed against the State. We set them out in order as follows:

"Sec. 8533. Whenever any person, committed to jail upon any criminal process, under any law of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff or jailer shall

provide such prisoner with food, for which he shall be allowed a reasonable compensation, to be fixed by law; and if, from the inclemency of the season, the sickness of the prisoner or other cause, the sheriff shall be of the opinion that fuel, additional clothes or bedding, medicine and medical attention are necessary for such prisoner, he shall furnish the same, for which he shall be allowed a reasonable compensation."

"Sec. 8534 The expenses of imprisonment of any criminal prisoner, such as accrue before conviction, shall be paid in the same manner as other costs of prosecution are directed to be paid; and those which accrue after conviction shall be paid as is directed by the law regulating criminal proceedings."

"Sec. 8554. In case any prisoner confined in the jail be sick, and, in the judgment of the jailer, needs a physician or medicine, said jailer shall procure the necessary medicine or medical attention, the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his service and medicine, when required to be taxed and collected as aforesaid."

"We believe it is manifest that by reason of the terms used in these respective statutes, to-wit, in the first one, "whenever any person, committed to jail upon any criminal process," and in the second one, "the expenses of imprisonment of any criminal prisoner," and in the third one, "in case of any prisoner confined in any jail," together with the fact

that all three sections appear in an article of the statutes confined to "Jails and Jailers", that the medical attention mentioned in each of the three sections refers and is confined to a person or prisoner when and while confined in jail. It is obvious that there is nothing said in the statute with reference to the right of the sheriff to obtain hospitalization for any such prisoner, nor is there any mention in such sections that the expense of room, board and nurse attendance can be procured for a prisoner in a hospital and the expense of such room, board and nurse hire charged up to the State as costs in a criminal case."

Criminal costs, as well as civil costs, are solely a creature of the statutory law. Our Supreme Court in State ex rel. v. Wilder, 197 Mo. 1. c. 32, said as follows:

"For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows. (Shed v. Railroad, 67 Mo. 687, Crouch v. Plummer, 17 Mo. 420, State ex rel. vs. Hill, 72 Mo. 512, Williams vs. Chariton, 85 Mo. 646.)"

Likewise, in the case of Ring vs. Paint and Glass Company, 46 Mo. App. 1. c. 377, the court said:

"It may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other person claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation."

// In other words, such statutes are strictly construed against the allowance of costs against the State, and it is not permitted by intendment or liberalization to read into such

statutes something that is not plainly provided for therein. Hence, we do not believe that there is sufficient justification for saying that the sheriff has the right to obtain hospitalization for anyone whom he might have lawfully in his custody, and we are constrained to the belief that the medical attention mentioned in the statutes means such medical attention as is the usual and customary attention provided for a prisoner while and when in the county jail.»

We appreciate the fact that it could be said that in the exigencies of this case, or any other like case, it was either better or possibly necessary that Jackson be taken to the hospital for medical attention rather than to procure such administrations in the jail. Assuming that such would be good argument, we believe that all that could be granted is that the hospital authorities in this case might be entitled to charge for the medical attention administered, that is to say the items enumerated in the hospital bill except for room, board and nurse. It is our belief that the hospital authorities were and are charged with knowledge of the provisions of the statute, and that when they undertook to render the medical attention to Jackson in the hospital, they did so charged with the knowledge that the expense for room, board and nurse could not be a justifiable charge against and collected from the State.

III.

It is to be noted that so far as any expense of medical attention and medicine which is provided for a person confined in jail, (or if, for the purposes of this case, we substitute the word "hospital" for "jail", in an effort to permit the allowance of such expenses to be taxed as costs in the case), it is manifest to us that if at the time such expense is incurred or accrued there is no prosecution or case commenced or pending, then there is no prosecution in force as

mentioned in Section 8534, supra, nor any case in existence as mentioned in Section 8554, supra, (within the meaning of the statutes) to which costs could be attributed. In other words, costs in a criminal case cannot accrue or come into existence until after and not before, the process of the court is called for and issued which creates a case. Without the legal existence of a case no foundation exists for the taxation of costs therein.

IV.

Section 3840 permits the county court, if it sees fit under any given case, to make an allowance for medical services given a prisoner who may be confined, whenever satisfied of the necessity of so doing. This statute, in terms at least, does not limit or prescribe the particular place of confinement. Hence, if there could be read into any of the statutes mentioned, by interpolation or otherwise, the word "hospital" or "hospitalization", which might include medical attendance, room, board, nursing, etc., then it may be that Section 3840 might give color for placing the claim of the hospital before the county court. No doubt such court could see that the action of the officers in question in procuring hospitalization for Jackson was at least a humane action, and hence the court might take some favorable action regarding the bill.

CONCLUSION

It is the opinion of this department, in view of the reasons hereinabove stated, that the taxation of the hospital bill in question, (at least so far as the item for room, board and nurse for \$218.00 is concerned), is not a lawful charge against the State in the case in question.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

Prosecuting Attorneys:) Prosecuting attorney, under Sales Tax Act,
Sales Tax Laws:) not entitled to fee for instituting and
prosecuting suits for collection of
delinquent sales tax.

December 22, 1938.



Honorable G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

This Department is in receipt of your letter
of some time ago, wherein you make the following inquiry:

"Some months ago I brought a suit
in the Justice Court against one
Floyd McCord on the petition fur-
nished by the Attorney General's
department for Sales Tax and obtain-
ed a judgment for \$80.00 and within
ten days after obtaining the judg-
ment a notice and affidavit was
filed with the Justice and with the
Constable notifying them that two
parties claimed priority for wages
during the last six months and set
up claim under Statutes to support
their claims.

"In order to protect the Constable
and also protect the judgment for
the state I filed an interpleader
in the Circuit Court for the Constable
and after some delays the matter was
taken up before the Court and argued.
The Court found that the priority
claim by the claimant was proper and
sustained the cross-bill of one of
the claimants, the other was not sus-
tained for the reason that he did
not secure a judgment in the Justice
Court for his claim.

"Following the usual custom I asked the Court if I would be allowed a small fee for filing which he readily allowed. There is still a small balance over and above after paying the judgment of Mrs. Shultz, claimant for wages as cook and servant in the restaurant operated by McCord, and since if I should take that fee it would reduce the balance coming to the State that much, the question with me is whether the taking such fee would be in good conscience and lawful, and I would appreciate your opinion on that phase."

In answering your precise question, we will disregard the question as to whether or not the claims mentioned in your letter were in reality prior claims and should receive priority over the sales tax. We assume that the suit in question was instituted in the nature of an attachment.

With reference to the fee allowed you by the court, you do not state that the action was brought to collect delinquent sales taxes under the Act of 1935, Laws of Missouri, 1935, page 411 et seq., or the Act of 1937, Laws of Missouri, 1937, page 552 et seq. However, we are of the opinion that it does not make any material difference, as duties with reference to the attorney-general and prosecuting attorney under both acts are very similar.

Section 32, page 565, Laws of Missouri, 1937, is as follows:

"Except as in this Act otherwise provided, all suits for taxes herein required to be filed shall be filed in the County wherein the person resides or has a place of business or agent for the transaction of business in this State or where he or it may be found. If such suit be by attachment it shall be brought in the County

wherein the property attached is located, and when the amount of tax involved does not exceed the jurisdiction of Justice Courts within such County, the attachment suit may be filed in the Court of some Justice of the Peace therein; where the amount of tax involved exceeds the jurisdiction of Justice Courts, said suit shall be filed in the Circuit Court of such county. In every such suit there shall be assessed, taxed and collected as other costs, a fee of ten (\$10) dollars for the services of the Attorney-General in instituting and prosecuting said suit, which shall be paid into the State Treasury to the credit of the ordinary revenue fund."

The duty of the prosecuting attorney, upon the request to file suits for sales tax is contained in Section 40, page 567, Laws of Missouri, 1937, which is as follows:

"It shall be the duty of the Auditor to certify under seal to the Attorney General on the last day of each calendar month, following the due date of the returns herein, the names and addresses of all persons required to remit any tax, interest and penalties under the provisions of this Act for the preceding calendar month, who are delinquent in the payment of said tax, interest and penalties, together with the amount due from each delinquent, and it shall be the duty of the Attorney-General, and, upon his request, the duty of each prosecuting and circuit attorney to forthwith institute and prosecute suits for the collection thereof as herein provided."

Section 30 of the Laws of 1933, page 423, is almost identical with Section 32, quoted supra, of the Laws of 1937.

December 22, 1938

Under Section 11318, R. S. Mo. 1929, it is the duty of the Prosecuting Attorney to institute and prosecute all suits for or against the State, within his jurisdiction. There is no provision in said section for paying fees or other emoluments for the services of the prosecuting attorney in any suit. Likewise, there is no provision in the Sales Tax Act for the payment of a fee to the prosecuting attorney for prosecuting sales tax suits. While Section 32, supra, provides for a fee of \$10.00 for the services of the Attorney-General, it is silent as to prosecuting attorney. With respect to that fact the section also provides that the \$10.00 fee shall be paid into the State Treasury and not retained by the Attorney-General.

It is a well recognized principle of law that an officer in order to receive any fee must be authorized by some statute to receive the same. As Prosecuting Attorney you receive annually a certain salary which is supposed to compensate you for all duties preformed by you as Prosecuting Attorney, and finding no provision in the sales tax acts which would entitle you to any fee, we are of the opinion that you are not in a position to ask or receive from the court a fee in the case which you mentioned in your letter.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

PENAL INSTITUTIONS:

A boy convicted while under 17 years of age cannot be transferred to Algoa, and if a fugitive, sheriff is entitled to fees for returning to the Missouri Training School for Boys.

May 2, 1938

Mr. I. H. Coin,
Sheriff of Stone County,
Galena, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated April 26, 1938, for an official opinion from this department, which request is as follows:

"I am asking your advice on a matter concerning a boy whom we have picked up for the Missouri Training School for Boys at Boonville. This boy was sentenced for five years for receiving stolen property, and after serving the usual time was paroled to S.P. Huffines at Crane, Mo., and while on parole he stole two guns and killed some geese and his sponsor turned him in and they came after him and took him back and after staying two or three months, he ran off and has been bumming freight trains till we located him in Springfield, and drove up there and apprehended him and brought him back to Galena and locked him up and phoned to Boonville and notified them, and they said the age he is now, he would have to be sent to the Algoa Farm, and that he would have to be resentenced, so I asked Judge Gideon about it and he advised me to explain the matter to you, and ask your advice.



Mr. I. H. Coin

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May 2, 1938

We drove 95 miles after him and would like to have pay for it.

I am enclosing their letter for further information to you.

Your early advice will be greatly appreciated."

"Missouri Training School for Boys
Boonville, Missouri.

Sheriff Stone County,
Galena, Missouri.

Escape Notice

Name Curtis Eaton No. 7192
Alias
escaped from this Institution 10-14-37
he was sentenced in the Circuit
Court of Stone County on 3-13-33
term five years for the crime of receiving stolen property

Description

age 18 height 5-8 weight 175 hair brown
eyes blue complexion fair build medium
marks and scars none
Parents' address Mother Mrs. J. T. Eaton,
Crane, Mo.
Please arrest and notify Missouri Training
School, Boonville, Missouri, at our expense.
Reward.

Roy E. Stone,
Superintendent

By J. M. Highfill "

The Missouri Training School for Boys was formerly known as the "Missouri Reformatory", and most of the sections under the general law of the Revised Statutes of Missouri, 1929, refer to the now known Missouri Training School for Boys as the Missouri Reformatory or the Missouri Reform School for Boys. In Session Laws of Missouri, 1933, page 331, Section 8345, reads as follows:

"The institution heretofore known as the 'Missouri Reformatory', located at Boonville, Missouri, shall continue to be maintained and shall hereafter be designated as the 'Missouri Training School for Boys'; and wherever the words 'Missouri Reformatory' or the words 'Missouri Reform School for Boys', or 'Missouri Training School for Boys' occur in the statutes they shall be held to mean and refer to the 'Missouri Training School for Boys' located at Boonville, Missouri."

And Section 8350, R.S. Mo. 1929, reads as follows:

"Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary or committed to the Missouri reformatory, or Missouri training school for boys; and any boy under the age of seventeen years

convicted of any other felony, either upon plea of guilty or upon trial, may be committed to the Missouri reformatory or Missouri training school for boys. Any boy under the age of seventeen years convicted of a misdemeanor in any court or (of) record, either upon the plea of guilty or upon trial, may, in the discretion of the court, be committed to the Missouri reformatory, or Missouri training school for boys. No boy under seventeen years of age convicted of a felony shall hereafter be committed to the county jail as a punishment for such offense. Any court having criminal jurisdiction, in which any male person, between seventeen and twenty-one years of age, shall, upon a plea of guilty, or by the verdict of a jury, be convicted of a felony and his punishment assessed at imprisonment in the penitentiary, may, in its discretion, at the same term at which such plea of guilty is entered or conviction occurs, and before such person is transferred to the penitentiary, commute the punishment to confinement in the Missouri reformatory for such term as the court may deem proper, but not for a longer time than that fixed in the sentence to the penitentiary; but such court shall first ascertain and determine that said conviction or plea of guilty is for the first offense, and that the previous conduct, habits and associations of the person so convicted warrant such commutation. All commitments of boys under the age of seventeen to the Missouri reformatory, the Missouri training school or the penitentiary shall be made by the juvenile division of the circuit court."

By this Section 8350, supra, the legislature has provided that any male person under seventeen years of age who is convicted of a felony punishable by imprisonment for a term in excess of ten years in the penitentiary, may be punished as any person over the age of seventeen years, or, if a boy, he may be imprisoned in the penitentiary or Missouri Training School for Boys, and the section also provides that any boy under the age of seventeen years, who is convicted of any other felony, may be committed to the Missouri Training School for Boys. This section also provides that any boy convicted of a misdemeanor may, in the discretion of the court, be sentenced to the Missouri Training School for Boys.

We find no provision of the Laws of Missouri which prohibits the legislature from designating the place of imprisonment for the violation of a crime. In the case of State v. Walker, 309 Mo. 103, 1.c. 111, the Court said:

"The purpose of the act of the legislature establishing the reformatory was to segregate youthful offenders and free them from associating with habitual criminals."* * * * *

According to the record of Curtis Eaton as furnished you by the Missouri Training School for Boys, he was convicted of a felony while he was under the age of seventeen years. Under Section 8350, supra, he is still an inmate of the Missouri Training School for Boys for the reason that he has not been lawfully discharged or transferred as hereinafter set out.

Section 8475, R.S. Mo. 1929, reads as follows:

"Transfers may be made under the following conditions:

a. As soon as the construction of the intermediate reformatory is to be under-

taken, or as soon as its agricultural or industrial activities require laborers, the commissioners of the department of penal institutions shall have power, with the consent of the governor to transfer to the tract of land upon which the intermediate reformatory is to be located any or all inmates of the Missouri reformatory at Boonville and of the Missouri penitentiary, who at the time of their last conviction were between the ages of seventeen (17) and twenty-five (25) years and who are serving their first sentence for conviction of a felony." * * * * *

The same section further provides as follows:

"* * * * * It is further provided, that if in any case it shall be found by the department of penal institutions and the governor of this state, that a prisoner confined in the Missouri penitentiary or the Missouri reformatory at Boonville, has been improperly sentenced to either of these institutions, and that such prisoner should have been sentenced to the intermediate reformatory, such prisoner may, with the consent of the governor, be transferred to the intermediate reformatory, to be and become an inmate therein, subject to the rules and discipline of such reformatory; and it shall be the duty of the general superintendent of said reformatory to receive such prisoner into said reformatory as may be so transferred, and properly care for such prisoner therein until such time as such

May 2, 1938

prisoner may be lawfully paroled or discharged therefrom. In like manner, transfers may be made from the Missouri reformatory at Boonville to the intermediate reformatory of any offender who, subsequent to his commitment, shall be shown to their satisfaction to have been, at the time of his conviction seventeen years or more of age, but less than twenty-five and for the first time convicted of a felony. In case of any transfers herein set forth the convict is not to remain under the custody of the department of penal institutions for a longer time than that fixed in the original sentence."

Under this section it provided that boys who at the time of their last conviction were between the ages of seventeen and twenty-five years and who were serving their first sentence for conviction of felony in the Missouri state penitentiary or in the Missouri reformatory at Boonville could be transferred to the intermediate reformatory at Algoa. As you notice this section only applies to boys over seventeen. Also this section provided the procedure for transfer of boy prisoners when there was a mistake made in their age at the time of their last conviction and had been improperly sentenced, the section provided for a procedure to correct the improper sentence by removing the boy prisoners from the Missouri Reformatory at Boonville to the Missouri Penitentiary or from the Missouri Penitentiary to the Intermediate Reformatory at Algoa.

In the case of Curtis Eaton as set out in your request, he was under seventeen years of age at the time of his last conviction and cannot serve his time anywhere except at the Missouri Training School for Boys.

May 2, 1938

CONCLUSION

It is, therefore, the opinion of this department that Curtis Eaton can only serve the unexpired term of his conviction as set out in the report of the Missouri Training School for Boys and cannot be resentenced to Alcoa under any circumstances on the crime that he was convicted of before he was seventeen years of age.

In answer for your request as to payment for services rendered in the apprehension of Curtis Eaton, will say that Section 8355, R.S. Mo. 1929 reads as follows:

"It shall be the duty of every sheriff, deputy sheriff, constable or marshal, and every officer and employe of such reformatory, to arrest, with or without warrant, any person who shall have escaped from such institution and return him thereto, and such officer, except officers and employes of the institution, shall receive such compensation as shall be allowed by law for like services rendered and shall be paid out of any fund in the treasury of such institution not especially appropriated."

As you notice this section states that the sheriff shall receive such compensation as shall be allowed by law for like services rendered. In construing this section, one must refer to Section 8357, R.S. Mo. 1929, part of which reads as follows:

"* * * The sheriff, marshal or other person charged with the delivery of any person to the re-

reformatory shall be allowed the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time actually occupied in taking such person to said reformatory and in returning therefrom" * * * * *

In other words, as set out in Section 8355, supra, the compensation of returning a fugitive to the Missouri Training School for Boys is "like service" as set out in taking boys to the Missouri Training School for Boys by the sheriff and should receive the same fees for returning fugitives to the Missouri Training School for Boys as the sheriff should receive for taking boys to the Missouri Training School for Boys under original sentence.

"Like" as used in the Revised Statutes of the United States, Section 847, providing that for issuing any warrant or writ and for any other service, the United States Commissioner shall receive the same compensation as is allowed to clerks for "like services", does not mean "identically with", but includes those services of clerks which bear a substantial resemblance to the duty performed by the commissioner. The phrase should receive a reasonable construction. U.S. v. Wallace, 6 Supreme Court, 408, 409, 116 U.S. 29, L. Ed. 675.

Under Section 8357, supra, the sheriff who takes a boy to the Missouri Training School for Boys shall be allowed the necessary traveling expenses of himself and such person, and a per diem of two dollars (\$2.00) for the time actually occupied in taking such person to said reformatory and in returning therefrom, to be paid out of any fund in the treasury of such institution not especially appropriated.

Under Section 8357, supra, fees are allowed the sheriff and would also require a copy of a commitment or warrant upon which the cost and fee would be endorsed, but for the

May 2, 1938

return of the fugitive from the Missouri Training School for Boys, it is unnecessary to have a warrant or any other authority and the compensation for services rendered shall be paid out of any fund in the treasury of such institution not especially appropriated. In order to receive this fee, it will be necessary for the sheriff to render an itemized account against the Missouri Training School for Boys.

CONCLUSION

It is, therefore, the opinion of this office that Curtis Eaton as described by the record of the Missouri Training School for Boys, must be returned to the Missouri Training School for Boys, and the sheriff shall be allowed two dollars (\$2.00) per day for the time actually occupied in taking such boy to said reformatory and in returning therefrom, which shall be paid out of any fund in the treasury of said institution not especially appropriated. The sheriff is also entitled and shall be allowed the necessary traveling expenses of himself and such boy.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

ELECTIONS:

PROXIES:

COUNTY COMMITTEES:

Proxies can be voted in county committee meeting. Majority of committee members necessary to constitute quorum to transact business.

(C O P Y)

August 25, 1938

Filed: #18

Honorable J. Carrol Combs
Prosecuting Attorney
Barton County
Lamar, Missouri



Dear Mr. Combs:

We have received your letter of August 16 which reads as follows:

"There was considerable discussion at the meeting of the county committee, under Section 10280 of the Revised Statutes of Missouri for 1929, as to whether or not absent members of the committee could vote by proxy which had been duly executed and delivered to an individual to be acted upon at the meeting according to the dictates of the signer of the proxy.

"At the meeting there were 13 members of the committee present. At the primary there were 30 committeemen and committeewomen elected by the Republican voters. There were at least nine proxies of absent members to be voted at the meeting which the temporary chairman at the meeting would not recognize.

"I would like to have the opinion of your office as to whether or not absent committeemen or committeewomen can vote at the organization meeting by proxy and if so,

if the election of the county chairman by the members present, after the proxies had been ignored, would be a legal organization of the county committee; that is, the election of the chairman by a majority of those present, it being an evident fact that all of the proxies if they had been allowed to have been voted would have been for the losing candidates. * * * * *

"P.S. I should state that the party holding the proxies left the meeting before they were offered and never offered the proxies as votes at the meeting."

The first question you raise is whether or not absent members of the county committee can vote by proxy. This office has previously ruled on this question. In an opinion dated August 17, 1936, addressed to the Honorable Joe Crain, Prosecuting Attorney of Christian County, Missouri, we said:

"Section 10280, R. S. Mo. 1929 relates to the organization of the county committee after the August primary. It is our opinion that it is the duty of the committee, after being duly assembled and organized, to determine whether or not proxies shall be recognized; in other words, by Section 10280, it is the duty of the County Chairman to call the committee for the purpose of organization, and if proxies of the various members of the committee have been recognized in the past, then proxies for said meeting may be recognized. Once the Committee has met and organized, it can determine its future course with reference to proxies. Unless it determines that it will not recognize proxies, then we think such proxies may be accepted. We think the best course to pursue is for the members present to determine whether or not proxies will be recognized when the meeting is called."

August 25, 1938

In the postscript of your letter you state that no proxy was offered at the meeting. Consequently the question is not now presented as to whether any such proxy was properly refused or accepted. Also we gather from your letter that the committee had never determined whether or not proxies should be recognized. Therefore, all we can say is that if proxies had been submitted and if the committee had either determined to accept the same in advance or if no action with respect thereto had been taken at all, then it would have been proper for any such proxies to have been accepted and voted.

In connection with your second question you state that at the primary thirty committeemen and committeewomen were elected by the Republican voters in Barton County; that at the meeting there were thirteen members of the committee present and that no proxies were submitted for consideration. Consequently there were only thirteen possible votes at the meeting. Your question then is whether "the election of the county chairman by the members present * * would be a legal organization of the county committee; that is the election of the chairman by a majority of those present * * * *." In other words, is it necessary to have a majority of the committee, that is at least sixteen out of the thirty members present, in order to transact business.

Section 10280 R. S. Mo. 1929 is the only statute relative to the meeting and organization of such a county committee. This statute reads as follows:

"The county committee, or city committee, as the case may be, shall be composed of the committeemen and committeewomen elected in the several townships, or voting districts, at the August primary next preceding, and shall meet at the county seat of the several counties of this state, and at such place in any city not within a county, as the chairman of the then city committee may designate, on the third Tuesday in August of the year in which the primary election is held, and organize by the election

of one of its members as chairman, and one of its members as vice-chairman, one of whom shall be a woman, and a secretary and a treasurer, one of whom shall be a woman, but who may or may not be members of the committee. (Laws 1923, P. 197, sec. 2.)"

It will be observed that the Legislature has not prescribed what number of the governing body shall constitute a quorum for the transaction of business. In the case of State ex rel. Kiel v. Riechmann, 239 Mo. 81 there **was** a contest between two contending factions of the **Republican** City Committee of the City of St. Louis. It was contended that certain amendments to the rules of the committee **were** improperly adopted because they were adopted by less than a majority vote of the committee. In this connection the court said:

"The statutes of this State authorizes the city committee to pass rules for its own government, but does not undertake to say by what number of votes such rules should be passed. In such case the general rule of law is that a bare majority will suffice. That was the common-law rule. * * * * *"

"Lastly it is urged under this point that the amendments were not passed by even a majority of the members. The law creating the city committee contemplates that it may adopt new rules for its own government, but, as said above, does not say what proportion of the committee shall be required to pass such rules. Under that **state** of facts it is clear under the general rule of law that a **majority** can act. Under the law such a majority constituted a quorum for the transaction of business.

"The rule is further stated in 29 Cyc., p. 1688, thus: 'Where a quorum is not fixed by the Constitution or statute creating a

deliberative body, consisting of a definite number, the general rule is that a quorum is a majority of all the members of the body. * * * *'.

"The rule seems to be that, unless there be some specific law to the contrary, a majority of a given body has the right to transact all business which the entire body is authorized to do. And not only so but that a majority vote of those present and voting (there being a majority participating) can do all the things which could be done by the entire body. This was the common-law rule, and is only changed by some express provision. The theory is that the majority is the body itself for the transaction of business. * * * *'.

"Going now to the case at bar, we must hold that inasmuch as the statutes of this State have not prescribed what number shall constitute a quorum for the transaction of business by this committee, the common law fixes a quorum of such committee at a majority of its members. Such quorum has the full power of the whole committee, and for the purposes of transacting business is in law the committee itself, and if in the transaction of any business a majority of that quorum votes for a measure such measure is as valid and binding as if adopted by the entire vote of the committee."

Conclusion

We conclude, therefore, that in the absence of a rule to the contrary duly passed by a county committee at which a quorum was present, proxies may be accepted; that since no proxies were offered at the particular meeting of the committee and since there were only thirteen actual members of the committee present and voting out of a total of thirty committeemen and committeewomen

Hon. J. Carrol Combs

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August 25, 1938

elected by the voters that a quorum was not present for the transaction of any business. Since the statute does not prescribe what number of the committee shall constitute a quorum for the transaction of business, the common-law rule prevails, which is that a quorum of such committee must constitute a majority of its members. In this particular case sixteen members would be the minimum in order to constitute such a majority. Since only thirteen members were present, there was not a quorum for the transaction of any business.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

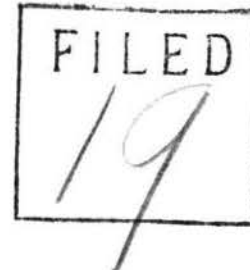
J. E. TAYLOR
(Acting) Attorney General

JFA/w

ELECTIONS; Four questions on registration and elections
in cities of 30,000 to 80,000 population (Joplin)

February 24, 1938

Honorable Roy Coyne
Prosecuting Attorney
Jasper County
Joplin, Missouri



Dear Sir:

This will acknowledge your inquiry of
the 21st instant, which reads as follows:

"Our Legislature has passed a new
registration law pertaining only
to the City of Joplin, being found
in Session Acts of 1937 at page 289.

"The Joplin Board of Election Com-
missioners and our County Clerk have
asked me for an opinion regarding
certain phases of the new law. In
order that there may be a uniform
opinion over the State, I am asking
for your opinion on the following
questions.

" 1. Is the registrar to have charge
of the registration books during the
time of actual voting, or is the
registrar merely there to check the
challenge lists as the voters appear?

" 2. Does the elected registrar have
a vote as a member of the Board of
Election Commissioners in determining
who are eligible to vote, or to regis-
ter?

" 3. Does the Board of Election Com-
missioners have a right to make a rule
that the registrars shall have the
sole control over the registration

books, make all entries made in them, and prohibit the County Clerk from entering any names in the books?

" 4. Who is to determine whether a voter is properly registered, the registrar or the judges of election?

" I shall appreciate your opinion on these questions as our Election Board meets on February 28th."

Your letter presents four questions, and we shall discuss them in order.

I.

Is the registrar to have charge of the registration books during the time of actual voting, or is the registrar merely there to check the challenge lists as the voters appear?

Sec. 5, p. 292, L. 1937, provides in part as follows:

"The Clerk of the county court of counties wherein a city or cities of 30,000 to 80,000 inhabitants are located shall have custody of and keep in his office all registration books and affidavits. *** "

Sec. 14, p. 233, L. 1933, reads as follows:

"The county clerk of each county containing cities in which registration may be had under and by virtue of this article shall, on the day before the election for which any such registration was made, deliver to the judges of election appointed under and by

virtue of the general law of elections, the original registration book of their respective precincts, together with a copy thereof, heretofore required to be made, and shall take the receipt of one of the judges therefor."

From the foregoing, it appears that the county clerk, who is the custodian of the registration books, is required to deliver same to the judges of the respective precincts on the day before the election is to be held. It is quite apparent that the judges of election would need such registration books in order to determine whether voters who offer to vote are registered in their precincts.

The duties of the registrars on election day are set forth in Sec. 3, p. 290, L. 1937, in the following language:

"The Board of Election Commissioners shall meet on the tenth day before the election unless said tenth day fall on Sunday in which case said meeting shall be held on the Saturday preceding said tenth day, and pass on all challenges made to the right of persons to register and if any names are challenged said board shall cause to be made a certified list of said challenges to be delivered to the registrar of each ward which registrar shall serve as an official of the election and challenge the right to vote of such persons, who offer to vote, and if such persons do not appear they shall so certify at the close of the election and such names shall be stricken from the books. Registrars shall serve only during the time of voting and shall receive the same pay as registrars days. ** "

It seems clear, therefore, that the registrar who has been furnished a list of challenges which have been made to the Board, is an election official for the purpose of challenging the vote of any person whose registration has been challenged. He would not need the registration book for this duty, since he had a certified list of the challenged names in his possession.

CONCLUSION

It is, therefore, the opinion of this office that the registrar in cities of 30,000 to 80,000 population is not entitled to have charge of the registration books during the time of actual voting, but that it is the duty of the registrar to challenge the votes of all persons who offer to vote whose registration has been challenged as shown by the certified list of challenged names furnished to him.

II.

Does the elected registrar have a vote as a member of the Board of Election Commissioners in determining who are eligible to vote, or to register?

Sec. 2, p. 215, L. 1931, provides for the creation of a Board of Election Commissioners composed of four members. There is nothing in the statutes governing cities under consideration which in any case enlarges the membership of said board.

Sec. 3, p. 290, L. 1937, provides in part as follows:

"The Board of Election Commissioners shall have a supervisory control over the Clerks of the County Courts and over the registration officers appointed by virtue of this Article touching all matters appertaining to the registration of voters. ** "

As the Board composed of four members has supervisory control over the registrars, it would be difficult to see how this control could be exercised if the registrars of the various voting districts have a vote as members of the Board, since there would evidently be more than four registrars in a city of the size under consideration. We find nothing in the law governing registrations and elections in such cities which makes registrars members of the Board.

CONCLUSION

It is, therefore, the opinion of this office that the elected registrar in cities of 30,000 to 80,000 population does not have a vote as a member of the Board, in determining who is eligible to register.

III.

Does the Board of Election Commissioners have a right to make a rule that the registrars shall have the sole control over the registration books, make all entries made in them, and prohibit the County Clerk from entering any names in the books?

As heretofore pointed out, Section 5, p. 292, L. 1937, places the custody of the registration books in the clerk of the county court, and requires him to keep such books in his office. The same section provides that such clerk may register any qualified voter or transfer his registration on any day of the year, except Sundays and holidays, prior to the twenty-fifth day before an election. His office is an office which is open daily, except Sundays and holidays, during the whole year, and evidently the Legislature provided that the registration books should be left in his office in order that they might be accessible to the voters at all

times for the purpose of registering or of having their registration transferred.

The duties of the registrars are set forth in Sec. 13, p. 293, L. 1937, which reads as follows:

"The registration officers shall, in the discharge of their duties, attend at the places of registration in their respective districts on the days appointed by the Board of Election Commissioners and by this article, from the hour of eight o'clock in the forenoon until nine o'clock P.M. of each day, and shall, without delay, register all persons as voters who, having the qualifications prescribed by law, present themselves therefor and take the oath required by this article; provided, however, the registration officers shall transfer from one ward to another the name of any person who presents himself to be transferred upon the making of an affidavit in form to be provided by the county clerk showing himself to be a registered voter in the ward from which he wishes to transfer. The said registrar shall write opposite the name of said person transferred from Ward (giving number of ward from which said person is transferred). The said registrar shall carefully preserve all such affidavits and deliver them to the county clerk who shall enter them and strike from the registration books of the ward the name of the person so transferred."

The registrars are only required to be present to receive applications for registration on days set apart

for registration. If the county court could and would prohibit the county clerk from having any control over the registration books and could order them turned over to the registrars, the voters would have no opportunity to register or have their registration transferred except on the regular registration days. Such an arrangement would nullify the provisions of Section 5, supra, and would clearly defeat the purpose of the Legislature.

It is true that Section 3, supra, gives to the Board supervisory control over the county clerk touching all matters appertaining to the registration of voters, but does supervisory control give the Board the power to prevent the county clerk from performing the duties imposed upon him? We think not. Supervisory control implies that there is something to supervise and control, and that which is to be supervised by the Board in this case is the performance by the county clerk of the duties imposed upon him by these registration laws.

In the case of *Kollentz vs. Chicago and N.W. Ry. Co.*, 175 N. W. 927; 180 Wis. 385, the Supreme Court, in discussing the power of supervisory control, which the circuit court had over inferior courts, said:

"Its function is: (a) to compel inferior tribunals to act within their jurisdiction; (b) to prohibit them from acting outside their jurisdiction; and (c) to reverse their extra-jurisdictional acts."

CONCLUSION

It is, therefore, the opinion of this office that the Board of Election Commissioners does not have the right to make a rule that the registrars shall have sole control over the registration books, or that the registrar shall make all entries made in them, or to prohibit the county clerk from entering any names in the registration books.

IV.

Who is to determine whether a voter is properly registered, the registrar or the judges of election?

As we read Sections 5 and 13 of the 1937 Act, we understand the provisions to mean that whenever a voter makes the required affidavit to the county clerk, or to the registrar of his voting district on registration days, showing himself to be a qualified voter, such voter is entitled to be registered. Section 3 of said act provides that any voter may challenge the right of any person registered to register. Such challenges must be filed in writing with the Board, and the Board is directed to notify the persons whose registration has been challenged, to appear before it and show cause why their names should not be stricken from the registration books. The Board is required to meet at the appointed time and pass on all challenges.

Section 10, p. 232, L. 1933 provides:

"** Any person whose name is stricken from the registration books shall have the right to appeal from the ruling of the board of election commissioners to the circuit court of the county on any date before the election. "

Therefore, if the Board is required to notify persons whose right to register has been challenged, to appear and show cause why their names should not be stricken from the registration books and is given power to pass on said challenges, and if a voter whose name has been stricken from the registration books, has the right to appeal from the ruling of the Board of Election Commissioners to the circuit court, it follows that the Board necessarily has the power to determine whether a voter is properly registered, subject, of course, to the right of the circuit court to review its action. If the registrar had the right to determine

who is properly registered, the right of appeal would have been from his ruling.

Said Section 3 does provide that if any names are challenged, the Board shall cause a certified list of said challenges to be delivered to the registrar of each ward who shall serve as an official of the election and challenge the right to vote of such persons who offer to vote, and it may be this provision is what gives rise to your fourth question.

We are frank to say that this part of the Act is rather indefinite and somewhat confusing. However, the main duty of the Board of Election Commissioners is to conduct registration of voters and to pass upon the qualifications of those who offer to register, subject to the power of the circuit court to supervise its action, and Section 3, supra, specifically empowers and directs the Board in cities inquired about to meet and pass on the challenges made to the right of voters to register. If the Board strikes a name off the registration list, the party whose name is so stricken has the right to appeal under Section 10, page 232, L. 1933. If the Board decides the challenged person is properly registered, any member of the Board can appeal from such decision to the circuit court under said Section 10. Therefore, it would seem that a complete scheme is provided for determining whether any person is properly registered and that the registration book, which is turned over to the judges of election on the day previous to election day, contains a list of those persons who are properly registered.

It should be observed that the registration law under consideration does not in any way undertake to regulate or control the judges and clerks of election. It merely has to do with registration of voters.

Section 10554, R. S. Mo. 1929 provides as follows:

"All elections in such city shall be conducted in all respects as provided in this article, and subject to all the provisions of chapter 61, R. S. 1929, entitled 'Elections,' so far as the same do not conflict with this article."

Therefore, we must look to the provisions of the Article of which this registration law is a part (Article XVI, Chapter 61) and also to Chapter 61, R. S. Mo. 1929, for directions as to the procedure in case of challenges on election day. Said directions are found in Section 10544, R. S. Mo. 1929 in the following language:

" ** Provided, any person registered according to the provisions of this article, when he offers to vote, may be challenged as disqualified by any person who is an elector of this state; and it shall be the duty of the judges of election to try and determine, in a summary manner, before the close of the polls, the qualifications of any person challenged as aforesaid, and upon proof that the person so challenged is not a qualified voter, the judges of election shall reject his vote, and they shall state, opposite the name of the person on the registered list of voters whose vote is rejected, the nature of his disqualification and the names of the witnesses upon whose testimony his vote was rejected, but the vote of no person who may be challenged shall be rejected except upon the testimony of two credible witnesses; and provided further, that the party challenging the right of any person to vote shall swear, before the judges of election at the time of so challenging the vote, that to the best of his knowledge and belief the party (naming him) is not a qualified voter under the laws of this state, and he shall also swear to the reasons which disqualify him from voting; and provided further, that the ballot of such person so rejected shall be preserved and returned with the books and other ballots in a separate envelope marked rejected ballots, and the clerk of the county shall preserve the same in his office."

And in Section 10309, in the following language:

" ** If any person desiring to vote at any election shall be challenged, he shall not receive a ballot until he shall have established his right to vote in the manner provided by law; and if he shall be challenged after he has received his ballot, he shall not be permitted to vote until he has fully complied with such requirements of the law.
*** "

It is seen by the foregoing provisions that if a voter asks for a ballot, the judges, before giving him such ballot, must first determine whether such voter's name appears upon the registration list. If it does, then the voter is entitled to vote, unless he is challenged. If he is challenged, he is not entitled to a ballot until he shall have established his right to vote in the manner provided by law, the manner provided by law in the instant case being that set out in Section 10544, supra.

The provisions in Section 3 of the 1937 Act, supra, give the registrar the right and makes it his duty to challenge on election day the vote of the persons who have been registered after their registration has been challenged, and thus such registrar has the right to put the question of the right of such person to vote up to the judges of election.

It is apparent that there are a number of sections of law touching the immediate question at hand, some general and some special. In interpreting these various sections, we think an effort should be made to give effect to all of them and reconcile them, if possible.

We have tried to follow the rule laid down in the case of Timmonds vs. Kennish, 244 Mo. 318, l.c. 326, wherein the court said:

"**It is our duty to dovetail and reconcile all the election laws, so far as possible, and to give effect to all of them applicable to the situation, bearing in mind that if any inconsistency appears between the general law and the special law on any one point, the latter must prevail. **"

CONCLUSION

Applying this rule to the provisions cited above, we conclude that the Board of Election Commissioners has the right to determine whether a voter is properly registered, subject to the supervisory control of the circuit court, but that the judges of election have the final say as to whether the voter has the right to vote if his vote is challenged by the registrar of his election district or by any other voter.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

ELECTIONS:) Party representatives appointed under Section 10270,
PRIMARY:) R. S. 1929, not entitled to be paid as election
judges out of the county treasury.

August 8, 1938



Honorable J. V. Conran
Prosecuting Attorney
New Madrid County
New Madrid, Missouri

Dear Sir:

This is to acknowledge your letter of August 4th in which you request the opinion of this office. Your letter states fully the question to be determined and we herewith set forth same as follows:

"Section 10270 of the Revised Statutes of Missouri, 1929, provides that in a Primary Election the County Committee, representing each of the major political parties, may appoint a challenger, an alternate challenger, a witness to the count, an alternate witness to the count, to represent their respective parties at the voting precinct during said election. In this County many of such officers were duly appointed and acted at the Primary Election held on August 2nd. I note that the Poll Books, on which the returns are made, have a space for the signature of the witnesses the same as for the election judges.

"The question now arises that since the law provides for these officers to act during the election, whether or not they take the same status as election judges and clerks, and who is responsible for the payment of

their compensation for such services. The judges and clerks of election in this County are allowed \$3.00 each per day, and we desire to know if the aforementioned specially appointed officials are entitled to be paid the same amount from the funds of the County, or whether such payment must be made by the political party making the appointment."

Section 10270, R. S. Mo. 1929, provides as follows:

"The county, ward or township committeeman of each party in each county, or the ward committeeman in any city with a population of over 300,000 may appoint two party agents or representatives, with alternates for each, who may represent his party at the polling place in each precinct during the casting, canvass and return of the vote at a primary, who shall act as challengers and witnesses to the count of the vote for their respective parties, and have the power prescribed by law."

It will be noted that under the provisions of this section the county, ward or township committeeman of each party in each county may appoint two party agents or representatives, with alternates for each, who may represent their party at the polling places at the primary election. The persons so designated by the committeemen are the representatives of the political party so appointing them and their appointment is a privilege which the party committeemen may exercise at their option, and the failure of the political party to appoint such representatives in no way affects the validity of the primary election.

Aug. 8, 1938

Section 10287, R. S. Mo. 1929, provides that the judges and clerks for primary elections held under Article 5, Chapter 61 (relating to primary elections) shall be appointed in the same manner and possess the same qualifications and consist of the same number as judges and clerks of general elections in this State. The compensation of the judges and clerks of election is fixed by Section 10203, R. S. Mo. 1929, which permits the county courts to pay not to exceed \$3.00 per day for their services out of the county treasury. Nowhere do we find any statute allowing compensation out of the county treasury to the agents or representatives of the political parties appointed as provided in Section 10270, supra, and in the absence of some statutory authority authorizing payment we are of the opinion that these agents and representatives are not entitled to be paid out of the county treasury. If they are paid for their services, we think they should be paid by the respective political parties so appointing them.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

TAXATION:

County Board of Equalization or State Tax Commission may raise the assessment on the valuation of real property.

August 12, 1938

Honorable J. V. Conran
Prosecuting Attorney
New Madrid, Missouri



Dear Sir:

We acknowledge your request for an opinion dated August 4, 1938, which is as follows:

"In this County we have several tracts of land which are on the Assessment Books at a figure far below what they are worth. In one instance, we have a home in the City of New Madrid which is assessed at \$4800.00. The original cost of construction of this place was \$93,000.00, and the very minimum that it is reasonably worth today is \$25,000.00. We also have a half block of buildings in this town where a new picture show has been recently constructed, and many modern apartments built on the upper story, and several other office rooms modernized for rental purposes. All of this property is assessed at only \$9,000.00, and it is probable that a reasonable value for it would be around \$50,000.00.

"The County Court and several of the citizens of this County are anxious to know the proper procedure to compel the placing of this property on the tax books at a reasonable value in accordance with the assessment on other property in this County. So kindly advise what steps may be taken by the County Court and the citizens of this County in order to accomplish the

desired result. Would a mandamus suit lie against the property owners, the County Court, or the County Assessor to compel the correction of this inequality? Would it be better to proceed by way of filing affidavits with the State Board of Equalization, and, if so, what steps may be taken to compel them to act?"

Section 9811, R. S. Mo. 1929, reads as follows:

"There shall be in each county in this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year: Provided, that in any county having adopted township organization, the sheriff of said county shall be a member of said board of equalization; Provided further, that in counties containing a population of more than seventy thousand, such board shall meet upon the first Monday of March in each year."

Section 9812, R. S. Mo. 1929, reads as follows:

"Said board shall have power to hear complaints and to equalize the valuation and assessments upon all real and personal property within the county which is made taxable by law, and, having each taken an oath, to be administered by the clerk, fairly and impartially to equalize the valuation of all the taxable property in such county, shall immediately proceed to equalize the valuation and assessment

of all such property, both real and personal, within their counties respectively, so that each tract of land shall be entered on the tax book at its true value: Provided, that said board shall not reduce the valuation of the real or personal property of the county below the value thereof as fixed by said state board of equalization."

Section 9813, R. S. Mo. 1929, reads as follows:

"The following rules shall be observed by county boards of equalization: First, they shall raise the valuation of all such tracts or parcels of land and any personal property, such as in their opinion have been returned below their real value, according to the rule prescribed by this chapter for such valuation; but, after the board shall have raised the valuation of such real estate, it shall give notice of the fact, specifying the property and the amount raised to the persons owning or controlling the same, by personal notice, through the mail or by advertisement in any paper published in the county, and that said board shall meet on the fourth Monday of April, except in counties containing a population of more than seventy thousand and less than one hundred thousand, in which counties such board shall meet on the fourth Monday of March of each year, to hear reasons, if any may be given, why such increase should not be made; second, they shall reduce the valuation of such tract or parcels of land or any personal property which, in their opinion, has been returned above its true value as compared with the average valuation of all the real and personal property of the county."

Under the above sections the county court, the county clerk, the county surveyor, and the county assessor, sitting as a board of county equalization, have the power to raise or lower the valuation turned in by the county assessor, during their session as a board of equalization. They are only limited to the provision that they shall not reduce the valuation of real or personal property of the county below the value as fixed by the state board of equalization.

The property mentioned in your request, I presume, has been valued as set out therein and placed upon the tax rolls by the county assessor. If that is the case, the above mentioned county board of equalization may raise the valuation of the property by complying with the above set out sections, which are part of Article 3, Chapter 59, of the Revised Statutes of Missouri, 1929.

I am presuming that the county board of equalization met in April of this year and has adjourned. Under all of the authorities, the county board of equalization does not have the power at this time to raise the valuation of property for the year 1937 where the property has been placed on the tax roll at some valuation. This rule would not apply where the property was omitted by the county assessor.

Section 9854, R. S. Mo. 1929, reads as follows:

"It shall be the duty of the commission, and the commissioners shall have power and authority, subject to the right of the state board of equalization, finally to adjust and equalize the values of real and personal property among the several counties of the state, as follows:

* * * * *

"(3) To receive all complaints as to property liable to taxation that has not been assessed, or that has been fraudulently or improperly assessed, to investigate the same and to institute such proceedings as

will correct the irregularity complained of, if any irregularity be found to exist.

* * * * *

"(5) To furnish the state board of equalization at each session thereof a statement of the value of the taxable property in each county in the state, and, when so requested, to meet with the state board of equalization. The said statement herein referred to shall include a statement of the amount to be added to or deducted from the valuation of the real and personal property of each county, specifying the amount to be added to or be deducted from the valuation of the real or personal property, to the end that the state board of equalization may adjust and equalize the valuation of real and personal property among the several counties in the state as is provided by law.

* * * * *

"(8) To raise or lower the assessed valuation of any real or personal property, including the power to raise or lower the assessed valuation of the real or personal property of any individual, copartnership, company, association or corporation: Provided, that before any such assessment is so raised, notice of the intention of the commission to raise such assessed valuation and of the time and place at which a hearing thereon will be held, shall be given to such individual, copartnership, company, association or corporation as provided in section 9855."

In view of Section 9854, if the county board of equalization refuses to give a fair valuation for the true value of the property, while meeting as a board of equalization, then it would be proper for anyone to complain to the state tax commission, who, in accordance with Section 8954, supra, may raise or lower the assessed valuation of any real or personal property of any individual, copartnership, company, association or corporation. Their decision in the matter is subject to the right of the state board of equalization finally to adjust and equalize the values of real and personal property among the several counties of the state.

The state board of equalization is organized solely under the powers granted them by Article X, Section 18, of the Constitution of the State of Missouri, which reads as follows:

"There shall be a State Board of Equalization, consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney-General. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the State, and it shall perform such other duties as are or may be prescribed by law."

The session of the state board of equalization is governed and controlled by Section 9862, R. S. Mo. 1929, which reads as follows:

"The board shall meet at the capitol in the City of Jefferson on the last Wednesday in February, 1894, and every year thereafter, the majority of whom shall constitute a quorum, and the members thereof shall each take an oath or affirmation that he will, to the best of his knowledge and ability, equalize the valuation of real and personal property among the several counties in the state, according to the rules prescribed by this chapter for equalizing

and valuing real property; and the secretary of the board shall keep an accurate account of all their proceedings and orders, and file the same, together with all their papers, in the office of the state auditor."

You also inquire in your request if mandamus proceedings would lie against the property owners, the county court, or the county assessor to compel the correction of the inequality of the assessment. Mandamus is not the proper remedy and does not issue where there is another adequate remedy. This was so held in the case of *State ex rel. v. Hudson*, 226 Mo. 239. Under the facts in your request, there are two adequate remedies to compel an equal assessment of the property in your county.

Mandamus also will not lie to control the exercise of judicial discretion in the absence of any abuse thereof. This was so held in the case of *State ex rel. v. Thompson*, 190 Mo. App. 12.

In the case of *State ex rel. v. West*, 272 Mo. 304, the court held that mandamus would not lie in a discretionary matter or for the enforcement of any judicial or quasi judicial matter, and only should be issued where the duty or action sought to be compelled was solely ministerial.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the proper and most convenient method of having the property described in your request assessed at a fair and equal value would be to have the matter adjusted by the county board of equalization, and if their procedure is not satisfactory, to have the matter adjusted by the state tax commission by way of the state board of equalization and state auditor.

It is also the opinion of this department that mandamus will not lie against the property owner, the county court, or the county assessor to compel the correction of this inequality, but may be used by the state auditor if any property is omitted from the tax rolls by the county assessor. In the case of omission of the property from the county tax rolls, the proper method would be a complaint before the state tax commission through the state board of equalization and the state auditor. In that case if the county assessor would refuse to place the property as assessed by the state tax commission upon the tax rolls, the state auditor, by mandamus, may compel the performance of this ministerial act by the county assessor.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

TAXATION: City property to use of hospital is taxable, but hospital property used for charity is tax exempt in limited acreage.

October 13, 1938

Hon. Roy Coyne
Prosecuting Attorney
Jasper County
Joplin, Missouri



Dear Sir:

We acknowledge your request for an opinion dated October 10, 1938, which reads as follows:

"As Prosecuting Attorney of Jasper County, I will appreciate an opinion from you relative to the following questions:

"The City of Carthage owns as Trustee some three or four hundred acres of ground in Jasper County for the use and benefit of the McCune-Brooks Hospital of Carthage, Missouri. The assessor of this county has attempted to and has assessed this property, but the City of Carthage and the McCune-Brooks Hospital both claim that this property is exempt from taxation.

"A number of acres of this property held by the City of Carthage is over in the western edge of Jasper County. This, of course, does not apply to the hospital property.

"All of the title to the land held in this County is in this manner: To the City of Carthage for the use and benefit of the McCune-Brooks Hospital.

"These lands held by the City have been donations made by individuals for the hospital of the City of Carthage.

"I would like to have an opinion from you as to whether or not this land is taxable under our statutes. Understand that no part of this land is used either by the City or by the McCune-Brooks Hospital, but is far removed both from the City of Carthage and from the hospital."

No property is exempt from taxation in Missouri except that specifically exempted by law and in State ex rel. v. Gehner, 294 S.W. 1017, 1.c. 1018, 316 Mo. 694, the court said:

"The policy of our law, constitutional and statutory, is that no property than that enumerated shall be exempt from taxation."

We look to the Constitution and statutes to discover what property is tax exempt in Missouri. The Missouri Constitution, Article X, Section 6, relating to tax exemption, provides:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

The above constitutional provision exempting from taxation the property of municipal corporations refers to such property as the city holds for its own use and not property held in trust, and in *City of St. Louis v. Wennicker*, 47 S.W. 105, 145 Mo. 230, the Supreme Court said at l.c. 238:

"We think that the property of a county or city exempted from taxation by the constitutional provisions hereinbefore quoted, is that of which such county or city is the beneficial owner, which is held by it 'for its own use' and not merely in trust. It does not include that in which the only interest of the municipality is as trustee. We therefore hold that this real estate is not exempt from taxation."

From the holding in the above case, the title to the property in issue is no legal reason to claim that this hospital property be exempt from taxation as city property is exempt from taxation, because under the title the property is not held by the City of Carthage for the use of the City of Carthage. We find nothing in the Missouri Constitution or statutes specifically exempting hospital property from taxation. Since not tax exempt as city property for city uses, and since not tax exempt as hospital property, it must be that those claiming exemption are basing their claim on grounds that this property is hospital property used exclusively for purely charitable purposes under a general legislative tax exemption act. Your request does not state why this property is claimed as tax exempt, and as we read the Constitution and statutes on tax exemption, we can give no other plausible reason for claiming tax exemption on this property other than the general legislative tax exemption act on property used exclusively for charitable purposes.

Section 9742, R.S. Missouri, 1929, provides:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

In the light of the Constitution, supra, which authorized the Legislature to pass general laws exempting property used exclusively for purposes purely charitable, the Legislature in Section 9743, R.S. Missouri, 1929, followed the language of the Constitution and provided tax exemption as follows:

* * * * * fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; * * * * * sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

The general rule of constitutional and statutory construction followed by the courts is to the effect that tax exemption provisions must be strictly construed against those claiming the exemption, and in *Fitterer v. Crawford*, 157 Mo. 51, 1.e. 58, 57 S.W. 532, the court said:

"In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is liable to taxation, exemption the exception, and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt."

Vol. 2, *Cooley on Taxation*, (4 Ed.), pages 1403-1408, states the rule on strict construction as it relates to exemption from taxation, and reads in part as follows:

"An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant."

CONCLUSION

We find nothing in the Missouri Constitution or statutes exempting property from general taxes in Missouri simply because same be used for hospital purposes.

Hon. Roy Coyne

- 6 -

October 13, 1938

The Constitution and the statutes exempt municipal property from general taxes, but we are of the opinion that property held by a municipal corporation in trust for the use of the McCune-Brooks Hospital Company is not such city property as the Missouri Constitution and statutes exempting city property intended as tax exempt city property. We are of the opinion that the only city property intended in Missouri as tax exempt was such property held by a municipal corporation for the use of the municipal corporation.

We are not familiar with the facts relating to the organization and operation of the McCune-Brooks Hospital Company, or the nature of any use of any property by said hospital. In Missouri the actual use of property exclusively for charitable purposes may determine its status as non-taxable property, regardless of whom the deed sets out as legal and equitable owners of title.

We are of the opinion that if none of the property be used for charitable purposes, then all of said property is subject to general taxes without exemption. On the other hand, we are of the opinion that a limited acreage of the real estate with buildings thereon which is being used exclusively for charitable purposes is entitled to a tax exemption from general taxes, under the Constitution and statutes of Missouri, as follows: Up to one acre tract, with buildings thereon, located in any incorporated city or within one mile of said city, and also up to five acre tracts, with buildings thereon, located within one mile or more distant from such city, conditioned upon said property being used exclusively for charitable purposes.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

WOS:VAL

LABOR - Commissioner of Labor and Industrial
Inspection without authority to make inspection
of schools conducting manual training courses
by the use of machinery.

January 25, 1938.

Mrs. Mary Edna Cruzen, Commissioner
Labor & Industrial Inspection Dept.
Jefferson City, Missouri



Dear Mrs. Cruzen:

This is to acknowledge your letter of recent date requesting an opinion from this department on the following state of facts:

"Under Section 13218, R. S. of Missouri, 1929, this Department is authorized to make inspections of mechanical establishments and workshops. In several cities in Missouri there are now being conducted manual training schools, financed by the capital of private individuals, which might be classified as workshops and inasmuch as students use various types of machinery, grinders and welding equipment, use of which in industrial workshops and mechanical establishments is considered hazardous unless properly guarded and the operators of such machines equipped with goggles and other necessary safety devices.

"In the schools referred to, the students operating this machinery are not in any sense considered as employees, but are paying for the training they are receiving.

"Has this Department any right to make inspections of such establishments and to insist upon the proper guarding of such machinery and the elimination of such hazards as may be determined?"

The pertinent part of Section 13218 of R. S. Mo. 1929 about which you inquire reads as follows:

" ** It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. ** "

If an inspection may be made of the schools which conduct manual training courses, then the authority therefor must exist and be embraced within the terms as set forth in the above quoted part of the statute. An examination of Section 13219 of R. S. Mo. 1929 indicates that an inspection of the places or establishments as set forth above shall be made in accordance with the provisions of Articles 4, 5, 6, 8, 9 and 10 of Chapter 95 of R. S. Mo. 1929. This section further provides the fee to be charged for making the inspection, which fee is based upon the number of persons employed or found at work.

We have examined Chapter 95, supra, and do find that such statutes have been enacted by the Legislature in view of the protection of the health and safety of employees pursuing various occupations which are hazardous in their nature. These enactments are proper police regulations and have heretofore met with the approval of the Supreme Court in the case of State v. Vickers, 186 Mo. 103, 106, wherein the court passed upon objections that had been directed against what is now Section 13219, supra, and said:

"The answer to each and all of them is that this is a police regulation for the protection of the lives, health and morals of the employees in factories, and is clearly within the power of the Legislature to enact."

Since these inspections are required to be made of certain places, as above set forth, in the furtherance of the health and the protection of the lives of persons employed in certain establishments, these statutes should receive a liberal interpretation in light of the object and purpose for which said statutes were enacted. In so doing we may properly extend words used in a statute to effectuate its purpose. *Straughan v. Myers*, 187 S. W. 1159; *Kerens v. St. Louis Union Trust Company*, 223 S. W. 645.

With these principles of law in mind, we have examined in detail all of Articles 4, 5, 6, 8, 9 and 10 of Chapter 95, supra, and fail to find any statute which by the plain wording thereof or by any necessary implication may be construed so as to include schools which are conducting manual training courses.

It is plain from the reading of these articles relating to an inspection of certain places, that such inspections are to be made in the interests of the welfare of those who might be employed in those places. As was said by the court in *State v. Vickers*, supra, in disposing of objections lodged against a section of the statute contained in one of these articles aforementioned that these are police regulations for the "protection of the lives and health and morals of the employees in factories." The Legislature, so as not to be misunderstood by the use of the term "factory" and "workshop", has defined the same in Section 13287, under Article 9, as follows:

" ** The expression 'woman' means a woman of the age of eighteen years and upward. The expression 'factory' means any premises where steam, water or other mechanical power is used in

Mrs. Mary Edna Cruzen

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January 25, 1938

aid of any manufacturing process there carried on. The expression 'workshop' means any premises, room or place, not being a factory as above defined, wherein any manual labor is exercised by way of trade, or for purposes of gain, in or incidental to any process of making, altering, repairing, ornamenting, finishing or adapting for sale any article or part of an article, and to which or over which premises, room or place the employer of the persons working therein has the right of access or control: ** "

From the above section, you will have noticed from the plain wording of the statute that a manual training school using various types of machinery could not be included within the meaning of a workshop or factory as these two terms are defined. Hence, the Commissioner of Labor and Industrial Inspection would have no authority to make an inspection of such a school.

CONCLUSION.

In view of the above, it is the opinion of this department that the State Commissioner of Labor and Industrial Inspection is without authority to make inspections of schools which conduct manual training courses by the use of various types of machinery or other equipment, because no authority therefor exists within the meaning of Section 13218, R. S. Mo. 1929.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:FE

LABOR COMMISSIONER:

(1) City sanitariums, city hospitals etc., classed as public institutions within meaning of Section 13210, R. S. 1929; (2) Commissioner has no jurisdiction to make inspection of female employes in federal, state, city, county offices or on election boards.

February 17, 1938.

Honorable Mary Edna Cruzen
Commissioner of Labor
Jefferson City, Missouri



Dear Mrs. Cruzen:

This Department acknowledges receipt of your letter of February 16th, wherein you request an opinion involving certain portions of Section 13210, R. S. Mo. 1929. The first paragraph of your letter is as follows:

"On November 11, 1933, an opinion was handed down from your department prepared by Frank W. Hayes, Assistant Attorney-General, in which Section 13210, R. S. of Missouri 1929, was quoted and question asked 'If the provisions accepting the application of the provisions of the Section 13210 in towns or cities have a population of three thousand or less was constitutional.' In this opinion a review was made of the provisions of Section 13210 'no female shall be employed, permitted or suffered to work, manual or physical, in any manufacturing, mechanical or mercantile establishment or factory, workshop, laundry, bakery, restaurant or any place of amusement or to do any stenographic or clerical work of any character in any of the diverse kinds of establishments and places of industry wherein above described or by any person,

firm or corporation engaged in any express or transportation or public utility business or by any common carrier or by any public institution, incorporated or unincorporated, more than nine hours during any one day or more than fifty-four hours during any one week.'

For the sake of clarity we are answering your questions separately.

I.

"The question has arisen 'Does this portion of Section 13210 apply to city sanitariums, city hospitals (colored and white), city infirmaries, isolation hospitals, girls and boys homes maintained by the city?'"

Your letter quotes the pertinent part of Section 13210, supra, and we shall not burden this opinion by again quoting same. The privisos and exceptions contained in said section do not affect the questions.

The Supreme Court of the United States in the decision of *Commonwealth v. Riley*, 232 U. S. 671, has said that in order to determine what employers are within the purview of statutes regulating the hours of laborers, the statutes should be read in the light of the general purpose of the Legislature in enacting them. Therefore, we are concerned with what the Legislature had in view in using the phrase "by any public institution." It appears to have a varied meaning and to the layman's mind includes any place which is sanctioned, operated, maintained or opened to the public by any governmental political division, such as State, county and city. However, we think the Legislature had in mind a more narrow or constricted meaning, such as contained in the case of *Henderson v. Shreveport*

Gas and Electric Co., 62 So. 616, 618, as follows:

"A 'public institution' is one which is created and exists by law or public authority, e. g., an asylum, charity, college, university, school house, etc."

In Vol. 6, page 5793 of Words and Phrases, a "public institution" is defined as follows:

"Public institutions are those which are created and exist by law or public authority, while private institutions are those which are created or established by private individuals for their own private purposes. Some public benefits or rights may result from the institutions of private individuals or associations. So, also, some private or individual rights may arise from public institutions. The only sensible distinction between public and private institutions are found in the authority by which, and the purposes for which, they are created and exist. Because, therefore, a corporation may fall under the denomination of private corporations in the artificial distinction between public and private corporations, it is none the less a public or political institution. Toledo Bank v. Bond, 1 Ohio St. 622, 642."

Applying these definitions to your question, we are of the opinion that city sanitariums, city hospitals,

Feb. 17, 1938

city infirmaries, isolation hospitals, girls and boys homes maintained by the city, are to be classified as public institutions within the meaning of Section 13210, supra, provided that the institutions herein mentioned are maintained, controlled or owned, governed and directed by the city.

II.

"As this is a very important and urgent matter, I will appreciate an immediate reply which will set forth explicitly the places included in any public institution, incorporated or unincorporated. Further, could this by any chance cover women working in federal, state, city, county offices or on election boards?"

One of the well recognized canons of statutory construction is the latin expression *expressio unius est exclusio alterius*, which means in effect that where the statute enumerates the things upon which it is to operate it is to be construed as excluding all things not expressly mentioned. *State ex inf. Conklin v. Sweeney*, 270 Mo. 685.

Therefore, if female employees employed in Federal, State, city, county offices or election boards are to come within the purview of Section 13210, there must be language in said section which would clearly embrace such employees. We have read the statute carefully and finding no words, terms or language which could reasonably be interpreted to include such employees, we are of the opinion that you, as Labor Commissioner, have no jurisdiction to make any inspection of female employees employed in such offices or boards.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

LABOR COMMISSIONER:

Section 13218, R. S. Mo. 1929, does not give Commissioner authorization to make inspections of radio broadcasting stations.

February 24, 1938.



Honorable Mary Edna Cruzen
Commissioner of Labor
Jefferson City, Missouri

Dear Mrs. Cruzen:

This Department is in receipt of your letter of February 28th, wherein you make the following inquiry:

"A question has arisen regarding the rights of this Department to make inspections of radio broadcasting stations. We have considered commercial radio broadcasting stations as coming under or within the scope of the meaning of the word 'workshops.'

"Will you please advise if this Department has any authorization, under Section 13218 of R. S. of Missouri 1929, to make inspections of radio broadcasting stations who accept paid commercial advertising?"

We quote the pertinent part of Section 13218, R. S. Mo. 1929, referred to in your letter, as follows:

"* * * It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots,

machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. * * *

We are not exactly familiar with the operations and the mechanics of a broadcasting station. However, we are convinced from our limited knowledge of the same that they do not constitute or cannot be classified under the statute as "workshops." We think the definition of a "workshop" is contained in a statute of long standing in the State of Illinois in the case of *Kitchie v. The People*, 155 Ill. 102, is sufficient to dispose of the question, as follows:

"The present prosecution, as is conceded by counsel on both sides, is for an alleged violation of section 5 of said Act. That section is as follows: 'No female shall be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week.'

'Factory' or 'workshop' is defined in section 7 of the Act as follows: 'The words, "manufacturing establishment," "factory," or "workshop," wherever used in this act, shall be construed to mean any place where goods or products are manufactured or repaired, cleaned or sorted, in whole or in part, for sale or for wages.'

Feb. 24, 1938

If the broadcasting stations are to be included within the terms of the statute then we think it is necessary for the statute to be more definite in its terms. Radio broadcasting stations being comparatively modern, with respect to the other enumerated things in the statute, we are of the opinion that before you can assume jurisdiction of the stations, as Commissioner of Labor, it will be necessary for the Legislature to specifically include the same.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

LABOR DEPARTMENT: License ~~not~~ required of furniture manufacturers making, remaking or renovating bedding when designed for sleeping or reclining purposes.

March 4, 1938



Mrs. Mary Edna Cruzen
Commissioner of Labor
Jefferson City, Missouri

Dear Mrs. Cruzen:

We wish to acknowledge your request for an opinion under date of February 17th, as follows:

"Please advise if overstuffed furniture, upholstered springs for overstuffed furniture and pillows used for overstuffed furniture by furniture manufacturing establishments require a license from the State Labor Department or if such industries remake or renovate upholstered springs, pads, cushions or pillows as provided for under Section 13308 R. S. Missouri."

Chapter 95, Article 12, Section 13308 R. S. Missouri 1929, to which you refer, provides that persons making, remaking or renovating bedding, except for their own use, must secure a permit from the State Commissioner of Labor and Industrial Inspection, as follows:

"No person shall make, remake or renovate bedding, except a person making, remaking or renovating bedding for his own use, until he has secured a permit from the state commissioner of labor and industrial inspection and has paid to the state commissioner of labor and industrial inspection an inspection and permit fee of twenty dollars, which such payment or charge shall constitute a factory inspection charge for the purpose of enforcing this article."

The permit so issued by the state commissioner of labor and industrial inspection shall remain in force and effect until the end of the calendar year in which it was issued or until voided by the state commissioner of labor and industrial inspection for failure to maintain the required sanitary conditions in and around a factory in which bedding is made, remade or renovated or for failure to sterilize and disinfect properly all previously used materials used in making, remaking or renovating bedding."

The term "bedding" as used in the above article is defined in Section 13300, Subsection 1, R. S. Missouri 1929, as follows:

"(1) The term, "bedding," as used in this article shall be construed to mean any mattress, upholstered spring, comforter, pad, cushion or pillow designed and made for use in sleeping or reclining purposes, except where the filling consists exclusively of sterilized feathers."

Under the above definition the articles must be such as are "designed and made for sleeping or reclining purposes".

Funk & Wagnalls New Standard Dictionary of the English language defines the word "recline" as follows:

"To cause to assume a leaning or recumbent position; as to recline the head on a pillow, to assume or be in a leaning or recumbent attitude; lie down; as to recline in a hammock."

Sleeping is such a common word that we feel that it is not necessary to define same.

The meaning and intent of the Legislature is clear and unambiguous and cannot be construed to include overstuffed furniture, upholstered springs for overstuffed furniture and pillows used for overstuffed furniture unless they are specifically designed for sleeping or reclining purposes.

As a matter of public policy it might be wise to construe the statute so as to include overstuffed furniture etc., inasmuch as there is the same need for sanitary fillings whether the articles be for sitting and resting purposes or for sleeping and reclining purposes. However, as stated by the Court in the case of Betz vs. Kansas City Southern Ry. Co. 284 S.W. 455, 314 Mo. 309, we are not justified in departing from the natural meaning of the statutes by any consideration of concensus or public policy:

"And in 36 Cyc. 1114, it is furthermore said:

'In the interpretation of statutes, words in common use are to be construed in their natural plain and ordinary signification. It is a very well settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the court to give it force and effect.'

And in the case of Sleyster vs. Eugene Donzelot & Son, 25 S. W. (2) 147, 223 Mo. App. 1166, the Court in holding that where the meaning of the statute is plain and must be given effect regardless of the results or wisdom of the law, said:

"Where the meaning of the language used is plain, it must be given effect by the courts (Betz vs. Kansas City Southern Ry. Co. 314 Mo. 390, 284 S.W. 455, loc. cit. 534, 228 S.W. 454, loc. cit. 457) without regard to results of the construction or the wisdom of the law as thus construed. (State ex rel. v. Wilder, 206 Mo. 541, 105 S.W. 272."

Mrs. Mary Edna Cruzen

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March 4, 1938

From the foregoing we are of the opinion that a license is required by furniture manufacturing establishments under Section 13308 R. S. Missouri 1929, from the State Labor Department for making, remaking or renovating overstuffed furniture, upholstering springs for overstuffed furniture and pillows used for overstuffed furniture, when same are made or designed for sleeping or reclining purposes.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

AGRICULTURE: TIME:--The time within which an act is to be done is computed by excluding the first day and including the last."

March 4, 1938



Doctor H. E. Curry
State Veterinarian
Department of Agriculture
Jefferson City, Missouri

Dear Dr. Curry:

We wish to acknowledge your request for an opinion wherein you state as follows:

"We have a point in question concerning the payment of indemnity on a cow belonging to Kuhne Bros. of Troy, Missouri, which was condemned on account of reacting to the tuberculin test.

This cow was tested under the provisions of cooperative Federal and State tuberculosis eradication program, which provides that the Federal government shall pay one-third, the State one-sixth, and the County one-sixth of the difference between the appraised value and salvage.

The local Inspector in Charge of U.S. Bureau of Animal Industry operations in Missouri declines to certify to the Kuhne Bros. claim, which amounts to \$50.00 (representing the portion to be paid by the Federal Government), alleging that the animal was not slaughtered within the thirty day period as set forth in Section 3 of Regulation 4, B.A.I. Order 344, which reads as follows:

March 4, 1938

"The tuberculous cattle shall be destroyed within a period of 30 days of the date of appraisal, except that in extraordinary and meritorious cases and at the discretion of the Chief of Bureau, such time limit of 30 days may be waived; however, no such waiver shall be given in order to allow a cow to produce a calf."

This animal was appraised August 17, 1937, and was sent to Swift & Company, St. Louis, by Kuhne Bros., September 15, and was slaughtered the morning of September 16.

Kuhne Bros. have written us several letters about this claim. They are anxious to have it settled; therefore, I would greatly appreciate it if you will give us an opinion in writing as to whether or not this animal was slaughtered within the thirty day period, as prescribed by Missouri laws under which we are carrying on cooperative tuberculosis eradication work."

Section 655 R. S. Missouri 1929, sets out various rules for construction of statutes and declares the rule to be followed in computing the time within which an act shall be performed, as follows:

"****fourth, the time within which an act is to be done shall be computed by excluding the first day and including the last****".

62 C. J. Section 30, page 984, declares the rule, as follows:

"The rule most commonly adopted, and which in many jurisdictions has either expressly or in substance, been provided by statutes, which have been held to be merely declaratory

of the existing common law rule, is that the time within which an act is to be done is to be computed by excluding the first day, and including the last, that is, the day on which the act is to be done*****"

The Federal Courts have adopted the same rule, for in the case of *Sugilschiffer vs. Penn Mut. Life Ins. Co.* 248 Fed. 226, 160 C.C.A. 304, we find the following language:

"It is also, we take it, settled by the weight of authority that the time within which an act is to be done is to be computed by excluding the first day and including the last. *Sheets vs. Selden*, 2 Wall. 177, 17 L. Ed. 822, *Eliot National Bank v. Gill* (D.C.) 210 Fed. 933, 940."

And in a more recent case, *In Re: Hamilton*, 29 F. (2d) 281, the Court said:

"The general rule in computing time is to exclude the first day and include the last."

The month of August has thirty-one days. So following the rule of excluding the first day, which was August 17th, the day of appraisal, and including the last day which was September 16th, the day of slaughter, we have a total of twenty-nine days.

From the foregoing we are of the opinion that the animal was slaughtered within the thirty day period whether the act be construed under state or federal laws.

Respectfully submitted,

APPROVED:

MAX WASSERMAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

LABOR: Sale of products produced by persons under 18 years of age when employed by parent or guardian, are exempt from the provisions of the Laws of Missouri, 1937, page 196.

March 15, 1938.

3-17



Mary Edna Cruzen
Commissioner of Labor
Jefferson City, Missouri

Dear Madam:

This is to acknowledge receipt of your request for an opinion, which reads as follows:

"I am receiving any number of complaints and considerable controversy is arising with reference to the question of child labor, especially in the tiff mining section of Missouri where children are employed by their parent or guardian. A greater part of this controversy has arisen over Senate Bill No. 1 of the 59th General Assembly, a copy of which is attached hereto.

"It is my understanding that my Department has no jurisdiction in this matter and that the employment of persons under fifteen years of age by their parent or guardian in this industry is exempt from the provisions of this act.

"I would greatly appreciate an opinion from you in this matter in order that I may give complainants the proper information."

The Act, about which you inquire, Laws of Missouri, 1937, at page 196, was directed toward prohibiting the sale of any goods, wares or merchandise manufactured, produced, mined or quarried, wholly or in part, by child labor, either within the state or without the state. The Act exempted the sale of goods

March 14, 1938

sold in the course of Interstate Commerce and to agricultural or farm products.

The term "child labor" is defined in Section 2, sub-section "b", in part, as follows:

"Employment of persons under eighteen (18) years of age in any manner or by any means whatsoever in, or in connection with, the mining or quarrying of minerals; provided however, that the provisions of this sub-section shall not apply to employment of persons under eighteen (18) years of age by their parents or guardian."

It will be noticed that the above section clearly prohibits the employment of persons under eighteen (18) years of age in any mine or quarry, in connection with any mine or quarry. This inhibition is limited in its application when construed with its proviso which immediately follows. Therefore, the proviso, limiting or restraining the preceding clause to which it is attached, has for its effect of permitting the employment of persons under the age of eighteen (18) by their parents or guardian. State ex rel. Crow vs. City of St. Louis, 174 Mo. 125; Brown vs. Patterson, 124 S. W. 1.

From these considerations it will be noticed that the sale of products from any mine or quarry, that have been produced by persons under the age of eighteen (18) years, when employed by their parents or guardians, are excepted from the provisions of the Act.

CONCLUSION

In view of the above, it is the opinion of this department that the sale of products from mines or quarries

Mary Edna Cruzen

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March 14, 1938

which have been produced by persons under eighteen (18) years of age, when employed by parent or guardian, are excepted from the provisions of the Act.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

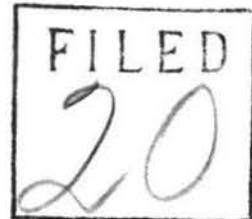
RCS:LB

DEPARTMENT OF AGRICULTURE:

Proclamation made by Governor
Caulfield on March 4th, 1932
in reference to rules and regulations
of shipment of hogs within the state
of Missouri, is no longer in effect.

April 7, 1938

4-9



Mr. H. E. Curry,
State Veterinarian,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated
March 24, 1938, for an official opinion which is as follows:

"Enclosed you will please find copy of
Proclamation issued by Governor Caulfield,
March 4, 1932, enacting rules and regu-
lations relative to the shipment and
quarantining of hogs within the State of
Missouri.

We are having a great deal of trouble with
parties who make it a practice of buying,
selling, and trading in stocker and feeder
pigs. These animals are transported from
one sale to another in trucks, until they
are finally sold to some farmer, who
generally loses a large per cent of them
on account of hog cholera and other in-
fectious diseases. Therefore, we would
like to have an opinion as to whether the
Proclamation issued by Governor Caulfield
is still in force, and in legal form. If
it is, we shall attempt to institute pro-
ceedings against parties violating pro-
visions of the Proclamation and try to
effectively stop the promiscuous movement
of stocker and feeder pigs that is now
being carried on in violation of the rules
and regulations contained in Governor
Caulfield's Proclamation."

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Section 12535, R.S. Mo. 1929, among other provisions therein, provide:

"The governor of Missouri may, in his discretion, order said veterinary surgeon to visit any state or territory and investigate any dangerous or infectious disease, including contagious or infectious abortion, said to exist in any designated locality in the state named and report to the governor the result of said investigation, together with such suggestions that he may deem proper and right.*
* * * * * The governor, on the approval of such rules and regulations, shall issue his proclamation, scheduling and quarantining against such localities in which domestic animals may be considered as capable of conveying infectious or contagious diseases, including contagious or infectious abortion, and prohibit the importation and the unloading in this state of any livestock of the kind capable of causing such disease, except under the aforesaid rules and regulations. Such rules and regulations, after approval by the governor, shall be sent to all corporations or other agencies doing the business of transportation or conveying live stock through or into the state of Missouri; and any corporation or agency or individuals who shall violate such rules and regulations by transporting prohibited animals shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than a thousand dollars nor more than ten thousand dollars for each and every offense, and shall be liable for any and all damages or loss that may be

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sustained by any party or parties by
reason of such importation or trans-
portation:"* * * * *

This section does not say upon the proclamation of a past governor, but specifically upon the proclamation of the governor of Missouri. In the first part of the section it sets out the following:

"The governor of Missouri may, in his discretion, order said veterinary surgeon to visit any state or territory and investigate any dangerous or infectious disease, including contagious or infectious abortion, said to exist in any designated locality in the state named and report to the governor the result of said investigation, together with such suggestions that he may deem proper and right."* * * * *

Under this section the veterinary surgeon, which means the state veterinary surgeon, must first make an investigation and then report to the governor, and after compliance with such order for investigation, the governor then shall make the proclamation and under this section the proclamation of Governor Henry S. Caulfield, made on the fourth day of March, 1932, is no longer in effect.

In the case of State ex rel. v. Hitchcock, 241 Mo. 433, 1.c. 469, the Court said as follows:

"Mr. Webster defines the words as follows:

'1. Act of proclamation: official or general notice; publication.

'2.. That which is proclaimed, publicly announced. . . .

'Law: A public notice by an official of some order, an intended action, or some state of facts. In British and

American law the term is used only of such notices by an administrative or executive officer, or the King of Great Britain, the President of the United States, a Governor, mayor, etc., esp. with reference to some matter of public policy or the exercise of some administrative or executive power affecting the public at large; as a proclamation of material law; a Thanksgiving proclamation.'

When we analyze this definition, we find that it is composed of two elements, namely: first, the officer whose duty it is to make the proclamation, and, second, the matter to be proclaimed by him.

Now as to the first: Who is the officer designated by the Constitution to make the proclamation? That question is answered in plain terms by the Constitution itself. It says 'upon the proclamation of the Governor,' etc. That language means the Chief Executive of the State; not the Governor, the Secretary of State and the Attorney-General, nor the two latter by themselves. There is nothing in the language used, which by any fair or reasonable construction can be said to include or refer to the Secretary of State or Attorney-General, severally or collectively; but if we read the language just quoted in connection with its context, it will clearly appear that it was the intention of the framers of the Constitution to exclude the Secretary of State and the Attorney-General from participating in the proclamation. The language of the contract

is that all three of said officers shall apportion the State into districts, make out and sign the statement thereof, and file it in the office of the Secretary of State, but when it comes to speak of the proclamation, it drops therefrom the words 'Secretary of State' and the 'Attorney-General,' and all nouns and pronouns and all other words which refer to them in any manner, but says in plain and unambiguous language that the proclamation shall be made by the Governor."

Under authority of Section 12535, R.S. Mo. 1929, the governor may, in his discretion, order the state veterinary surgeon to visit any state or territory and investigate any dangerous or infectious diseases said to exist in any designated locality in the state named and report to the governor the result of said investigation, together with such suggestions that he may deem proper and right. On receipt of such report, or any official report of the state veterinarian, the governor may call the secretary of the state board of agriculture and the state veterinary surgeon together, and said secretary and said veterinary surgeon may, if deemed wise, arrange and adjust such rules and regulations as safety may demand for the transportation of stock, etc. After this described meeting has been held, the governor, which means the present governor, may issue the proclamation as set out in Sections 12535 and 12536, R.S. Mo. 1929.

In the case of State v. Chicago, Milwaukee and St. Paul Railroad, 200 Mo. App., page 109, the Court held:

"The matter of quarantine of live stock and regulating their transportation between the states is interstate commerce and when acted upon by Congress so as to impose its own rules and regulations, state quarantine regulations are superseded; and a conviction of a transportation

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company for violating a State statute is without legal support."

The Court, in the same case, also said:

"* * * * The Secretary of Agriculture and the Governor of the state, in conjunction with the State Board of Agriculture, as distinct bodies, are empowered by the respective statutes to declare quarantine and to make and promulgate rules and regulations respecting the transportation of live stock into this State. Each is required to give notice of the regulations to transportation companies and large (but different) penalties are inflicted by each for a violation of the regulations and rules of each, respectively. Illustration is not needed to show the endless confusion and embarrassment to interstate commerce and the companies transporting it in endeavoring to comply with both laws. Two concurrent jurisdictions may exist together when one is quiescent; but when both are commanded to lay hold of the same matter at the same time, confusion and conflict will follow, unless one is the superior, and which when called into exercise of its power, will supercede the other. In the present instance the federal statute, under the authority of the constitution of the United States, supplants that of the State."* * * * *

In the same case the Court said:

"* * * If, as insisted time and again by the State, no federal law was in force until the event of the secretary of Agriculture declaring quarantine, what would be said of a situation where

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the Secretary did not consider there was cause for quarantine and therefore took no action and the State thought there was? What sort of medley would this opposite action and clash of authority present?

Something similar to the theory presented in this case was advanced in *Nor. Pac. Ry. v. Washington*, 222 U.S. 370, and *Louisville Ry. v. Hughes*, 201 Fed. Rep. 727, 746, 751, and it was rejected. We quote the following from the opinion in the first case: 'It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power.' * * * * *

Under the above ruling any proclamation made by the present governor after an investigation in other states made by the state veterinarian would be superseded by any of the United States regulations under the secretary of agriculture and would be of no effect where the matter would be properly covered by the regulations of the United States Secretary of Agriculture.

The proclamation, as authorized under Sections 12535 and 12536, R.S. Mo. 1929, is to be construed as giving the governor authority to issue proclamations in case of emergency where the state legislature is not in session or could not pass any rules or regulations in reference to the agricultural laws. In the case of *Wallace et al. v. Woods*, 102 S. W. (2d) 91, the Court said:

"Primary rule for construction of statutes is to ascertain lawmakers' intent from words used, if possible, give language thereof, honestly and faithfully, its plain and rational meaning, and promote its objects."

Under Section 12535, R.S. Mo. 1929, it provided that the governor of Missouri and not any past governor may, in his discretion, order said veterinary surgeon to visit any state or territory, and investigate any dangerous or infectious disease including contagious or infectious abortions said to exist in any designated locality in the state named and report to the governor the result of said investigation, together with such suggestions that he may deem proper and right. In order for the governor under this section to issue a proclamation, the investigation must be made and a report made back to the governor of Missouri which in the ordinary language of the section does not mean the past governor of Missouri. The proclamation of Henry S. Caulfield expired at the same time as his term of office. This section was made in anticipation of certain events to happen before the then governor of Missouri could make a proclamation.

In the case of State v. Smith, 74 S.W. (2d), page 27, the Court said:

"It is well settled that a law may be enacted to become effective on the happening of a future contingency. State ex rel. Maggard v. Palm, 93 Mo. 606, 1.c. 621."

CONCLUSION

In conclusion, will say that it is the opinion of this department that in order to bring any action under Sections 12535, 12536 and 12537, it will be necessary for the investigation to be made by the state veterinary

Mr. H. E. Curry

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April 7, 1938

surgeon and a report made to the governor before he shall issue a proclamation as set out in Section 12535.

It is also the opinion of this department that the proclamation issued by Governor Caulfield is not still in force but expired with his term of office.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

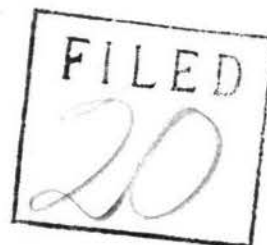
J. E. TAYLOR
(Acting) Attorney General

WJB:DA

SCHOOLS:
DIRECTORS:
QUALIFICATIONS:
TAXPAYERS:

The person who is qualified to vote at a school meeting may be elected as a director of the school board of such district provided he has paid taxes, real and personal, in any county in the State of Missouri within the previous year.

April 19, 1938



Mr. Brevator R. Creech,
Prosecuting Attorney,
Lincoln County,
Troy, Missouri.

Dear Sir:

This is to acknowledge yours of the 15th, requesting an official opinion from this department based on the information set out in your letter which is as follows:

"I would like very much to have an opinion from your office on the following statement of facts:

On the first Tuesday in April, the school district of Winfield held a school election, and a resident of the Winfield School District by the name of Herbert J. Crosby (a person over the age of 21, and a citizen of the United States) obtained the highest number of votes as one of the candidates for school director.

Before he had an opportunity to attempt to qualify, the secretary of the board mailed him the enclosed letter which letter, as you will note, states that he had been instructed to notify Mr. Crosby that the present members of the board were of the opinion that he could not qualify as one of the directors, and this fact was made known to the County Superintendent of Schools, Mrs. Sanders.

The contention on the part of the board is that he is not a taxpayer, in the mean-

ing of the statute, in the Winfield School District, or in Lincoln County.

The facts are that Mr. Crosby was a resident of St. Louis up until two years ago, at which time he moved to Winfield School District and has been a resident of that School District since.

He owns property in the City of St. Louis and has paid taxes (personal and real estate) during the years of 1935, 1936, and 1937; and has paid poll tax in Lincoln County for the year of 1936. During the year of 1936 he was not assessed for '37, but was assessed in '37 for the year of '38, and will pay a tax in '38 on personal property.

I have taken occasion to read 189 Mo. 532 which seems to be in point on the situation here, and I am sending in this letter the tax receipts that he has paid and the letter received from the board of education of Winfield, and ask your office to give me an opinion upon whether or not this man is qualified to serve as a member of the board of directors for the Winfield School District.

I would like to have this opinion as speedily as possible as there is quite a bit of tension in this matter."

"As Secretary of the School District of Winfield, Mo., and by its authority I am instructed to inform you, that before you can qualify as a Director, you must qualify according to school law in regard to paying taxes in the district.

I have a copy of the School law which you may see. As soon as you have complied with its requirements, we will have a meeting of the board and install you into office."

By Section 9328, R.S. Mo. 1929, it is provided as follows:

"The qualified voters of the district shall, annually, on the first Tuesday of April, elect two directors, who are citizens of the United States resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding their election or appointment, and who shall have resided in this state for one year next preceding their election or appointment, and shall be at least thirty years of age, who shall hold their office for three years and until their successors are duly elected and qualified; and all vacancies in the board shall be filled for the unexpired term."

In the case of State v. Menengali, 270 S.W. 103, the Court said:

"It was admitted at the trial that respondent possessed all the qualifications required by above section to fill the position of school director, except the disputed issue as to whether she was a taxpayer of said school district, and as to whether she had paid, or caused to be paid, a state and county tax within one year next preceding her election in April, 1922. In Webster's New International Dictionary, a taxpayer is defined as: 'One who pays a tax.' In Funk & Wagnall's New Standard Dictionary, a taxpayer is defined as: 'One who pays any tax, or who is liable for the payment of any tax.'" * * * * *

In the case of State ex inf. Sutton v. Fasse, 189 Mo., 1.c. 536, the Court said:

"Appellant insists the requirement that a school director must be a resident taxpayer of the district means

that he must have paid taxes for school purposes within the district. That contention cannot be adopted without enlarging the language of the statute and changing its intention. The meaning is that a person who is a qualified voter of the district and also a taxpayer is eligible. A qualified voter is defined in the same section to be one who, under the general laws of the State, would be allowed to vote in any county for State and county officers and who has resided in the district thirty days preceding the school district meeting at which he offers to vote. Any person who possesses those qualifications is a qualified voter as defined in section 9798 (9759?) in regard to the qualifications of school director. If he is also a taxpayer (that is, a person owning property in the State subject to taxation and on which he regularly pays taxes) he is eligible to the office of school director whether he has in fact paid a tax within such school district or not; otherwise, when a new district is formed no one would be eligible to the office of school director; or, if territory is taken from one district and attached to another, no person residing in the newly attached part would be eligible to the office of school director in the district to which it is attached until he first had paid a school tax therein. Provisions are made by the statute for the formation of new districts and also for changing the territory of districts. (R.S. 1899, sec. 9742.) The statutes bearing on the subject must not be so construed as to have unreasonable consequences, and the construction contended for by appellant, we think, would have."

Mr. Brevator R. Creech

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April 19, 1938

From our research on this subject, we fail to find that the above rule as laid down in the Fasse case has been either criticized or overruled. From the tax receipts of Mr. Crosby which you enclosed with your letter, it is conclusively shown that he has paid taxes in the State of Missouri for the past three years and therefore is a taxpaying citizen of this state. As said in the Fasse case, it is not necessary that such party pay taxes in the district to which he is elected, and the only requirement is that he be a taxpaying citizen in the State of Missouri.

The qualifications of directors of common school districts and of city, town and consolidated districts are the same except that directors of city, town and consolidated districts must be at least thirty years of age.

CONCLUSION

From the foregoing, this office is of the opinion that Mr. Crosby, having paid taxes regularly within the State of Missouri for the past three years, and if he possesses the qualifications of a voter in the city school district and is at least thirty years of age, he is eligible to hold the office of school director in such district.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

TAXATION:
SALES TAX:
JURISDICTION OF STATE OF
MISSOURI OVER GOVERNMENT
PROPERTY:

State of Missouri has no jurisdiction
over sales of tangible personal
property belonging to the United States.

April 26, 1938 4/27



Honorable Ray J. Cunningham,
Chief Attorney
Veterans Administration,
Jefferson Barracks, Missouri.

Dear Sir:

In reply to yours of April 22, 1938, your file number "G", requesting an official opinion from this department based on the following letter:

"This has reference to prior correspondence in connection with an opinion rendered by your Department over the right of the State of Missouri to tax sales made by the lessee of the concession at this Facility under a lease made by the Veterans Administration, as lessor, with Mr. Glenn Beaman.

In your letter dated February 9, 1938 you stated that you would not prepare a special opinion on this question unless it was felt that the opinion enclosed (opinion of John W. Hoffman, Jr., Assistant Attorney General, dated November 5, 1937, holding that the Missouri Athletic Commission has no jurisdiction over boxing events held at Jefferson Barracks) did not cover the subject matter.

Feeling that the opinion written by Mr. Hoffman with reference to the taxation of boxing events was analogous

April 26, 1938

to the case of Mr. Beaman, it was felt that an opinion from your Department was not necessary. However, Mr. Beaman is in my office this morning and states that the Prosecuting Attorney's Office of St. Louis County is ready to file suit against him for back taxes on sales made under his lease with the government, acting under instructions from the State Auditor. It is believed that the State Auditor is not familiar with the facts in this particular case and that by calling the matter to his attention instructions should be issued to the Prosecuting Attorney of St. Louis County to desist from filing suit.

In order to determine this matter definitely we would thank you to render a formal opinion in the matter for our information and guidance. Reference is made to a letter of the Solicitor of the Veterans Administration dated August 12, 1937, as well as copy of a letter of the Attorney General, State of Tennessee, involving a similar question, dated November 3, 1937.

We are enclosing herewith a copy of the lease of the government made to Mr. Beaman for your information."

From your letter and a copy of the lease from the government to Mr. Beaman accompanying the letter, it appears that the state auditor is attempting to require Mr. Beaman, who operates a concession at Jefferson Barracks, Missouri, to collect the sales tax on sales of tangible personal property as provided by the two per cent Sales Tax Act of Missouri.

Your request involves the question of the authority of the State of Missouri to impose the provisions of the two per cent sales tax on sales of tangible personal property made on the premises owned by the United States which have been ceded by the State of Missouri to the federal government, and

especially as the act applies to sales made at Jefferson Barracks, Missouri. By an act of the Missouri Legislature in 1892 (Laws of Missouri, 1892, Extra Session, page 16) the State of Missouri ceded to the United States the properties now known as Jefferson Barracks, which act is as follows:

"Section 1. That exclusive jurisdiction be, and the same is hereby, ceded to the United States over and within all the territory owned by the United States and included within the limits of the military post and reservation of Jefferson Barracks, in St. Louis county, this state; saving, however, to the said state the right to serve civil or criminal process within said reservation in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state outside of said cession and reservation; and saving further to said state the right to tax and regulate railroad, bridge, and other corporations, their franchises and property on said reservation. In the event, or whenever Jefferson Barracks shall cease to be used by the federal government as a military post, the jurisdiction ceded herein shall revert to the state of Missouri."

By virtue of the provisions of the 17th clause of Section 8, Article I of the Constitution of the United States, congress is given exclusive jurisdiction over Jefferson Barracks, which clause is as follows:

"The Congress shall have power * * * To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to execute like authority over all places

purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings * *."

Section 11072, at page 291, Laws of Missouri, 1935 provides as follows:

"The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses."

Section 11073, R.S. Mo. 1929, provides as follows:

"The jurisdiction of the state of Missouri in and over all such land purchased or acquired as provided in section 11072 is hereby granted and ceded to the United States so long as the United States shall own said land: Provided, that there is hereby reserved to the state of Missouri, unimpaired, full authority to serve and execute all process, civil and criminal, issued under the authority of the state within such lands or the buildings thereon."

By said Sections 11072 and 11073, supra, and the act of the legislature of 1892, the State of Missouri has consented to the United States acquiring Jefferson Barracks and has granted and ceded to the United States jurisdiction over said

lands saving, however, to the said state the right to serve, civil or criminal, process within said reservation in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state outside of said session and reservation.

In the case of United States v. Unzeuta, 74 Law. Ed., 761, the Court said:

"When the United States acquires title to lands which are purchased by the consent of the legislature of the state within which they are situated, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, the Federal jurisdiction is exclusive of all state authority."

And at page 765 of the same case, the Court further said:

"If the consent of the state, in pursuance of the constitutional provision in question, be actually given, it is apparent from the terms of the Constitution that the state may not impose conditions inconsistent with exclusive jurisdiction in the national government."* *

The imposition by the State of Missouri of the provisions of the Sales Tax Act on transactions within Jefferson Barracks would be inconsistent with the exclusive jurisdiction ceded by the State of Missouri and acquired by the national government.

From an examination of the lease which accompanied your request made by the government to the operator of the concession at Jefferson Barracks, it is quite evident that the government has intended to retain all jurisdiction over its properties at said reservation which was ceded

Hon. Ray J. Cunningham

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April 26, 1938

to it by the State of Missouri in 1892.

CONCLUSION

In view of the foregoing, this office is of the opinion that the State of Missouri does not have such jurisdiction over the United States properties designated as Jefferson Barracks, Missouri, as will authorize it to impose the provisions of the Missouri Sales Tax Act on any sale of tangible personal property made at or on said premises.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWE:DA

COUNTY CLERKS) Clerk not entitled to charge fee for certifying
FEES) under seal document not required by statute to be cer-
tified. Clerk receives no compensation for making
"personal delinquent list" into "back tax book".

May 6, 1938



Mr. Joseph C. Crain
Attorney at Law
Ozark, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 18, 1938, in which you request an opinion on the legality and correctness of certain fees, charged as fees earned by the county clerk of Christian County in 1935 and 1936. The fees in question are set out in your letter as follows:

"1. To certifying under seal Apportionment of State aid to Clerks of the various school districts, as authorized by Secs. 9257 and 11781, R.S. 1929, and charged to the County as fees earned, for each Certificate and Seal .50¢

"2. To certifying under seal Apportionment of County and Twp. interest to Clerks of the various school districts, as authorized by Secs. 9257 and 11781, R.S. 1929, and charged to the County as fees earned, for each Certificate and Seal .50¢

"3. To certifying under seal Apportionment of Private car tax, to Clerks of the various school districts, as authorized by Secs. 9257 and 11781, R.S. 1929, and charged to the County as fees earned, for each Certificate and Seal .50¢

"4. To certifying under seal Apportionment of Foreign Insurance money and Railroad Tax money, to Clerks of the various school districts, as authorized by

May 6, 1938

Secs. 9257 and 11781, R.S. 1929, and charged to the County as fees earned, for each Certificate and Seal .50¢

"5. To certifying under seal Valuations of the various school districts, to the Clerks of school districts, as authorized by Secs. 10150 and 11781, R.S. 1929, and charged to the County as fees earned, for each Certificate and Seal .50¢

"6. Authenticating under seal, Treasurer's report to Clerks of the various school districts, as authorized by Secs. 9267 and 11781, R.S. 1929, and charged to the County as fees earned, for each Certificate and Seal .50¢

"7. Making the 'Personal Back Tax Book' as required by Sec. 9945, 1933 Session Acts, page 426, and Secs. 9943 and 9948, R.S. 1929, and charged to the County, as fees earned @ .10¢ per name or list."

The statutes under which the clerk claims his fees in the first six of the above items is Section 11781, R.S. Missouri, 1929, which is in part as follows:

"The clerks of the county courts, respectively, shall be allowed fees for their services as follows: * * *

* * * * *

For every certificate and seal not hereinbefore provided for .50¢."

In State ex rel. v. Brown, 146 Mo. 401, 406, a leading case on the right of officers to claim fees, it is said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v.

Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

Another case which we think bears on this question is Ford v. Kansas City, St. Joseph and Council Bluffs Ry. Co., 29 Mo. App. 616. In this case, the clerk of a circuit court in this state had charged a fee for preserving the oath, in the form of an affidavit, of witnesses before a grand jury when the witnesses claimed their fees and mileage. The clerk was required to swear the witness to the truth of the facts contained in the entry made by the clerk of these fees and the mileage claimed by the witness. The statute under which the clerk claimed his fee was one which provided a fee of fifteen cents "for certificate to affidavit".

The court points out in this case that the clerk was only required to swear the witness to the truth of his statement and was not required to preserve the oath in the form of an affidavit and for this reason was not entitled to this fee.

With the principles of the above cases in mind, let us see if the county clerk is required by statute to certify under his seal the papers prepared, as mentioned in the first six of the above charges.

The first four of said charges deals with the apportionment of state aid, county and township interest, private car tax, foreign insurance and railroad tax money to the clerks of the various school districts of the county as authorized by Section 9257, R.S. Missouri, 1929. This section provides that the county clerk "shall immediately after making such apportionment enter the same in a book to be kept for that purpose, and shall furnish the district clerks, and those of cities and villages, as the case may be, each a copy of said apportionment". Nothing is said requiring this copy to be certified under seal by the county clerk.

The fifth charge deals with the valuations of the various school districts and the county clerks' duties in respect thereto under Section 10150, R.S. Missouri, 1929. This section provides that the county clerk "shall on or before the third Monday in April each year certify to the county court, the city council, school boards and all other bodies * * * * the aggregate amounts of the real and personal property and the valuations thereof in the respective subdivision". Further, this section, in speaking of this valuation, calls it a "certificate".

The sixth charge deals with the report made by the county or township treasurer to the clerk of each school district in the county or township. This report is to show the actual cash on hand to the credit of each district's funds. The report must be jointly signed by the treasurer and county clerk. The authority for this is found in Section 9267, R.S. Missouri, 1929, which is in part as follows:

"The said county or township treasurer shall, on the 25th day of March and the first Monday in October of each year, deliver or mail to the clerk of each school district in the county or township an accurate and detailed statement, showing the actual amount of cash on hand to the credit of each of the district funds; and the statement made in October, as herein provided, shall show the amount of cash on hand on the day of the approval of the last settlement made by the said treasurer with the county court, and shall be jointly made and signed by the said county treasurer and clerk of the county court, and shall be a full exhibit, showing the amount of public money, railroad taxes, and all other moneys on hand or due the district by taxation, the levies made, the assessed valuation of each of said districts for the year, and the balance on hand to the credit of each district fund."

Nothing is said in this section requiring said report to be authenticated and certified under seal by the county clerk.

With reference to the fifth charge, we find that Funk and Wagnalls New Standard Dictionary defines "certify" as meaning: "to give certain knowledge or information; make

evident; vouch for the truth of; attest; make a declaration in writing, under hand, or hand and seal".

The term "certificate" is defined there as meaning: "a writing so signed and authenticated as to be legal evicence".

It seems reasonable that when the legislature used the terms "certify" and "certificate" in describing the thing to be done by the county clerk, and the valuation that the clerk prepares, they meant that said valuation was to be authenticated under the seal of the county clerk.

Only the fifth of the first six charges above is worded in this manner and under the authority of State ex rel. v. Brown and the Ford case, supra, the clerk, not being required to certify under his seal the items in the first, second, third, fourth and sixth charges above, is not entitled to charge and collect a fee if he does so certify and authenticate with his seal.

The seventh charge deals with the making of the "Personal Back Tax Books" by the county clerk, and his compensation therefor. We do not find where the statute you mention provides for a "personal back tax book", but rather, Section 9943, R.S. Missouri, 1929, speaks of this as the "back tax book". This section provides that "The clerk of the county court shall file the said list in his office, (the list is the one mentioned in Section 9942, R.S. Missouri, 1929) and within ten days thereafter make the same into a 'back tax book', as contemplated by Section 9948, under the seal of the court". Section 9942, R.S. Missouri, 1929, refers to these lists as follows: "at the term of the county court at which the several delinquent lists are required by law to be returned and certified."

The "several delinquent lists" mentioned are those under Section 9938, R.S. Missouri, 1929, described as the "personal delinquent list", the "land delinquent list" and the "delinquent list of officers". We are only concerned with the first two here. These are the lists filed in the office of the county clerk as provided in Section 9943, supra. However, it is only the "personal delinquent list" which the county clerk makes into the "back tax book". We say this because Section 9945, Laws of 1933, page 426, provides: "Hereafter as often as any delinquent tax list or tax bill shall be received by the county court * * * from collectors at their annual settlements, the same, except as to the delinquent lands, shall be made by the county clerk * * * into a 'back tax book' containing the same facts and in the same form as provided in

Section 9948 and 9952". The "delinquent land list" is to "be entered of record in the county collector's office by the collector * * in counties".

The compensation of the county clerk for making the "back tax book" is based on the tracts of land, city or town lots entered in his book and the book prepared by the county clerk only contains the personal delinquent list. Thus, there is no compensation provided for the county clerk for making the personal delinquent list into a back tax book. The fee to which the county clerk is entitled for his services in connection with the delinquent land list is found in Section 9945, Laws of 1933, page 426, which provides that, "the clerk for comparing and authenticating such record of the delinquent list of land and lots as made by the collector shall receive five cents per tract, city or town lot". The record here mentioned is the delinquent land list "entered of record in the county collector's office by the collector * * in counties".

CONCLUSION

Therefore, it is our opinion that the county clerk is not entitled to charge a fee of fifty cents for affixing his certificate and seal to the apportionment made by him, of state aid, county and township interest, private car tax, foreign insurance and railroad tax money to the clerks of the various school districts; that the county clerk is not entitled to a fee of fifty cents for affixing his certificate and seal to the report made jointly by him and the treasurer of the cash on hand to the credit of each district's funds; that the county clerk is entitled to charge and collect a fee of fifty cents for certifying under his seal the valuation of the various school districts to the clerks thereof; that the county clerk is not entitled to charge and collect a fee for making the "personal delinquent list" into a "back tax book", but is entitled to a fee of five cents per tract, city or town lot for authenticating the record of the "delinquent land list" entered of record in the collector's office by the collector.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

CORONER'S INQUEST: Jury must be summoned by constable in the township where the body is found, unless constable is unable to perform the duty.

August 13, 1938

Honorable Brevator R. Creech
Prosecuting Attorney
Troy, Missouri



Dear Sir:

This is to acknowledge receipt of your request for an opinion under date of July 9, 1938, which is as follows:

"I wish that your office would give me an opinion on Section 11612, R. S. Missouri on this situation:

"On several instances in this county the coroner has, under Section 11612, made out his warrant directed to the sheriff of Lincoln County, Mo., to summons a jury of six good and lawful men to appear before the coroner and hear the evidence and view the body; and it is contended by the constable that it is mandatory that the coroner direct the warrant, in each instance, to him when he is present in the township. (2) There have been instances when the bodies have been removed from the scene and taken to an undertakers establishment in a distant township, and the inquest held where the body lay at the undertaker's office. Is this permissible under the statutes?

"(3) Is it mandatory that the coroner must seek out and get the constable even though he lives quite a distance from where the body was, when the sheriff and other householders are present whom

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he could immediately call upon and deliver the summons as is provided under Sec. 11625? In other words, are these sections mandatory on the coroner?

"(4) If it is ruled by your department that Section 11612 is a mandatory section, then should the constable and sheriff who have collected fees from summoning juries out of their township be required to turn said fees so collected over to the constable of the township where the body was found?"

Under the general law, the sheriff of the county has statewide jurisdiction on the service of certain processes, and the constable has general jurisdiction throughout the county which contains the township in which he is elected. Section 11756, R. S. Mo. 1929, reads as follows:

"Constables may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law through their respective counties."

The above section is the general jurisdiction of the constable for the service of all writs and processes. Under this section the constable is limited to the summoning of coroner's juries in the township in which he is elected and the body involved in the inquest has been found.

Section 11612, R. S. Mo. 1929, in regard to the summoning of a coroner's jury, reads as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders

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of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

It has always been the rule that where a general jurisdiction is conferred upon a certain officer and also a special jurisdiction has been conferred upon a certain officer, the special law applies in preference to the general law. In the case of State v. Brown, 68 S. W. (2d) 55, 1. c. 59, the court held as follows:

"It will be observed that section 4556, except the last proviso which is not pertinent to the matter here in controversy, relates to corporations in general, while section 5613 relates only to a particular class of corporations, to wit, building and loan associations. In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute.'"

In construing the intention of the Legislature, one must read sections covering the same or similar matter in order to determine the intention of the passage of any section of the statute. Section 11756, supra, is the general law and Section 11612 is the special law in reference to the summoning of a coroner's jury. It will be noticed that in Section 11612 it provides that the coroner shall make out his warrant, directed to the constable of the township where the dead body is found. It also requires that he summon a jury of six men from the same township. This section, being a special section limiting the general section as to the summoning of a coroner's jury by the constable,

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must be construed to mean that only the constable shall summon the coroner's jury.

59 C. J., page 961, in reference to the construction of a statute, states as follows:

"In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used." (Citing Betz v. Columbia Telephone Co., (App.) 24 S. W. (2d) 224.

Section 11612, supra, does not mention the sheriff, but only the constable. This section is also limited further by Section 11625, R. S. Mo. 1929, which reads as follows:

"If the constable of the proper township is unable to execute the duties required by this chapter, the officer taking the inquest may direct his warrant to any householder of the county, who shall perform the duties of constable, be subject to the same penalties, and entitled to the same fees."

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It will be noticed that this section does not set out that the sheriff shall summon the jury where the constable is unable to execute his duties. Under both Sections 11612 and 11625 it is mandatory that either the constable of the township where the body is found shall summon a jury from the township, or else the duties shall be performed by any householder of the county. Section 11625 does not limit the appointment of the householder to any particular township, but only prescribes that the householder be a resident of the county and not of the township where the body was found.

In your request you inquire whether or not the constable and sheriff who have collected fees from summoning juries out of their township are required to turn these fees so collected over to the constable of the township where the body was found. In answering this inquiry, as set out under the above authorities, one must take into consideration the fact that in order that an officer should collect fees for the performance of his duties, it would be necessary that he put his finger on the statute authorizing their taxation. In the case of Ring v. Paint & Glass Co., 46 Mo. App. 1. c. 377, the court said:

"It may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other person claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation."

In other words, such statutes are strictly construed in reference to the payment of fees and costs.

Under Section 11612, supra, the only one entitled to payment of fees for the summoning of a coroner's jury is the constable in the township where the body involved in the inquest was found. It would be unlawful, under the above authorities, to remove the body to a different township and hold an inquest before a jury summoned by the constable of another township.

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As to the summoning of a coroner's jury by the sheriff, it would be unlawful for his summoning the jury as an official, but in case the constable is not available the coroner may in his official capacity appoint the sheriff as a householder of the county.

Any fees obtained by the constable of another township or the sheriff of the county in the unlawful summoning of a coroner's jury would not be returnable to the constable in the township where the inquest should lawfully be held for the reason that the constable had not performed any duties in the summoning of the coroner's jury, but the constable or sheriff who unlawfully assumed the duties of the proper constable for the summoning of the coroner's jury would be subject to suit by the county court for the return of the fees to the county treasurer.

CONCLUSION

In view of the above authorities, it is the opinion of this department that Section 11612, R. S. Mo. 1929, should be construed as mandatory; that the coroner should direct his warrant for the summoning of a coroner's jury to the constable in the township where the body involved in the inquest is found. This section must be followed unless the constable is not available, in which case the coroner shall direct his warrant for the summoning of the coroner's jury to any householder of the county.

It is also the opinion of this department that under the above authorities, no body should be removed from the township where it is found for the purpose of a coroner's inquest. If the coroner is unable to find the constable, then he may appoint the sheriff or any other officer in the capacity of a householder for the summoning of a coroner's jury.

It is further the opinion of this department that any fees collected by constables or sheriffs who have unlawfully summoned a coroner's jury cannot be returned to

Honorable Brevator R. Creech -7-

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the constable of the township where the body was found and who should lawfully have summoned the coroner's jury, but that the county court, by proper proceeding, may collect the fees that the constable or sheriff obtained in an unlawful summoning of a jury for a coroner's inquest.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

BOARD OF AGRICULTURE: State Veterinarian may make rules and regulations for the prevention of spreading of contagious and infectious diseases among cattle, horses and hogs.

September 21, 1938

Dr. H. E. Curry
State Veterinarian
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion under date of September 17, 1938, which is as follows:

"I am taking the liberty of referring to you correspondence from Prosecuting Attorney Fred C. Bollow of Shelby, Missouri, concerning the practice of transporting dead animals over our highways to rendering plants, within and outside of the State of Missouri. We have also had a telephone conversation with Mr. George M. Davis, Prosecuting Attorney of Macon County, concerning this practice.

"Is there any authority in the law which gives the State Veterinarian power to interfere with or stop such movements or to prevent the movement of dead animals from farms to rendering plants? Does any other officer have such authority?

"Our attention has been directed to the following sections: Section 4339 of Article 8, Miscellaneous Offenses, and Section 4439 of the same article, Volume 1, Revised Statutes of Missouri, 1929, also

Sections 12,784, 12,786, and 12,787 of Article 4, and Section 12,819 of Article 8, Volume 2, Revised Statutes of Missouri, 1929.

"The farmers of this State have recently lost a good many horses and mules as a result of the recent widespread outbreak of Infectious Equine Encephalomyelitis, commonly known as Brain Fever or Sleeping Sickness, and, naturally, this has resulted in an increased number of dead animals being hauled over the public highways to rendering plants. Many citizens have complained to the Prosecuting Attorney of various Counties, demanding that something be done to stop this trafficking of dead animals.

"Most of our laws prescribe that the farmer shall dispose of dead animals by burning or burying them, which was quite generally practiced years ago; but, I am sorry to say that today very few of our farmers dispose of dead animals on their farm in this manner, since many send them to rendering plants.

"Section 12,526, Article 10, referring to horses quarantined on account of glanders or dourine states that 'the carcass or carcasses may be delivered to a dessicating or rendering plant for final disposition without exposing other horses or mules to the disease.' In your opinion, have I, as Live Stock Sanitary Official of the State of Missouri, authority under Section 12,526 to control the hauling and transporting over the public highways of carcasses or animals that have died of other infectious or contagious diseases?"

Section 9021, R. S. Mo. 1929, reads as follows:

"The said board of health shall take cognizance of any fatal diseases which may be prevalent amongst the domestic animals of this state, and ascertain the nature and causes of such disease, and shall, from time to time, publish the result of their investigations, with suggestions for the proper treatment of such animals as may be affected, and the remedy or remedies therefor."

Under Section 1, Session Laws of 1933, page 166, the old State Board of Agriculture was abolished in the newly created Section 12348, wherein "the Governor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Agriculture, who shall hold his office for a term of four years, and who shall be in charge of the State Department of Agriculture, which is hereby created."

In Section 12353 of the same Session Laws, page 168, the Legislature said:

" * * * The Commissioner is hereby clothed with the power of reasonable quarantine in relation to the regulatory laws of the State Department of Agriculture, and it is further provided that the power of quarantine in relation to livestock diseases shall include poultry. * * *"

Section 12519, R. S. Mo. 1929, states:

"The state board of agriculture of the state of Missouri shall appoint a veterinary surgeon, to aid and assist in developing and protecting the livestock interests of the state of Missouri. * * *"

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The State Board of Health and the State Veterinarian are empowered by statute to work in unison as to the safeguard of the health of the people of the State of Missouri. Section 12522, R. S. Mo. 1929, reads in part as follows:

"The state board of health may demand of the secretary of the state board of agriculture, through their president and secretary, the services of the state veterinary surgeon to aid them in the inspection of such infectious or contagious diseases as are transmissible to the human family, and in examination of meats, milk and foods, when, in the judgment of said state board of health, the assistance of this officer is necessary."

In regard to the situation set out in the letter addressed to you by Mr. Paul H. Bebermeyer, County Extension Agent, Edina, Missouri, in which he refers to a depot established for the deposit of dead animals, the prosecuting attorney could bring an injunction suit in the name of the State asking for the abatement of the nuisance.

In the case of State ex rel. Lamm, Pros. Atty. v. City of Sedalia, 241 S. W. 656, an injunction suit was brought by the prosecuting attorney in the name of the State asking for the abatement of a nuisance which is very similar to the nuisance described in the letter by Mr. Paul H. Bebermeyer. The court held that the nuisance could be abated, and on the complaints set out in your request, in which the truckers are hauling dead animals over the highway, an injunction could be brought at the relation of the State asking for the abatement of such nuisance, which would be sufficient to stop the practice described in your request. In the above case, State v. City of Sedalia, the City of Sedalia had entered into a contract with a private individual for the hauling of dead animals to the outskirts of the city where they were allowed to remain before burial. In the petition for injunction filed in said suit, among other things, the following was set out:

"But the plaintiff alleges that the defendants in and about the matters afore-

said have been guilty of such gross negligence and want of care as that said animals when hauled to the place of deposit as aforesaid have been permitted to lie on the ground some times two or three days at a time. That many of the animals would be skinned, and after the skins were removed from the bodies they would be allowed to remain on the ground unburied for long periods of time."

Also the court said in its opinion, l. c. 657:

"We are unable to agree with the learned trial court in the disposition made of the demurrer. The petition manifestly states facts which show that both the manner and place in and at which the dead animals are disposed of create a public nuisance. *Whitfield v. Town of Carrollton*, 50 Mo. App. 98, 103-104.

"The prosecuting attorney can properly represent the public in the bringing of a suit to restrain a public nuisance within his jurisdiction, for he has powers analogous to those exercised by the Attorney General of England. *State ex rel. v. Lamb*, 237 Mo. 437, 451, 141 S. W. 665. A private person cannot maintain injunction to restrain a public nuisance unless he shows a special injury to himself, differing in kind and not merely in degree from the general injury to the public. *I High on Injunctions* (4th Ed.) sec. 762; *Bothe v. Chicago, etc., R. Co.*, 181 Mo. App. 720, 723, 164 S. W. 709; *Coombs v. Fuller* (Mo. App.) 228 S. W. 870. From the allegations of the petition there is no damage suffered by an individual aside from and independent of the injury to the public. Hence it could not be maintained by a private individual. *Cummings Realty, etc., Co. v. Deere*, 208 Mo. 66, 106 S. W. 496. And a court of equity has jurisdiction to restrain

a public nuisance by injunction at the suit of the state or some proper officer representing the state. State ex rel. v. Lamb, supra; State ex rel. v. Springfield Gas, etc. Co. (Mo. App.) 204 S. W. 942."

The court in holding that the prosecuting attorney may bring such a proceeding, said:

"The state can maintain an action against a municipal corporation and the creators of a public nuisance through the prosecuting attorney, its public law officer. State ex rel. v. Vandalia, 119 Mo. App. 406, 418, 94 S. W. 1009. Under the circumstances of this case there is no more reason why a city cannot be enjoined for creating a public nuisance than any other corporation or person. Swanson v. Bradshaw (Mo. App.) 187 S. W. 268. And when under the circumstances herein set out it creates a public nuisance it can be dealt with the same as any individual, for 'there is no law declaring municipal corporations infallible or that their demands are incontestable.' City of Hannibal v. Richards, 82 Mo. 330, 337. See, also, High on Injunctions (4th Ed.) sec. 810, and Attorney General ex rel. v. City of Grand Rapids, 175 Mich. 503, 534, 543, 141 N. W. 890, 50 L. R. A. (N.S.) 473, Ann. Cas. 1915A, 968."

In the case of State v. Percy, 41 S. W. (2d) 403, 1. c. 409, the court even allowed the proceedings to be brought by a private individual on a nuisance that was in the nature of a public nuisance, and in so holding said:

"Counsel for relators also insist that the disposal of garbage by the city is a governmental function, which may not be enjoined by the courts at the suit of private persons, citing 43 C. J. 958, 959; Behrmann v. St. Louis, 273 Mo. 578, 201 S. W. 547; State ex rel. v. Sedalia (Mo. App.) 241 S.W. 656, 657; and Gibson v. Baton Rouge, 161

La. 637, 109 So. 339, 47 A.L.R. 1151, 1152. With the exception of the Louisiana case, which apparently departs from the general rule, these authorities do not support the proposition here advanced. In 43 C. J., sec. 1735, pp. 958 and 959, the prevailing doctrine is thus stated: 'A municipality which, in the performance of the work of collecting and removing garbage and other refuse, creates a nuisance is liable to persons suffering special injury therefrom, regardless of any act of negligence on its part; and in a proper case an injunction will issue.'

"To the same effect is the Sedalia Case, supra; also Edmondson v. City of Moberly, 98 Mo. 523, 11 S.W. 990; and Smith v. Sedalia, 152 Mo. 283, 302, 53 S. W. 907, 48 L.R.A. 711. In defining 'special injuries,' it is said in Wood on Nuisances (3d Ed.) sec. 605: 'A person residing, or having a place of business, within the immediate sphere of such a nuisance sustains injuries, which the rest of the public, who merely suffer an annoyance when casually coming in contact with it, do not sustain. Persons owning property within the sphere of the nuisance sustain that damage which is incident to the deterioration of property in such localities and from such causes, and those residing or doing business there are subjected to a degree of annoyance and personal discomfort which is far in excess of that sustained by other members of the public. To them, and each of them, no matter how numerous, the nuisance is private as well as public. It inflicts upon them, in all respects, all the injury requisite to enable them to maintain an action; and the fact that more persons are similarly situated in reference to the same nuisance in no measure operates to deprive them of their remedy.' Also, same authority, secs. 16 and 608; Joyce on Nuisances, sec. 13a; Edmondson v. Moberly, supra; Givens v. Van Studdiford, 86 Mo. 149, 158, 56 Am. Rep. 421; and Newman v. Marceline, 222 Mo. App. 980, 6 S.W. (2d) 659, 660."

The fifth paragraph in your request reads as follows:

"Most of our laws prescribe that the farmer shall dispose of dead animals by burning or burying them, which was quite generally practiced years ago; but, I am sorry to say that today very few of our farmers dispose of dead animals on their farm in this manner, since many send them to rendering plants.

After considerable research, we find no section where a farmer can dispose of the carcasses of swine or cattle that have died of infectious, spreading or dangerous disease by delivering them or allowing them to be delivered to a rendering plant. The only section by which the carcasses of diseased horses or mules can be delivered to or moved by a rendering plant is Section 12526, R.S. Mo. 1929, but that section only applies in cases where the horses or mules have been quarantined by the state veterinarian or his deputy, and an appraisement has been made, and the sheriff has slaughtered the horse or mule under the provisions of said section, and in that case the sheriff may deliver the carcass of the horse or mule which has been condemned to a desiccating or rendering plant for final disposition without exposing other horses or mules to the disease.

Section 12526, R. S. Mo. 1929, under which the above procedure is carried out, reads as follows:

"It shall be lawful for the owner of any horses or mules, in quarantine by the state veterinarian or his deputy on account of being affected with glanders or dourine, to apply to the county court of the county in which such horses or mules are quarantined for the appraisement and slaughter of said diseased horses or mules. A county judge, or duly appointed representative of the county court, with the owner, shall, as an appraising committee of two, appraise each affected horse or mule. If a county judge or the representative of the county court and the owner cannot agree upon the value, a disinterested third party shall be called in, and a majority decision shall be final as to appraisement. This appraisement shall be signed and certified by said appraisers to the county court of the county

in which said horses or mules are located, and said court shall draw a warrant payable to the owner of such condemned horses or mules for one-half of the appraised value: Provided, that in no case shall more than \$25.00 be paid by any county court as indemnity on any one horse or mule; and provided further, that no indemnity shall be paid by any county court for any horses or mules on account of glanders or dourine unless such horses or mules are appraised and killed within 30 days after being placed in quarantine by authority of the state veterinarian or his deputy. As soon as such horses or mules have been appraised, the sheriff of such county shall forthwith kill such condemned horses or mules and the owner shall burn or bury the carcass or carcasses thereof, where quarantined, except that such carcass or carcasses may be delivered to a desiccating or rendering plant for final disposition without exposing other horses or mules to the disease."

The State Veterinarian, who has charge of the quarantine and provision for the health of the public, together with the State Department of Health, may make such reasonable rules and regulations as to the disposal of diseased horses and mules as set out under Section 12526, supra, and especially so concerning the exposing of other horses or mules to the disease while being delivered to a desiccating or rendering plant. This was so held in the case of State ex rel. v. Goodier, 195 Mo. 551, 1. c. 560, where the court in referring to the authority of the State Board of Health, said:

"The duties of the board are of an administrative or ministerial character, and therefore as long as its acts are within the scope of the exercise of a reasonable discretion it is free to act. (State ex rel. v. Gregory, 83 Mo. 123.)"

Though Section 12526, supra, gives the sheriff the discretion as to the disposition of the horse or mule slaughtered, he may either burn or bury the carcass or may deliver it to a desiccating or rendering plant, and the state veterinarian may supervise the disposal of said dead animal by way of delivering to a desiccating or rendering plant, or the carcass must be buried or burned as provided in the following sections herein set out.

Section 12787, R. S. Mo. 1929, reads as follows:

"That it shall be the duty of the owner, or other person in charge of any swine which shall die of any disease, to burn the carcass or carcasses on the premises where death occurred within twenty-four hours after its death."

Section 12819, R. S. Mo. 1929, reads as follows :

"All dead carcasses of cattle dying of Texas or Spanish fever or any other contagious or infectious disease shall be burned within twenty-four hours after the death of such animal or animals by the owner thereof or other person or persons authorized to do so by such owner. Upon trial and conviction in any court of competent jurisdiction of such owner for knowingly violating the provisions of this section such owner shall be deemed guilty of a misdemeanor."

The following sections mentioned in your request are not applicable to the points involved upon which you ask an opinion:

Section 4339, R. S. Mo. 1929, refers to throwing dead animals in wells and springs and placing near public roads.

Sept. 21, 1938

Section 4439, R. S. Mo. 1929, refers to unloading cattle not under quarantine by an individual or corporation into a pen in which cattle are located, or have been, which were under quarantine.

Section 12784, R. S. Mo. 1929, refers to the removal of dead animals.

In reference to the letter attached to your request from Fred C. Bollow, Prosecuting Attorney of Shelby County, in which he complains of a trucker who has been coming in here from Iowa, picking up carcasses of animals and hauling them back into Iowa, will say that this matter has been passed on recently by an opinion from this office dated September 14, 1938, to Fred C. Bollow, Prosecuting Attorney, Shelbina, Missouri, a copy of which is attached to this opinion.

CONCLUSION

In view of the above authorities, it is the opinion of this department that under Section 12526, R. S. Mo. 1929, carcasses of horses or mules may be delivered to a desiccating or rendering plant for final disposition by the sheriff where the horses or mules at the time were under quarantine and were slaughtered according to the provisions of said section, but that carcasses of horses and mules which were not under quarantine and which died of spreading, infectious or contagious disease must be buried or burned in accordance with Sections 12787 and 12819, supra.

It is further the opinion of this department that the State Veterinarian, with the State Board of Health, has the authority to make rules and regulations controlling the hauling and transporting over the public highways of carcasses of animals that have been slaughtered in accordance with Section 12526, supra, and unless the animals have been slaughtered according to the provisions of Section 12526, such carcasses must be burned or buried.

It is further the opinion of this department that even though swine have died of cholera or any other infectious

and spreading disease, under no consideration can they be hauled over the public highways to a rendering plant, but must be burned or buried in accordance with Section 12787, supra.

It is further the opinion of this office that cattle dying of Texas or Spanish fever or any other contagious or infectious disease shall not be hauled over the public highways to any desiccating or rendering plant, but must be burned within twenty-four hours after the death of such animal by the owner thereof in accordance with Section 12819, supra.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

PROBATE CLERKS:

A probate clerk may not act as an attorney in fact for surety companies and sell bonds to representatives of persons and estates which are in his court.

December 15, 1938



Mr. Glen Croy
Deputy Clerk
Grundy County
Trenton, Missouri

Dear Sir:

This is reply to yours of recent date wherein you request an opinion from this department on the following letter:

"I desire an opinion as to whether an appointed Clerk of the Probate Court may act as Attorney in Fact for a Surety Company and may sell bonds to Administrators and Guardians appointed by the Judge of the Probate Court.

"I have conversed with the Probate Judge Elect of Grundy County and he has intimated that I would be appointed as Clerk of the Probate Court.

"It is not the intention to be persistent in the sale of bonds. Rather to be in a position to accommodate should inquiry be made as to bond."

A clerk of a probate court is a public officer within the meaning of the statute while an attorney in fact for a surety company is not a public officer, and the rule as to a person holding two offices, the duties

of which are incompatible would hardly apply in this case. Therefore, the reasons why you could or could not hold both of these positions would be on account of being against public policy or being against the general provisions of the statutes in such cases made and provided.

In Volume 46 Corpus Juris at pages 941 and 942, we find the reason for the rule as it applies to public officers to be as follows:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

The clerk of the probate court in this state is appointed by the virtue of the provisions of Section 2049, R. S. Missouri, 1929, which is in part as follows:

"The judge of probate is required to act ex officio as his own clerk, and give bond in like amount, with like amount, with like conditions and penalties, to be approved by the judges of the county court, filed and recorded,

the same as is required of clerks filling said office by appointment: Provided, that any judge of probate may, by an entry of record in said court, appoint a separate clerk, who shall be paid by said judge and shall hold his office at the pleasure of the judge.

Said clerk, when so appointed and qualified, may discharge all the duties of clerk, and shall have power and authority to do and perform all acts and duties in vacation which the judge of said court is or may be authorized to perform in vacation, subject to the confirmation or rejection of said court at the next regular term held thereafter. *****

By this section it will be noted that the probate judge may act as his own clerk or he may appoint some person as his clerk. It will also be noted by this section that the clerk discharges the same duties and has the same power and authority to do and perform all duties of the judge in vacation. Such acts are, of course, subject to the approval of the court when it convenes at the next term.

Section 2053, R. S. Missouri, 1929, provides in part as follows:

"The judge of probate, if otherwise qualified, may practice as an attorney and counselor at law in any of the courts of this state, except his own; but no judge of probate shall sit in a case in which he is interested, or in which he may have been counsel or a material witness, or related to either party, or in the determination of any cause or proceedings in the administration and settlement of any estate of which he is or has been executor, administrator, guardian or curator, when any party in interest shall object in writing, verified by affidavit;
*****" (emphasis ours)

By this section it will be seen that the judge of the probate court is prohibited from sitting in any matter in which he is interested. As the judge of the court may also be his clerk, we think the same rule would apply to the clerk that applies to the judge, therefore, the clerk of the court would not have any authority to sit in a matter in which he is interested. Then the question resolves itself into whether or not the clerk of the court, in matters pertaining to bonds filed in the probate court, would be sitting in matters in which he is interested.

You suggest in your letter that you are considering acting as attorney in fact for surety companies who expect to do business with guardians, curators and administrators who may have business in that court. The duties of the clerk of the probate court in relation to bonds filed in that court are found in Section 18, R. S. Missouri, 1929, which is as follows:

"The court, or judge or clerk in vacation, shall take a bond of the persons to whom letters of administration are granted, with two or more sufficient securities, resident in the county, to the state of Missouri, in such amount as the court or judge or clerk shall deem sufficient, not less than double the amount of the personal estate."

If the judge be the clerk or if he has appointed a clerk and if such clerk be an attorney in fact for a surety company which is offering a bond for the approval of the clerk or the court, then the judge or the clerk by performing his duties under Section 18, supra, would be sitting in a matter in which he was interested when he is passing upon the sufficiency of the bond and this would be in violation of the provisions of Section 2053, supra.

We are further fortified in our views on this matter by the provisions of Section 21, R. S. Missouri, 1929, which is as follows:

"No judge of probate, sheriff, marshal, clerk of a court, or deputy of either, and no attorney at law, shall be taken as security in any bond required to be taken by articles 1 to 13, inclusive, of this chapter."

We think this section is broad enough to include the clerk who may be acting as an attorney in fact for the bonding company and Section 22, R. S. Missouri, 1929, further evidenced the fact that the lawmakers did not intend to permit such acts by the clerk as you have suggested in your letter. Section 22, supra, provides in part as follows:

"The court, or judge or clerk in vacation, shall take special care to take as securities men who are solvent and sufficient, and who are not bound in too many other bonds; and to satisfy themselves, they may take testimony, or examine, on oath, the applicant or persons offered as his securities; and said bond shall be signed and executed in the presence of the court, judge or clerk, or acknowledged before some officer authorized to take the acknowledgments of deeds, who shall certify to the same, * * * * *

If the clerk were acting as attorney in fact for the bonding company and the bond is offered to him in vacation for approval, he would be passing upon the sufficiency of his own principal and that would be inconsistent with the duties of the court and clerk and in violation of Section 2053, supra.

It seems to us from these sections that if the judge happens to be acting as his own clerk and as an attorney in fact for a bonding company, he would be serving in a dual capacity to perform his official duty and to represent such bonding company and this would be against

Mr. Glen Croy

-6-

December 15, 1938

public policy and against the provisions of Section 2052, supra.

If the judge happens to appoint a clerk who is an attorney in fact for a bonding company whose bonds come before the court for approval, there is such a close relation between the judge and the clerk and their duties in relation to bonds filed in probate courts that we think the clerk would not be authorized to act in such capacity for it would be in violation of the foregoing statutes and against public policy for the clerk to represent a bonding company which is offering a bond for approval in the court in which such clerk is also appearing as attorney in fact for the bonding company.

CONCLUSION

We are, therefore, of the opinion that the clerk of the probate court may not act as attorney in fact for a surety company and sell bonds to administrators and guardians appointed by the judge of the probate court in which such person is acting as clerk of the probate court.

Respectfully submitted

TWB:DA

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

ATHLETIC COMMISSION - Shall collect 5% of all the gross receipts of every boxing, sparring or wrestling exhibition held.

February 1, 1938

Athletic Commission
State of Missouri
Jefferson City, Missouri



Attention: Mr. Horace T. Dawson, Sec.

Gentlemen:

This is to acknowledge your request of January 24, 1938 for an opinion, which reads as follows:

"This letter is to request an opinion from your office concerning the priority of taxes.

"This question was called to my attention a few days ago by one of our inspectors in his report and remittance to this office. According to the statutes, our inspectors collect a 5% State tax of the gross gate receipts of all boxing and wrestling matches in the State. This deduction is made after the Federal tax has been deducted.

"The question now arising is whether or not the sales tax should be deducted from the gross gate receipts before the 5% State tax, or whether the State tax should be taken before the sales tax."

The question of priority of state taxes is not discussed in the course of this opinion, in view of the obvious requirements of Section 12999 of R. S. Mo. 1929, which reads in part as follows:

" * the athletic commission of the state of Missouri shall have general charge and supervision of all boxing, sparring and wrestling exhibitions held in the state of Missouri, and it shall have the power, and it shall be its duty; *** to collect five per cent. of the gross receipts of every boxing, sparring or wrestling exhibition held, *** "

The only question for determination in view of the above section is: what did the Legislature mean by the use of the words "gross receipts"? Ordinarily, in the construction of statutes, words should be construed in their ordinary and usual sense. *Cummings vs. Kansas City Public Service Company*, 66 S. W. (2d) 920; *O'Malley vs. Continental Life Insurance Company*, 75 S. W. (2d) 837.

In applying the above principle of law to the words above used, we find that Webster's Dictionary defines the word "gross" as meaning,

"whole; entire; total; -- opposed to net.
The undivided whole."

The word "receipts", when used with the word "gross", and when interpreted in its common acceptation, leaves nothing to construe as to what the Legislature meant when those words were used in the above statute.

Our Supreme Court has never passed on the words "gross receipts" as have been used in a statute. In the case of *Pacific Gas and Electric Company vs. Roberts*, 167 Pac. 845, 848, the Supreme Court of California had before it for consideration the term "gross receipts from operation", and held that those words meant the total, entire income, without any deductions of any kind. In reaching its conclusion, the court quoted with approval the Supreme Court of Illinois and said:

"In *State v. Illinois Central Railroad Co.*, 246 Ill. 188, 92 N. E. 814, the

court was considering a provision in a charter of a railroad company requiring it to pay a percentage of 'the gross receipts,' and it was held that the quoted expression meant the entire income without deduction. In the illuminating discussion of this subject the court cited German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94, wherein 'gross income' was held to be the gross receipts of the business, the court saying that the word 'gross', as used in the statute, is opposed to 'net', and in its ordinary significance is applied to all of the receipts of the business, while net receipts are those remaining after deductions for the expenses of conducting the business. *** "

In support of our conclusion, we have examined the Federal Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, (26 U. S. Code Annotated, Section 940) and the Sales Tax Act (Laws of Mo. 1937, page 552, Section 2, Subdivision b and Section 5) and do find from such examination that the tax is in addition to the price paid for an admission to any place of amusement.

Sub-section a of Section 940, supra, and Sub-division 2 of Sub-section a of the Federal Revenue Act, provides a specified rate of tax to be levied, assessed, collected and paid by the person paying for such admission. A similar provision is provided under the Sales Tax Act. This provision requires that it is the duty of every person making a purchase to pay the amount of the tax imposed to the person making the sale.

From these observations, it will be noted that the amount of tax to be collected is in addition to the actual price paid for such admission, and is based upon the price paid. For example, if a ticket of admission to a boxing exhibition costs \$1.00, the Federal tax is

February 1, 1938

to be computed on the \$1.00. Likewise, as to the sales tax and should be collected by the person making such sale.

To further illustrate, if a boxing exhibition is held before an attendance of 100 persons, and the price of admission for each person is \$1.00, the total amount of gross receipts would be \$100.00, and the tax computed on such single admissions would be in addition, and the 5% tax should not be computed on the additional taxes imposed by the State and Federal government, because such taxes in nowise constitute a part of the gross receipts, since such taxes are to be collected on the single admission.

CONCLUSION

In view of the above, it is our opinion that the Athletic Commission is required to collect 5% of the gross receipts derived from every boxing, sparring or wrestling exhibition held in this state after excluding taxes collected on behalf of the Federal government and the State.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:FE

ESCHEAT when proceedings may be instituted to escheat property to the State of Missouri.

February 12, 1938

Mr. Donald B. Dawson,
Attorney at Law,
Noe Building,
Butler, Missouri



Dear Sir:

This department is in receipt of your letter requesting an opinion as to the following:

"I have your letter of December 9th in answer to my letter to Forrest Smith requesting information in regard to the procedure to follow where real estate is escheated to the State.

You called my attention to Chapter three, and particularly Section 625 of the Revised Statutes of 1929.

I am, of course, very familiar with that Chapter and the Section you mentioned. However, the way I read Section 625 it would seem to infer that I would have no power to bring proceedings to have this land escheated until after five years after the death of the person last seized. Perhaps I am misreading the Section but since I am unable to find any cases under this Section I would not want to proceed until I knew just what the ruling would be on that matter. That part of the Chapter three dealing with depositions of unclaimed money is very clear, but as to the Section 625 I could not decide in my mind just when I would have the authority to file an information and claim the land as escheated to the State.

If you would be kind enough to set me straight on this matter I would be very glad to proceed at once to establish the right of the State of this land."

Section 131, R. S. Mo. 1929 provides:

"Sec. 131. Administrator or executor may take charge, when. Whenever letters of administration or testamentary shall have been granted on an estate, and it shall appear to the court or judge in vacation, that the decedent died

possessed of real estate in the state, and his heirs or legatees have failed to take charge of same, or the identity or whereabouts of such heirs or legatees are unknown, then the court or judge in vacation may on its or his own motion, or that of any party interested, direct the administrator or executor in charge of said estate, to take charge and manage the real estate, until such time as such heirs or legatees shall appear and petition the court to turn over to them, or until the same shall escheat to the state as is provided by the "escheat act". (R. S. 1919, Section 130.) "

Section 625 R. S. Mo. 1929 provides:

"Sec. 625. When lands escheat. When the prosecuting attorney shall be informed, or have reason to believe, that any real estate within his county has escheated to the state, and such estate shall not have been sold according to law, within five years after the death of the person last seized, for the payment of the debts of the deceased, he shall file an information in behalf of the state in the circuit court of the county in which such estate is situate, setting forth a description of the estate, the name of the person last lawfully seized, the names of the terre-tenants and persons claiming the same, if known, and the facts and circumstances in consequence of which such estate is claimed to have escheated and alleging that, by reason thereof, the state of Missouri hath right to such estate. (R. S. 1919, Section 5314)."

It is apparent that, under the facts as here submitted, until such time as the state shall act to escheat the property in question to the state, the Court should direct the administrator to take charge of and manage the property. However, we do not consider it necessary for the prosecuting attorney to remain quiescent for five years before instituting proceedings under Section 625 supra. The only possible reason for the five year period is to permit the property to be sold for the debts of the deceased. In the instant case, there are no debts unpaid. The reason for the rule having no application here, the rule itself has no application and is of no binding effect.

We are, therefore, of the opinion that, under the facts here submitted, you may proceed, after the final settlement of the estate, under Section 625 R. S. Mo. 1929 to escheat said property to the State of Missouri.

Respectfully submitted.

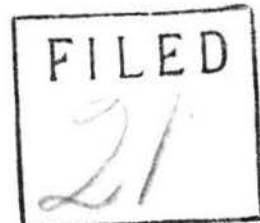
(Acting) Attorney General

JOHN W. HOFFMAN, Jr., Assistant
Attorney General.

TOWNSHIP ORGANIZATION: Annual statement required to be made by Section 8170 should cover preceding fiscal year.

February 25, 1938

Mr. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri



Dear Sir:

This department is in receipt of your letter of February 18, 1938, in which you request an opinion as follows:

"Section 8170 of Revised Statutes of Missouri, 1929, provides that the clerks of township boards in all counties under township organization shall, between March 1st and 10th of each year, publish a statement of financial condition of townships, showing receipts and disbursements for preceding year.

"Feeling many township clerks would not know of that provision in our statutes, I took the liberty of sending every township clerk in the county a copy of Section 8170. Now the question arises as to what is meant by the words 'preceding year' in the above section. I have taken the position, pending an opinion from you, that 'preceding year' means from January to January and not from March to March. In other words, the financial statements due this coming March, 1938, should cover the period from January 1, 1937, to January 1, 1938, and not from March 1, 1937, to March 1, 1938. I would sincerely appreciate knowing if mine is the correct construction of the section, and if not just how the section is to be construed."

Section 8170, R.S. Missouri, 1929, requires the township board of directors in counties under township organization to publish between March 1st and 10th of each year an itemized statement of certain receipts, disbursements, etc., of the township. This section is as follows:

"The township board of directors in all counties under township organization shall keep or cause to be kept a full, true and correct record of all moneys received and disbursed on account of roads and bridges and all other receipts and disbursements of every nature in such township, showing in detail from whom and on what account such money was received, and to whom and for what purpose disbursed, together with a complete inventory of all tools, road machinery and other property belonging to the township, together with such other information as to the condition of roads and bridges and the needs of same as may be deemed of value, and between the first and tenth day of March of each year shall cause to be published an itemized statement of such receipts and expenditures, inventory of tools, machinery and other property in some newspaper published in such township, and if there be no newspaper published in the township, then such publication may be made in any newspaper of general circulation within such township published in the county; such statement shall be made by the township clerk under the direction of the township board and shall be sworn to by such clerk, and it shall be the duty of the township clerk on or before the twentieth day of March of each year to file a copy of such detailed statement with the county clerk of such county, and the county clerk shall lay the same before the county court at its next regular meeting."

The forms for this publication are to be furnished by the county clerk and a certified copy of said statement published must be filed in the office of the county clerk on or before March 20, of each year. (Section 8171, R.S. Missouri, 1929.)

The question here is: What period of time is to be covered by said statement? As we read this section, we can find no reference by the term "preceding year" to the time to be covered as stated in your request. The statute is silent as to time. It merely provides when said statement is to be published and filed and what it shall contain.

While this section does not fix any definite period of time to be covered by said statement, it is evident it can be for no more than a period of one year. This is evident by reason of the fact that this statement must be published each year and there can be no valid reason for the statement including something which has been included in a former statement. The mere fact that the township directors are required to keep a record of certain things indicates that the things to be included in said statement are those which transpired in the past. This, of course, is so elemental it cannot be questioned.

The only ambiguity in this section is whether or not this statement which must be published between March 1st and 10th of each year is to cover the period from January 1, 1937, to December 31, 1937, or March 1, 1937, to February 28, 1938.

Section 11398, R.S. Missouri, 1929, is in part as follows:

"The fiscal year of the state shall commence on January first and terminate on the thirty-first day of December in each year, and the books, accounts and reports of the public officers shall be made to conform thereto."

This section has been construed to control the fiscal year of the counties of this state. *Wilson v. Knox County*, 132 Mo. 387; *State ex rel. v. Allison*, 155 Mo. 325. Also, to control the fiscal year of cities. *Union Trust and Savings Bank v. Sedalia*, 254 S.W. 28. We think, based upon the reason found in these cases, that it also will control the fiscal year of townships in counties under township organization. The reason for holding that this section includes counties and cities is stated in *State ex rel. v. Allison*, supra, 1.c. 331, as follows:

"The argument for the relator is that the term 'public officer' therein used to designate those required to conform their books, etc., to those dates are State officers alone. This argument, drawn as it is from the language and immediate context of the statute, it being a section in the chapter creating the State Treasury Department, is not without force, but taking the section in connection with the whole subject of revenue as treated in the chapter, we think the construction the relator put upon it is too restricted. The revenue for the State and that for the county is collected by the same officer and at the same time. While the legislature was dealing with the subject of the fiscal year, if it intended to give it one limit for the State and another for the county, it would very naturally have given expression to that intention at that time. The language is not that the fiscal year for the State revenue shall commence on the first day of January, etc., but is, 'the fiscal year of the State shall commence,' etc. The natural meaning of the words would include a county as a part of the State."

In counties under township organization, the revenue of the state, county and township is collected by the same officer (a public officer) at the same time.

Section 8170, supra, enumerates the items to be contained in the statement as follows: "An itemized statement of * * * receipts and expenditures, inventory of tools, machinery and other property" of the township. The wording of the statute and the items required to be contained in the statement indicates that this statement is, in fact, a financial statement showing the condition of the finances and property of the township. The fiscal year of the township ends on December 31 each year and it is the twelve calendar months preceding this date which the statement should cover.

Mr. Donald D. Dawson

- 5 -

February 25, 1938

CONCLUSION

Therefore, it is the opinion of this department that the statement required to be published by township boards of directors between March 1st and 10th should cover the preceding fiscal year of the township.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

LIQUOR CONTROL: City may not suppress or prohibit the sale of intoxicating liquor within its limits. Applicant otherwise qualified cannot be denied city permit merely because city does not desire liquor sold.

February 26, 1938



Mr. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

This department is in receipt of your letter of February 11, 1938, in which you request an opinion as follows:

"The town of Amoret has been asked to grant a liquor license to a man to operate a package liquor store. The citizens of Amoret are very strongly opposed to the granting of the license, and I am quite positive the license will be refused. As I read the Liquor Laws of Missouri, it would seem a license cannot be refused if the applicant (1) is of good moral character, (2) is a qualified legal voter and taxpaying citizen of the county, town, city or village, (3) has not had his license revoked for liquor violation or employs a violator in the business.

"Therefore, if the applicant fulfills all of the requirements of Section 27, Laws of Missouri, 1937, applies for and secures a license from Bates County Court, and tenders the amount of license charge to Amoret, can the Board of Aldermen of Amoret refuse him a right to operate a package liquor store in Amoret on the sole ground the citizens do not want that kind of a business in the town?"

For the purposes of this opinion, we are assuming that the applicant for the liquor permit here is able to qualify for said permit under the laws of this state and the ordinances of the town of Amoret. Further, that the only objection or obstacle is that the city does not desire to have a liquor store within its limits.

Section 25 of the Liquor Control Act (Laws of 1935, page 276) is in part as follows:

"The Board of Aldermen, City Council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

It will be noted that this section only gives a city the power to regulate and control the sale of intoxicating liquors within its limits. As a general proposition of law, it has long been recognized in this state that a city has only such power as is conferred on it by its charter and the laws of the state.

In State ex rel. v. McCammon, 111 Mo. App. 626, the court had under consideration the old dramshop laws. In this case a city had enacted an ordinance regulating the sale of liquor within its limits so unreasonably that its effect was to prohibit the sale of said liquor within the city. The court, in disposing of this matter, held the ordinance invalid and stated at l.c. 632:

February 26, 1938

"Under power conferred on cities of the fourth class 'to regulate and to license' dramshops, there is no authority to wholly prohibit or suppress. Where there is mere power in a municipality to regulate in a State with a general policy of conducting licensed saloons, authority to prohibit is excluded. 'The difference between regulation and prohibition is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity; the latter implies its entire destruction or cessation.' Black on Intox. Liq., section 227; 17 Amer. & Eng. Ency. Law (2 Ed.), pp. 285, 286; 1 Dillon on Munic. Corp. (3 Ed.), section 357, note 2, section 363 and notes; Berry v. Cramer, 58 N.J. Law 278; Steffy v. Monroe City, 135 Ind. 466; Champer v. Greencastle, 138 Ind. 339; Ex parte Hinkle, 104 Mo. App. 104."

CONCLUSION

Therefore, it is the opinion of this department that the Board of Aldermen, City Council or other proper authorities of incorporated cities have only the authority to regulate and control the sale of intoxicating liquors within the limits of said city in a manner not inconsistent with the laws of the state. That the power to regulate and control said business does not confer on the city the right to suppress or prohibit said business.

It is further our opinion that if the applicant for a city liquor license is qualified in all respects, that the city cannot refuse him a license solely because they do not desire intoxicating liquors sold within the limits of said city.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED BY

J. E. TAYLOR
(Acting) Attorney General

LLB:VAL

AGRICULTURE: Validity of Regulation "C", Missouri Insect Pest
and Plant Disease Law.

March 18, 1938

3-21



Hon. J. Carl Dawson
State Entomologist
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion which is as
follows:

"We will appreciate having your opinion
concerning the following two questions,
relating to Regulation C, appearing on
page eleven:

1--Is said Regulation C properly sus-
tained by the Act? (Sections 12368
to 12382 inclusive R. S. Mo. 1929).

2--If this Regulation C is sustained
by the Act is it in proper form?"

Regulation "C" is set out on page eleven of the bulletin
of the Missouri Insect Pest and Plant Disease Law as revised
1937.

We find that Section 12369 as amended by the 1937
Session Acts, Laws of Missouri 1937, page 178, authorizes the
State Entomologist to formulate and publish regulations, for
which fees not exceeding the actual cost of inspection may be
charged and collected. Section 12371, 1937 Laws of Missouri,
page 179

March 18, 1938

Section 12375 R. S. Missouri 1929, in part provides:

"It shall be unlawful for any person to bring* * *into this state any plant or plant products listed, as required by Section 12372, in the rules and regulations made pursuant to this article, unless there be plainly and legibly marked thereon or affixed thereto* * *a statement or a tag * * *showing the names and addresses of the * * * shippers and the* * * persons to whom shipped, the general nature and quantity of the contents, and the name of the locality where grown, together with a certificate of inspection of the proper official of the state* * * from which it was* * * shipped, showing that such plant or plant product was* * *free from insect pests and diseases, and any other information required by the State Entomologist."

It is therefore the opinion of this office that the above Regulation "C" is fully authorized by the above statutes.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

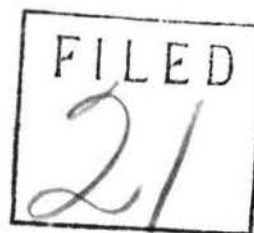
FER:MM

SCHOOL DISTRICTS: Has the Board of Directors of a Consolidated District the sole power to select school sites and can such power be exercised arbitrarily

April 12, 1938

4-13

Mr. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion which reads as follows:

"A controversy has arisen here in Bates County between the board of directors of the Consolidated School District and some of the residents of the district. The district voted bonds for a new building, and the question involved is: does the board of directors of a consolidated school district have the sole power to locate and select the site for a new school building? Section 9330 would seem to hold that the power is in the board of directors, but can that power be exercised arbitrarily and unreasonably? The school board in question is considering two sites for the new school building. A petition signed by 105 resident voters of the district opposes both of the sites selected by the board and gives pretty good reasons for objecting to the sites and proposes a third which meets with the approval of the 105 signers. Therefore, if the board is not allowed to exercise the power of selection arbitrarily and unreasonably, the signers of the petition feel that if the board continues

to ignore the 105 people who have objected to the board's selections, their action would be arbitrary and unreasonable. What is your opinion? "

It appears from your letter that there are two questions asked, to-wit:

First, Does the Board of Directors of a Consolidated School District have the sole power to locate and select the site for a new school building?

Second, If so, can that power be exercised arbitrarily and unreasonably?

I

Relative to your first question we cite you the case of Gladney et al. v. Gibson et al., 208 Missouri Appeal, l. c. 80, wherein the Court said:

"The language of this section (now 9330 and the kindred section 9327) clearly indicates that it was the intention of the Legislature that in a common school (three director school district) district the authority to select a schoolhouse site be vested in the resident taxpayers of the district assembled in annual meeting but that in a city, town or consolidated district such authority be vested in the board of education."

And, at l. c. 85 of the same decision the Court says:

"In conclusion we may say that in

view of the nature of city and town school districts, and the various statutes applicable thereto, it seems well nigh inconceivable that the Legislature intended that the question of selecting a high school site should be left to the qualified voters of such districts. As said above, elections held in such districts are required to be by ballot, and conducted as are elections for State and county officers; and the polls must be kept open from seven o'clock A. M. to six o'clock P. M. now Section 9341 (section 11251). No provision whatsoever is made by law for submitting at such an election the question of the selection of a schoolhouse site or the changing of such a site; nor does this appear practicable. To leave the matter entirely to the judgment of the qualified voters of the district, would mean that each voter would have the right to vote for any site that he might indicate. There is no provision in the law as to how a voter shall indicate on his ballot what site he is voting for. An effort to have each voter, of his own initiative, point out or describe the site of his choice, might well lead to utter confusion. And if the board of education should designate two or more sites, between which the voters are to choose, then the voters would be precluded from exercising their independent judgment in the matter, being confined to a choice between the sites submitted by the board. And for this there is no sanction in the law."

Again, in a later case decided by the Supreme Court in *State v. Wenom*, 32 S. W. (2d) 1. c. 62, the Court said:

"As to the location of the school site, there can be no question but that it is left to the discretion of the school board in consolidated districts."

Hence, it is conclusively established that the board of directors of a consolidated school district has the sole power to locate and select school sites.

II

Relative to your second question, it does not appear that our courts have passed directly on the precise question you ask, that is to say, we find no case where the power or discretion exercised by the board in selecting a particular site was attacked on the ground that the power or discretion as exercised was arbitrary or unreasonable. However, in this connection, the Kansas City Court of Appeals, in *Velton v. School District of Slater*, 6 S. W. (2d) 1. c. 654, in quoting with approval from a South Carolina case, said:

"When the exercise of judgment and discretion is vested, either by law or contract, in an individual or governing body, a reservation is implied that it must be exercised in good faith and reasonably. In determining whether it has been so exercised, the Court will not substitute its judgment for that

April 12, 1938

of the individual or body in whom the discretion has been vested. In such a case, the inquiry is: Does the action under consideration fail to measure up to any fair test of reason? If the facts and circumstances are such that reasonable men may differ as to the wisdom and expediency thereof, the judgment and discretion of those vested with authority to decide must be upheld. It follows that a very clear case of abuse of discretion must be made out to warrant judicial interference."

Your letter does not detail sufficient facts or circumstances surrounding the apparent controversy existing between the board and the voters of the school district for this Department to intelligently arrive at a conclusion whether or not a "very clear case of abuse of discretion" is made out by the action of the board. You being, no doubt, in possession of all the facts, and having in mind what is said in the afore-said last mentioned case, will be in a position, no doubt, to resolve the question one way or the other.

CONCLUSION

I

The Board of Directors of a consolidated school district has the sole power or discretion to locate and select a site for a new school building.

III

A very clear case of the abuse of discretion must be made out to warrant judicial interference with

Mr. Donald B. Dawson

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April 12, 1938

the action of the Board of Directors in the selection of a school site.

Respectfully submitted

J. W. BUFFINGTON
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

JWB LC

CORONERS,
JUSTICES OF THE PEACE:

In the absence of the coroner, any justice of the peace or judge or justice of some court of the proper county may perform all duties enjoined on coroner.

May 18, 1938.



Mr. Donald B. Dawson,
Prosecuting Attorney,
Butler, Missouri.

Dear Mr. Dawson:

This is to acknowledge your letter of recent date, requesting an opinion based on the following facts:

"In case the County Coroner is unable to act in the proper case either because of illness or absence and a Justice of the Peace in the township is called to act in the place of the Coroner, is it proper and should the Justice of the Peace sign the death certificate?

"Section 9047, Revised Statutes of Missouri for 1929 provides, among other things, that in case the Coroner is called to investigate the death of a person he should sign the death certificate. Section 11624, Revised Statutes of 1929, provides that in case of the absence of the Coroner any Justice of the Peace of the proper county may take the inquest and perform all of the duties hereby enjoined on the Coroner. On the basis of those two Statutes I am of the opinion that in the event the Justice of the Peace is called to act in the absence of the Coroner he has full authority and is required by law to carry out all of the duties enjoined on the Coroner including the signing of the death certificate."

Your request must necessarily be determined by a construction of Section 11624, R. S. Mo. 1929, to which you have referred. It reads as follows:

"If the coroner is unable to take the inquest, any justice of the peace, or any judge or justice of some court of record of the proper county, may take the inquest and perform all the duties hereby enjoined on the coroner."

Except for the words "all of the duties" as above underlined, this statute is plain and unambiguous and needs no interpretation. The intent manifested by the Legislature has been clearly expressed by the words used. The previous words above quoted, as far as we have been able to determine in our research, have not been construed judicially, although the word "all" has been interpreted in connection with other matters which we believe by analogy to be here applicable.

In this respect your attention is invited to the case of *Ingalls v. Campbell*, 24 Pac. 904, 906, wherein the Supreme Court of Oregon construed a statute with reference to the repealing of all laws relating to civil disabilities of a wife. In passing upon the statute the court said:

"* * * The first section (2998) provides that 'all laws which impose or recognize civil disabilities upon the wife which are not imposed and recognized as existing as to the husband are hereby repealed.' 'All laws' would include both the statutory and common law; and whatever of these that impose or recognize civil disabilities in the one that is not recognized in the other are hereby repealed. The manifest object of the section is to repeal, not to modify or amend, all laws, whether common or statutory, which have the effect to impose or recognize such civil disabilities. * * *"

In the case of *Automobile Gasoline Company v. City of St. Louis*, 32 S.W. (2d) 281, 285, the Supreme Court of Missouri had occasion to construe a charter provision of the City of St. Louis, and said:

"Appellant insists that said clause 2 should be construed as applying only to property taxation, because it immediately follows clause 1; therefore obviously refers to the subjects and objects of taxation referred to in clause 1, which appellant contends was intended to include only real and personal property. The language used in clause 1 is not restricted to real and personal property.

It says 'all subjects or objects of taxation,' which, as above stated, includes persons and occupations subject to license taxes.* * *

Webster's Dictionary defines the word "all" to mean "the whole quantity, * * * every, wholly, entirely, totality; hence, everything.* * *

With these considerations in mind, it obviously follows that, if the coroner is required to hold an inquest on the body of any deceased person and to make the certificate of death required for burial permit, and such coroner is unable to take such inquest and the justice of the peace has taken the inquest, it then follows that such justice of the peace should sign the certificate of death.

CONCLUSION.

In view of the above, it is our opinion that whenever the coroner is unable to take an inquest or perform any duties imposed upon him by law, then any justice of the peace or any judge or justice of any court of record in the proper county may take such inquest and perform all the duties imposed upon the coroner by law.

Hence, the justice of the peace may sign the death certificate required for burial permit within the meaning of Section 9047, Revised Statutes of Missouri, 1929.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney-General

RCS/LD

CRIMINAL PROCEDURE - JUSTICES OF THE PEACE - APPEALS:

Justice of the Peace may not quash information.
State may not appeal from ruling of Justice of the
Peace, but may by writ of certiorari to the Circuit
Court have such record quashed.

August 5, 1938

Honorable Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri



Dear Sir:

This is in reply to yours of July 29th wherein
you request an official opinion from this department
upon the following question:

"Therefore, I would like your opinion
on this proposition: In a misdemeanor
case before a Justice of Peace can the
State appeal from the order of the
Justice sustaining a motion to quash
the information? If so, what are the
proper steps in perfecting such an
appeal?"

Upon the question of the right of the State to
appeal from an order of a Justice of the Peace sustaining
a motion to quash an information, we find that Sections
3753 and 3755, R. S. Mo. 1929, are the only sections which
provide for an appeal in a criminal case by the State.
These sections are as follows:

"Sec. 3753. When any indictment or
information is adjudged insufficient
upon demurrer or exception, or where
judgment thereon is arrested or set
aside, the court in which the proceedings
were had, either from its own knowledge
or from information given by the prosecut-
ing attorney that there is reasonable
ground to believe that the defendant can

be convicted of an offense, if properly charged, may cause the defendant to be committed or recognized to answer a new indictment or information, or if the prosecuting attorney prays an appeal to an appellate court, the court may, in its discretion, grant an appeal."

"Sec. 3755. If no appeal be taken by or allowed to the state in any case in which an appeal would lie on behalf of the state, the prosecuting attorney may apply for and prosecute a writ of error in the supreme court, in like manner and with like effect as such writ may be prosecuted by the defendant; but in such case the defendant shall not be required to enter into any recognizance to answer further to such offense, but if the judgment of the circuit court shall be reversed, the defendant may be arrested on warrant and brought before the circuit court for judgment, or such other proceedings as the case may require."

It will be noted that these sections only apply to procedure in the Circuit Court. Criminal procedure in Justice Courts does not provide for appeals by the State.

Section 3417, R. S. Mo. 1929, provides as follows:

"No case shall be dismissed or discontinued by reason of any defect in the information, but the same may be amended at any time before the case is finally submitted to the justice or jury, or, if the case be appealed to the circuit court, or other court having criminal jurisdiction, then the information may be amended in like manner in such court, and no amendment shall cause a delay of the trial, except at the

instance of the defendant for good cause shown upon oath or by affidavit. If an information shall be lost or destroyed, it shall be the duty of the justice or judge, as the case may be, to require another to be filed, and proceed with the trial."

A Justice of the Peace is only authorized to perform such acts as are prescribed by the statute. The law-makers evidenced their intention of limiting the powers of a Justice of the Peace by providing in Section 3417, supra, that no case shall be dismissed or discontinued by reason of any defect in the information. Therefore, the Justice of the Peace who attempted to pass upon the information exceeded his jurisdiction. Then your request goes to what recourse the State has in such a case.

As there is no provision in the statute for the State to appeal or sue out a writ of error from a Justice of the Peace judgment, we will look to the Constitution for a solution of this problem.

Section 23 of Article VI of the Constitution provides as follows:

"The circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals in each county in their respective circuits."

On this same subject, we find in the case of State v. Landwehr, 71 S. W. (2d) 145, the court said:

"Now the power of supervisory or superintending control which is vested by the Constitution in the circuit courts over courts and tribunals of inferior jurisdiction is of ancient inception, and relates back to and has its origin in the power exercised by the King's Bench

in England, which originally comprehended not only supervision and control over all inferior judicial tribunals by the exercise of an appellate jurisdiction, but also the power to issue extraordinary legal writs with a view to compelling such inferior tribunals to act within their jurisdiction, and thus to prohibit them from acting outside of or in excess of their jurisdiction. As such supervisory control came into exercise by the courts of the colonies, the power of review by appeal or error came to be regarded as separate and distinct from the power exercised pursuant to the established extraordinary legal remedies, so that it is now the latter power which is commonly and generally regarded as falling within the contemplation of the constitutional provision for superintending control, the same to be exercised as a discretionary authority, and under extraordinary circumstances when the remedy by appeal or error is inadequate."

In the case of *State ex rel. v. Wurdeman*, 254 Mo. 561, the court held:

"Under the general superintending control over all inferior courts conferred by the Constitution upon the Supreme Court the writ of certiorari will issue from said court to review the proceedings in a habeas corpus case pending in the circuit court. At common law the issuance of the writ of certiorari was authorized before the proceedings instituted had culminated in a trial, order or judgment, and was based on the absence or an excess or a usurpation of jurisdiction on the part of the court from which the proceedings were removed; and under Missouri procedure the office of the writ is the same as at

common law, and courts are authorized to adopt the principles and usages pertaining to it developed under the common law system, if in other respects consistent with existing statutes."

And at page 569 of said case the court said:

"Where the writ is applied for, as it is here, by the chief law officer of the State, the Attorney-General, it goes as a matter of course (State ex rel. v. Dobson, 135 Mo. 1, 19) in the first instance, provided there is apparent in the application any one of the following requisites: 1st, absence, excess or abuse of jurisdiction (State ex rel. v. Broadus, 238 Mo. 1. c. 204; State ex rel. v. Reynolds, 190 Mo. 578; State ex rel. Knox v. Selby, 133 Mo. App. 552); 2nd, absence of the right of appeal (State ex rel. v. Broadus, 245 Mo. 1. c. 135; Ferguson v. Ferguson, 36 Mo. 197; Ex parte Jilz, 64 Mo. 205; Weir v. Marley, 99 Mo. 484, 488); and, 3rd, lack of any other adequate remedy * * *."

All three of these requirements are contained in your case. The court in that case held that the court which had supervision of inferior courts could quash the record of such courts where they had acted beyond their jurisdiction. The same rule would apply to a circuit court in its supervisory powers over a justice of the peace court in its jurisdiction. We find the rule stated at Sec. 617, page 859, Vol. 35 C. J., as follows:

"The common-law writ of certiorari is strictly a revisory remedy intended for the correction of errors of law apparent on the face of the record, and which go to the jurisdiction of the inferior tribunal. It is not a substitute for an

appeal, and will not reach mere error or irregularity not affecting jurisdiction. In many jurisdictions writs of certiorari, recordari, and review, issued to review proceedings before justices, are now regulated by statute. But, while neither the common-law nor the statutory writ of certiorari or its equivalent can as a rule take the place of an appeal or writ of error, unless the statute so provides, it nevertheless partakes of their nature, and will lie where an appeal or writ of error does not, or where the right thereto has been denied or lost otherwise than by a party's own default."

And at Sec. 622, page 862, Vol. 35 C. J., we find:

"Certiorari or recordari is the proper remedy for a review of proceedings before a justice, where he was without jurisdiction or exceeded his jurisdiction, although in some jurisdictions certiorari will not lie in such case if there is an adequate remedy by appeal or otherwise. But certiorari cannot be used to try the question of the justice's right to the office."

And at Sec. 693, page 379, Vol. 16 C. J., the rule is stated as follows:

"A writ of certiorari to review a summary conviction by a magistrate brings up for review all jurisdictional errors apparent on the face of the record."

August 5, 1938

CONCLUSION

From the foregoing cases and authorities, it is the opinion of this department that a Justice of the Peace in this State is not authorized to quash and dismiss an information filed before him, that by doing so he acts in excess of his jurisdiction, and in view of the fact that the State has no right to an appeal from such act and that it has no other statutory remedy which is adequate, it may by the Prosecuting Attorney, by a writ of certiorari issued from the Circuit Court having jurisdiction, get the relief it desires for such unauthorized act by having the record of such unauthorized act of the Justice quashed, which would place the case in the same status it was before the Justice of the Peace sustained the motion quashing the information.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

CRIMINAL PROCEDURE - COMPLAINING WITNESS:

Any person who is competent to testify as a witness against the defendant may sign a complaint upon which an information may be filed.

August 10, 1938

Honorable Donald B. Dawson
Prosecuting Attorney
Butler, Missouri



Dear Sir:

This is in reply to yours of August 8th wherein you request an opinion from this department upon the following question:

"Where a small child of six years of age is assaulted is it proper for the mother of the child to file the affidavit for a State warrant even though the mother did not witness the trouble and is competent to testify against the defendant only as to the injuries her child had at the time he came home to report the trouble? In this case, a man of thirty-five disturbed the peace and struck a small boy of six years of age. The mother of the child was not present and did not know anything of the trouble until he came home with his face bruised and clothing torn to report what had happened. The Justice of the Peace informed the mother that she would have to sign the affidavit since her son was too young to realize the sacred character of an oath. Thereupon, the mother signed the affidavit for the warrant and the defendant was arrested and I filed information upon that affidavit. The defendant's attorney filed a motion to quash the information and affidavit for the sole reason that the mother was not competent to sign or make an affidavit charging the defendant with

August 10, 1938

disturbing the peace and assaulting her child of six years of age, and for the further reason that inasmuch as the mother was not a witness to the trouble she was not competent to testify concerning it and was therefore not a witness in the meaning of the statutes pertaining to the making and filing of an affidavit for a state warrant, and that she did not have personal knowledge of the charge she made affidavit concerning.

"The Justice of the Peace, in sustaining the motion to quash, evidently agreed with the defendant although I argued that a six year old child was too young to make oath and that the mother was the natural guardian and protector of her minor child and was legally qualified and capable of swearing out an affidavit charging the defendant with disturbing the peace and assaulting her minor son. I would like your opinion on that question of the right of this mother or any parent to swear out an affidavit charging that some crime had been committed against a minor son or daughter too young to realize the sacred character of an oath or affidavit."

Under Criminal Procedure, as it applies to proceedings before Justices of the Peace, Section 3415, R. S. Mo. 1929, pertaining to informations and complaints upon which such informations are filed, provides as follows:

"Prosecutions before justices of the peace for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith: Provided, that if the name of any such person is unknown, such fact may be stated in the information, and he may be charged under any fictitious name; and when any person has actual knowledge that any offense has been committed that may be prosecuted

by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the justice of the peace having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a justice of the peace in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or accompanied by such complaint."

From this section, a prosecution before a Justice of the Peace may be instituted by the Prosecuting Attorney filing an information either based upon a verified complaint of some person who has actual knowledge of the offense, or it may be based upon the knowledge, information or belief of the Prosecuting Attorney. There is no question but that the Prosecuting Attorney may file the information on his own knowledge, information or belief regardless of whether or not a complaint is filed.

It seems to be the rule in this state that a conviction cannot be had on an information which is based upon a complaint that is made by a person who has no knowledge of the commission of the offense for which such person is charged. This rule is stated in the case of State v. Meadows, 106 Mo. App. 604, 606, as follows:

"It has been several times ruled by us that when a prosecuting attorney files an information before a justice of the peace based on the complaint of a private citizen filed therewith, the defendant can not be convicted of an offense of which the person making the complaint had no actual knowledge."

As to what is actual knowledge, the lawmakers have not declared themselves unless by Sections 3416 and 3418, R. S. Mo. 1929, they meant any person competent to testify against the defendant was one who had actual knowledge of the offense.

Section 3416 provides in part as follows:

"Provided, that complaints subscribed and sworn to by any person competent to testify against the accused may be filed with any justice of the peace."

And Section 3418 touches this question in the following language:

"Upon the filing of a complaint before a justice of the peace, verified by the oath or affirmation of a person competent to testify against the accused, if the justice be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged, it shall be his duty to forthwith forward such complaint to the prosecuting attorney."

The term "actual knowledge" is defined in Words and Phrases, 4th Ed., Vol. 1, page 86, as follows:

"Means of knowledge are equivalent to knowledge, and, where it appears notice or information of circumstances which would put one on inquiry, which, if followed, would lead to knowledge, or that facts were presumptively within knowledge, he will be deemed to have had 'actual knowledge' of these facts."

In the case which you have submitted it appears that the mother of the child knew that it had been injured, and from the statement of the child she learned who had committed the assault. There is no doubt that she would be a competent witness to testify as to the condition of the child and the

August 10, 1938

injuries it received, and there is no question but that this testimony would be against the accused.

Said Section 3415 does not limit nor state the manner in which such complainant may obtain actual knowledge of the assault. By reading Sections 3416 and 3418 in connection with said Section 3415, we are convinced that the lawmakers intended that any person who is competent to testify against the accused, has sufficient actual knowledge of the offense to authorize such person to sign the complaint upon which an information may be based as is provided by said Section 3415.

CONCLUSION

From the foregoing, this office is of the opinion that the parent or guardian of a minor child who is too young to make an oath may sign a complaint against one accused of injuring such child, provided that such parent or guardian is a competent witness to testify against the accused. We are further of the opinion that if such parent knows of the injuries to the child, then such testimony is competent in the trial against the accused, which fact would qualify the parent as a complaining witness who had actual knowledge of the offense.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

SCHOOLS
TRANSPORTATION

School bus of Public school district may pick up school children in any rural districts thru which the bus route passes.

October 3, 1938

10-7



Hon. Barker Davis
Prosecuting Attorney
Lewis County
Canton, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"School bus, operated by a town school district. district which has high school, is routed thru two rural school districts adjoining for purpose of transporting high school pupils to such high school. Rural public schools are being maintained in such rural districts. Can such bus pick up and transport public school pupils, residing in such rural districts, to public school in town operating such bus, without consent of rural district, either free or for hire?"

Article XI, Section 1, of the Constitution of Missouri, provides as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years."

The Supreme Court of Missouri in Wright v. Board of Education of St. Louis, 246 S. W. 43, 44 said:

"In view of the beneficent purpose of public education, it was not attempted in the Constitution (Article II) to place any restriction upon Legislative action in regard thereto other than an age limit

Hon. Barker Davis

October 3, 1938.

"within which the rights granted were to be enjoyed.

It is seen that the Constitution gives to the General Assembly the right to establish and maintain free public schools for persons in this state between the ages of six and twenty years. The General Assembly in carrying out the mandate of the Constitution has established free public schools. Laws have been enacted creating rural schools, consolidated schools, town and city schools, enlarged school districts, and other laws have been enacted so that no child between the ages of six and twenty years has to do without attending school at public expense. Where a pupil resides, in most instances, determines the place where such may attend school free. In other words, if a pupil resides in a city, such attends a city school without charge and if the place of residence is a rural district, then the rural school. However, a pupil residing in a rural district may attend school in a consolidated or city school district, but in order to do so must pay tuition. But if the pupil attends school in the district in which he resides then no tuition can be exacted from him. And if pupils reside in a district in which no school is maintained and provision is made to transport such to an adjoining district, no tuition fee or transportation fee is required, because education to them is free in such instances. Section 20, Laws of Mo., 1931, page 346. Like-wise, if a rural district does not maintain a high school such pupils may attend an approved high school in another district and the state and rural district pay the tuition fees. Laws of Mo., 1935, page 351. Section 18, Laws of Mo., 1933, page 388, permits the County Superintendent to assign pupils to a more assessable school and no tuition is required of the pupil.

Section 9207, R. S. Mo., 1929, reads in part as follows:

"The Board shall have power to make all needful rules and regulations for the organization, grading and government in their school district * * * and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same * * * provided further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax."

Hon. Barker Davis

October 3, 1938.

Therefore, all school boards have the power to admit non-resident pupils and prescribe a tuition fee for their attendance. However, the right of the school district to admit non-resident pupils is purely discretionary and not mandatory. State ex rel Burnett v. School District of City of Jefferson, et al, 74 S. W. (2nd) 30. Also, the pupil is free to choose what school he desires to attend, if admittance can be had, in any school in the state. However, the pupils must attend school. Thus a student living in Canton, Missouri, could attend school in Canton free of charge, but could attend school in St. Louis, Missouri, if arrangements were made between him and the St. Louis school district. In other words, the right of the pupil to attend school in a district other than that of his residence is purely between the pupil and the district he seeks to attend school. The district in which he resides would have no voice in the matter if the pupil wants to attend a different school, as the district wherein he resides would not have to pay any tuition if he attended, under such circumstances, a different school. Like-wise, if a school which accepts non-resident pupils and exacts tuition fees from them desires to transport said pupils, we do not find any statute which requires the consent of the district of residence in order for such arrangement to be made. Therefore, whether the transporting is free or for hire does not enter into consideration. No consent of the rural district is required. And, if the transporting is pupils to a school, either free or for hire, such does not come under the Public Service Commission Act. As long as pupils are transported to and from school regardless of whether they reside in the district or not does not require the consent of the district, wherein the pupils reside, in our opinion, as it is a matter solely between the pupils and the school attended.

We answer your question - "Can such bus pick up and transport public school pupils, residing in such rural districts, to public school in town operating such bus, without consent of rural district, either free or for hire" - in the affirmative, in our opinion.

Yours very truly

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Acting Attorney General

TWE:WW

CONSERVATION COMMISSION
FISH AND GAME:

Prosecution for violation of commission regulations, when misdemeanor, must be in township where offense was committed.

December 7, 1938

12-9



Hon. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 23, 1938 requesting an opinion on the following:

"The Wild Life Conservation agent for this county has raised a question of criminal jurisdiction which I would like for you to render an opinion on. He contends that his orders are that whenever a person is arrested charged with violating any of the fish and game laws of the State of Missouri that the party can be tried before any Justice of the Peace in the county. The particular case came up in this manner: A boy was arrested in Butler for attempting to sell game he had shot in another township. The agent charged the boy with having hunted without a license and brought the case before a Justice of the Peace here in Butler. When I learned of the facts of the case I told the agent that I felt the case should be filed before the Justice of the Peace in the township in which the boy had engaged in hunting without a license. The agent said that his orders had been that the offense continued into any township into which the boy might go even though he did not hunt except in one township. Under the criminal laws of the state it has always been

my understanding that misdemeanors must be prosecuted in the township in which they are committed. If that were the case then this boy would have to have been prosecuted in the township in which he was charged with having hunted without a license. It is possible of course that the fish and game laws constitute a contempt to the criminal laws of this state and if such would be the case I would appreciate being informed of that fact. I know that that there has been some controversy concerning the powers of the fish and game department and thought perhaps you would be in a position to inform me as to the status of this matter."

Section 3414 R. S. Mo. 1929 provides in part:

" * * that all prosecutions before justices of the peace for misdemeanor shall be commenced and prosecuted in the township wherein the offense is alleged to have been committed: * * * "

In State v. Alford 142 Mo. App. 412, the court construed the terms of this statute, using the following language (l.c. 415):

"We had occasion to pass on this statute in State of Missouri v. Grant Sextion (141 Mo. App. 694) * * * *, and we there held that in order to give jurisdiction in a misdemeanor prosecuted before a justice, that the prosecution must be instituted before some justice of the peace in the township where it is claimed the offense was committed. * * * * *

"The Legislature has the right to say in what jurisdiction statutory misdemeanors

shall be prosecuted, and to make that jurisdiction exclusive."

The Conservation Amendment, Laws 1937 p. 614, does not confer on the Conservation Commission authority to alter, by regulation, the terms of the above statute. In *Ex Parte Byron Marsh*, (No. 36192 decided at the September Term 1938, and not yet reported) the Supreme Court of Missouri, En Banc, had occasion to, and did, pass upon numerous questions involving the powers of the Conservation Commission under the above mentioned Constitutional Amendment. In that opinion the court said, "Regulation and legislation are not synonymous terms." Also it is held the Conservation Commission is only vested with the power to prescribe, within its "administrative discretion", regulations to fill in the details of the Conservation Amendment. The effect of the whole decision is that the Conservation Commission is vested with no authority to make "laws", but only administrative rules, which, because punishable as public offenses, may have the force of laws. Further the court said in the course of that opinion, "punitive laws or laws fixing punishment as for violations of administrative rules are solely referable to the legislative power and function."

The Conservation Commission having only the authority to prescribe administrative regulations, they may not delve into the punitive field reserved to the General Assembly.

The Court also held that Section 8311 R. S. Mo. 1929 is available to supply the punishment for a violation of administrative regulations of the Conservation Commission. This section is a punitive law of the legislature. Punishment for violation of the Conservation Commission's regulations being left to the legislature it naturally follows that the power to prescribe, how, when and where said punitive law is to be applied is also within the province of the legislature.

CONCLUSION

Therefore, it is our opinion that prosecution for violation of Administrative regulations of the Conservation Commission, must be in accordance with the perscriptions of the General Assembly of Missouri, any regulation of said Commission, to the contrary notwithstanding.

We desire to add, however, that we have oral information, which is all that is available because there is no compilation containing the Conservation Commission regulations, that said body has made no regulation which in anywise attempts to fix the venue for the prosecution of violations of its administrative regulations.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

LLB:RT

TOWNSHIP OFFICES: Candidates for township offices and
CANDIDATES: committeemen and committeewomen not
ELECTIONS: required to pay fee for filing de-
claration papers.

August 23, 1938

Board of Election Commissioners
St. Louis County
Clayton, Missouri



Attention: Mr. Jack D. Dean

Gentlemen:

We have received your letter of August 12 which
reads in part as follows:

"During the recent campaign, it seems
that Circuit Judge Peter Barrett, dis-
covered a case where the Committeemen
and Committeewomen were required to pay
a filing fee of \$5.00 with their De-
clarations; as well as the Justices of
Peace and Constables.

"This information was conveyed to the ma-
jority of the people filing for the above
offices. The result was that in most cases
the filing fee was paid to the Central Com-
mittee.

"At a recent Committee meeting, I was re-
quested as the Chairman of the Committee
to get an opinion from you, as to whether
or not it will be required in the future
that this filing fee of \$5.00 be paid by
all those seeking the office of Committe-
men and Committeewomen, Justices of Peace

and Constables.

"I would appreciate an opinion from you at your earliest convenience. In the event your opinion is that it is necessary for the Committeemen and Committeewomen to pay into the Treasury of the County Committee the fee of \$5.00, at the time their Declarations for office are filed; those who fail to pay their filing fee, in spite of this fact, and their names are printed on the Ballot by the Election Commissioner, and in turn they are elected to the office they sought: Are they or are they not qualified to receive from the Election Board a certification of Election. * * * * *."

It is clear that the offices of Justice of the Peace and Constable are township offices.

As to Justices of the Peace Sec. 2136 R. S. Mo. 1929 states:

"Each municipal township, except as otherwise provided by law, shall be entitled to two justices of the peace, to be elected and commissioned in the manner hereinafter provided; * * * * *."

In the case of Carpenter v. Roth, 192 Mo. 658, 1.c.669 the court said:

"Cities do not elect justices - strictly speaking there is no such a thing as a justice in a city except possibly in St. Louis. Justices are municipal township officers."

In connection with the office of constable Sec. 11748

R. S. Mo. 1929 provides in part that:

"At the general election to be held in 1920, and at each general election every two years thereafter, the qualified voters of each township in every county in this state shall elect a constable, who shall be a resident of the township for which he is elected, and who shall hold his office for two years and until his successor be elected and qualified; * * * * *."

We are of the opinion, therefore, that the offices of justice of the peace and constable which are filled by the townships exclusively, can only be classified as township offices. These offices are in fact so designated by the statutes quoted above.

Sec. 10258 R. S. Mo. 1929 is the only statute which might in any sense be applicable relative to deposits by candidates previous to the filing of declaration papers. This statute provides that:

"Each candidate, except for a township office, previous to filing declaration papers, as in this article prescribed, shall pay to the treasurer of the state or county central committee of the political party upon whose ticket he proposes as a candidate and seeks nomination, a certain sum of money, as follows, * * * * *."

We observe therefore that the above statute by express wording exempts candidates for township offices from its provisions requiring certain amounts in connection with each office to be paid to the treasurer of the state or county central committee.

Sec. 10278 R. S. Mo. 1929 in connection with the election of committeemen and committeewomen reads as follows:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county, or in the case of a city not within the county, of the city of which such voting precinct, or district is a part: Provided, that any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot, or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 10257, R.S. 1929. (Laws 1923, p. 197, Sec. 1.)"

The effect of the above section is that there is to be no primary election for the purpose of nominating candidates for the offices of committeemen and committeewomen to be voted on at a subsequent general election. Committeemen and committeewomen are elected at the primary election. The names of such candidates for election may, however, be placed on the ballots by complying with said section 10257, which provides how and when the declaration shall be filed and what it shall contain.

Section 10258 R. S. No. 1929 provides that certain amounts shall be paid by each candidate, previous to filing declaration papers, to the treasurer of the state or county central committee of the political party upon whose ticket he proposes "as a candidate and seeks nomination." In other words this statute contemplates that only those candidates who are seeking a "nomination" shall be required to pay any such fee. It makes no such requirement of those seeking only election and not a nomination.

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We can therefore only arrive at the conclusion that candidates who file declarations for election to the offices of committeemen and committeewomen are not required to pay any fee whatsoever to the treasurer of the proper party committee; that such requirements are intended only for those candidates seeking a nomination for a party office.

Apparently you have in mind Section 10278a found in the Laws of Missouri, 1937, p. 233. This section is not applicable to St. Louis County. It provides that any qualified elector in any ward of a city containing five hundred thousand inhabitants or more may have his or her name printed on the primary ballot or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by filing a declaration and "by paying to the treasurer of the party committee of the city of which such ward is a part the sum of One Hundred Dollars (\$100.00) * * * * *." This statute further provides that "in all counties in this state containing a city of the first class, the sum of Five Dollars (\$5.00) * * " shall be paid to the treasurer of the party committee.

St. Louis County does not contain a city having a population of five hundred thousand inhabitants or more. Neither does St. Louis County have within its borders a city of the first class. Consequently Section 10278a is not applicable.

Conclusion

The offices of justice of the peace and constable are township offices and therefore candidates for such offices are not required to pay any amount to the treasurer of the state or county central committee of the political party to which any such candidate might belong as a preliminary to filing declarations for such offices. Committeemen and committeewomen are likewise not required to pay any such fees because

August 23, 1938

they are seeking to be elected and not nominated. Section 10258 R. S. Mo. 1929 provides only that such fee shall be paid by candidates seeking a "nomination."

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA/w

JURY SCRIP:
SCRIP RECEIVED IN PAYMENT
OF TAXES WHEN:

Jury scrips are not receivable in payment
of taxes for any year other than that for
which same are issued. Jury scrip payable
out of the funds of the year of issuance.

January 20, 1938

Mr. B. G. Dilworth,
Prosecuting Attorney,
Dent County,
Salem, Missouri.



Dear Sir:

This office acknowledges your request dated January 15, 1938 for an official opinion from this department which request is as follows:

"I have been requested by the County Court of Dent County, the County Treasurer and the County Collector to request your department's opinion on the following question:

The regular November Term, 1937, of our Circuit Court convened on the 4th Monday of November, 1937. It was in session for one week, and adjourned to meet on the 1st Monday of January, 1938, for a November Adjourned Term, 1937. At said adjourned term the regular petit jury was notified to be present, and also a special Grand Jury was ordered summoned which was done and it met and transacted business. For the services performed by the Petit Jury and Grand Jury commencing on January 3, 1938, the circuit clerk issued jury script to the petit and grand jurors for services and mileage. The County Collector has accepted a few of these script on 1937 County Taxes. I would like to know on behalf of the above County Officers of Dent County, whether such script for services entirely performed in the year 1938, is payable out of 1937 or 1938 county funds (Class 2, under budget) and whether such script is acceptable for and on 1937 or 1938 county taxes."

This request particularly refers to jury scrips issued prior to the date of the adoption of the budget by the county court and for what years for taxes such scrip shall be received

in payment of. On the law concerning payment of jurors, I find that Section 8765 R.S. Mo. 1929 provides as follows:

"Upon the demand of such juror, the clerk shall give him a scrip, verified by his official signature, showing the amount which such juror is entitled to receive out of the county treasury."

and Section 8767 provides as follows:

"The treasurer of the county is hereby required, upon the presentation to him of any scrips given by the clerk aforesaid, to pay the same out of any money in the treasury appropriated for county expenses, in the same manner and subject to the same rules as county warrants; and said scrip shall be received by the sheriff, collector or other proper officer in the payment of any debt due the county."

In Section 8, page 345 Laws of Missouri 1933 which contains the county budget act, it is provided:

"***** The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand). If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act. Immediately upon receipt of the estimated budget the state auditor shall send to the county clerk his receipt therefor by registered mail.

Any order of the county court of any county authorizing and or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any

such warrant shall be liable there-
for upon his official bond."

Section 1 of said budget act, page 341 Laws of Missouri 1933 provides as follows:

"The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

Section 2 of said act provides for the classification of expenditures of the county and the pay of jurors comes under class 2 of expenditures.

Section 3 of the act requires the officers to furnish by or before January 15 an estimate of the amount of county revenue needed to operate the respective office or department for the current year.

Section 4 of the act requires the county clerk to make a written report to the county court as to the amounts which will be necessary to operate for such year and the amount of expenses, in this report he is required to list any outstanding warrants and any outstanding obligations against the county. As the clerk is required to list outstanding warrants in this report, then such outstanding warrants which may be payable out of funds in a class prior to class 6, may be paid under class 6 of section 5, page 344 Laws of Missouri, 1933 of the budget act which provides:

"Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest. Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated

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as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

If there are warrants outstanding at the end of the year, then such warrant loses its classification it originally had and passes to class 6 under the classification of expenditures.

I note in your request that you refer to warrants which are issued after December 31 and before the February term of the court. Section 8 of the budget act, page 345 Laws of Missouri 1933 provides that:

"It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government.
*****."

It is at this term the duty of the county court to make up and adopt the budget as cited above. The treasurer is not authorized to pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed and the same section makes the treasurer and any other official violating it liable on his official bond for the violation of this act. It would therefore seem that the Circuit Clerk is not authorized to issue this scrip until the county budget is made up and adopted at the February term. I am enclosing a copy of an opinion from this office dated February 9, 1934 on this particular question.

On the question of whether the jury scrip which is issued in January is payable out of the 1937 or 1938 funds, it appears that under the county budget act the legislature intended that the business of the county should be done on a cash basis and to limit the current expenditures to the current revenues and that the books of the county should be closed on December 31 of each year.

Section 6 of the budget law provides:

"***** The estimate of each such officer shall cover the entire year beginning January first and ending December thirty-first, both dates inclusive. *****."

Then since the act requires the county clerk to list outstanding obligations and outstanding warrants in his estimate for the current year, it is evident that the legislated that such items be paid out of the funds for the current year that such estimate is submitted. As to which year such jury scrip shall be received in payment of taxes, I find that section 9911 R.S. Mo. 1929 provides as follows:

"Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. *****
Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year. (R.S. 1919, 12903. Amended, Laws 1929, p. 432.)

The question whether the clause in said section 9911 providing that warrants shall be only received in payment of taxes which were levied in the year of the issuance of the warrant applies to jury scrip presents itself.

Section 8677 quoted above provides that such scrips are to be paid by the county treasurer as county warrants are and that same shall be received by the sheriff and collector or other public officer in payment of any debt due the county.

1/20/38

The sentence in said Section 9911 pertaining to paying the taxes with jury scrip does not contain any clause that they shall be received only for taxes levied for the same year the jury scrip is issued. However, we think this clause applies to jury scrip the same as it does to county warrants, for the reason that the money to pay such jury scrip comes from the general levy for county revenue, the same as the money for payment of county warrants. In the case of *State ex rel. v. Payne*, 153 Mo. 653, the court said:

"The evident purpose of sections 11 and 12 of article 10 of the Constitution was to provide that the business of the county should be done on a cash basis and to limit the current expenditures of the county to the current revenues."

The same constitutional and statutory reasons exist for confining such payments with the jury scrip to the payment of taxes levied during the year of the issuance of such scrip as applied to the payment with county warrants.

While there is some conflict in Sections 8767 and 9911 on this question, we are of the opinion that Section 8767 is general on the subject and that Section 9911 is a special statute on the same subject and that legislature intended that its provisions be followed and we are further fortified in this view by the provisions of the said sections 11 and 12 of article 10 of the Constitution which provides that the business of the county should be done on a cash basis and to limit the current expenditures of the county to the current revenues.

CONCLUSION

From the foregoing, this office is of the opinion that the jury scrip can only be received in payment of the taxes which are levied for the same year in which such scrip is issued; and that such scrip is payable only out of the county funds of the year of such issuance unless such scrip is protested. Then in that event it goes to class 6 of demands under the budget act against the county funds for any year thereafter and payable as provided by the said county budget act out of the funds set out in class 6.

Respectfully submitted,

TRYE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

COUNTY BUDGET: Bills for county for 1937, may now be paid out of funds of 1937 revenue, in accordance with priority of classes as budgeted by county for year 1937.

February 12, 1938



Honorable B. G. Dilworth
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of February 9th, wherein you make the following request:

"I respectfully ask the opinion of your department concerning the following:

"During the year 1937, the County Court of Dent County, Missouri, in issuing 1937 warrants, did not come up to the budget limit of 90% of the anticipated 1937 revenues. Since December 31, 1937, various bills have been presented for services rendered the county during 1937, and which are properly payable as 1937 county obligations but for which warrants were not drawn prior to January 1, 1938. The County Court has asked that I secure your department's opinion as to whether or not warrants can now be drawn to pay such bills and obligations, such warrants now drawn to be drawn on the 1937 funds of the various and proper classes."

The purpose of the County Budget Act was to promote efficiency and economy in county government. When Article X, Section 12, of the Constitution was framed and adopted by the people the main purpose in mind was to abolish a credit system and establish a cash system by limiting the amount of tax which might be imposed for county purposes and limiting the expenditures in any year to the amount of revenue which such a tax would bring to the treasury for that year. By the terms of this section the county court was empowered to anticipate the revenue which might be collected during the current year and were permitted to contract debts for ordinary current expenses just so long as the debts were within the purview of the anticipated revenue.

Formerly Sections 9874, 9985 and 9986, R. S. Mo. 1929, were the controlling statutes with reference to the allotment and classification of county revenue. The Budget Act did not completely abolish the former system but merely emphasizes the cash system by creating priorities among the classes. Section 4 of the original act, page 343, Laws of Missouri, 1933, in enumerating the duties of the county clerk, states:

"Total unpaid obligations of the county on January 1st of current year. (This shall include unpaid warrants and outstanding bills for which warrants may issue)"

Thus it will be noted that the county court on February 1st has a complete analysis and statement of the finances of the county of any given year.

By Section 12 of Article X, supra, and decisions of the Supreme Court, the revenue of a current year cannot be used to pay accounts of previous years unless there be a surplus. We think the rule is well stated in *State ex rel. v. Johnson*, 162 Mo., 1. c. 629, as follows:

"It was then anticipated that, though the county court might not issue warrants in excess of the levy for a year's current expenses, and that a creditor might rely upon the fact that his contract was within the amount of revenue levied and provided, and trust to the power of the State to enforce its taxes, still it might happen from some unforeseen cause enough of the estimated amount of revenue might not be collected to pay all the warrants drawn against it in anticipation. Under such circumstances it has never been ruled that such a creditor's warrant was absolutely void and extinguished by the non-payment in the year in which it was drawn. On the contrary, this court has often said in no uncertain terms that it was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years. (Randolph v. Knox County, 114 Mo. 142; Andrew County v. Schell, 135 Mo. loc. cit. 39; State ex rel. v. Payne, 151 Mo. loc. cit. 673; Railroad Co. v. Thornton, 152 Mo. 570; State ex rel. v. Allison, 155 Mo. loc. cit. 344; and on this point, Reynolds v. Norman, 114 Mo. 509.)

"Accordingly we answer the first proposition in the affirmative: that a warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year for which it was issued, or is misappropriated by the officers of the county for whose act the holder of the warrant is not responsible."

Therefore, it is our conclusion that the bills which have been presented for services and contracts carried out for the county during the year 1937, may now be paid out of any funds, remaining or coming into the treasury, of 1937 revenue, in accordance with the priority of classes as was budgeted by the county for the year 1937.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

ELECTIONS: Defeated candidates in primary elections must file statements of expenses in accordance with Section 10482, R.S. 1929. Successful candidates in primary must also file statements within 30 days after primary.

August 20, 1938



Hon. B.G. Dilworth
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date which reads as follows:

"I would like to have the opinion of your department concerning sections 10481, 10482, 10483, and 10484 concerning whether or not a defeated candidate in the primary election must file his statement of expenses, as mentioned in the above sections. Also, as to whether or not a successful primary candidate, who is a party nominee, must file his statement of expenses for the primary election within thirty days thereafter, or whether such nominee may wait until thirty days after the general election, and then file such statement as is required by said sections, such statement then to be in consolidated form for both primary and general elections.

I will appreciate your prompt response to this inquiry in view of the fact that thirty days from the primary will fall on September 2."

I.

Section 10482, R.S. Missouri, 1929, reads as follows:

"Every person who shall be a candidate before any caucus or convention, or at any primary election, or at any election for any state, county, city, township, district or municipal office, or for senator or representative in the general assembly of Missouri, or for senator or representative in the congress of the United States, shall, within thirty days after the election held to fill such office or place, make out and file with the officer empowered by law to issue the certificate of election to such office or place, and a duplicate thereof with the recorder of deeds for the county in which such candidate resides, a statement in writing, which statement and duplicate shall be subscribed and sworn to by such candidate before an officer authorized to administer oaths, setting forth in detail all sums of money, except all sums paid for actual traveling expenses, including hotel or lodging bills, contributed, disbursed, expended or promised by him, and, to the best of his knowledge and belief, by any other persons or person in his behalf, wholly or in part, in endeavoring to secure or in any way in connection with his nomination or election to such office or place, or in connection with the election of any other persons at said election, and showing the dates when and the persons to whom and the purposes for which all such sums were paid, expended or promised. Such statement shall also set forth that the same is as full and explicit as affiant is able to make it. No officer authorized by law to issue commissions or certificates of election shall issue a commission or certificate of election to any such person until such statement shall have been so made, verified and filed by such persons with said officer."

August 20, 1938

It will be seen by the foregoing section that "every person who shall be a candidate * * * * shall, within thirty days after the election held to fill such office or place, make out and file * * * * a statement in writing * * * *". It seems to us that this statute plainly requires every person who was a candidate to file the statement. The statute is part of what is known as the corrupt practice act and is designed to assist in bringing about clean elections and to abolish bad political practices. There would seem to be no reason why a candidate who had violated the provisions of Section 10481 of said corrupt practice act should not be required to expose the practices which he used in the election, regardless of whether he was successful or not. It would be hard to stamp out the evils defined in Section 10481 if only one person out of those running had to disclose the practices which he adopted in the election, and for that reason, the Legislature required every person who was a candidate to file a statement of his campaign expenses in order that the public and the officers of the state might know just what took place in the way of expenditure of money in the election. It would be just as inimical to the interests of good government to expend too much money in a primary election as it would be to expend too much money in a general election.

CONCLUSION

It is, therefore, the opinion of this office that a defeated candidate in a primary election must file his statement of expenses in accordance with Section 10482, R.S. Missouri, 1929, within thirty days after said primary.

II.

Your next question is whether the successful candidate at a primary election may wait until after the general election to file his statement of all money expended by him or in his behalf in both the primary and general elections. In other words, can the successful candidate at the primary election wait until after the general election and then file a combined statement covering both elections? As pointed out above, the statute, Section 10482, R.S. Missouri,

August 20, 1938

1929, requires every person who shall be a candidate to file said statement within thirty days after the election held to fill such office or place. The successful candidate was, of course, a candidate at the primary. He, therefore, would be required to file his statement along with all others who had been candidates at such primary. No exception is made in the statute in favor of the successful candidate waiting to file his statement until after the general election.

CONCLUSION

It is, therefore, the opinion of this office that a successful candidate at a primary election must file his statement of campaign expenses as required by Section 10482, R.S. Missouri, 1929, within thirty days after the primary, and cannot wait until after the general election and file a combined statement of his expenses for both the primary and general elections.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

SCHOOLS: School district does not lose building on land formerly used for school purposes by the mere fact of nonuser, and same does not revert with the land to the original owner.

August 23, 1938



Honorable Paul J. Dillard
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Sir:

This Department is in receipt of your letter wherein you request the opinion of this office on the following question:

"When a tract of land formerly used for school purposes, having thereon a school house, reverts to the grantor because of a non-user for school purposes; does the building revert with the land or remain the property of the school district?"

The manner of acquiring the use and title to school property is contained in Section 9215, R. S. Mo. 1929, which reads as follows:

"Whenever any district shall select, at the annual or any special meeting, one or more sites for one or more schoolhouses, or the board of education in city, town or consolidated school district, under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, office and public parks and playgrounds, or additional grounds adjacent to schoolhouse site or sites, and cannot agree with the owner thereof as to the price to be paid for the

same, or for any other cause cannot secure a title thereto, the board of directors, or board of education aforesaid may proceed to condemn the same in the same manner as provided for condemnation of right of way in article 2, chapter 7, R. S. 1929, and upon such condemnation and the payment of the appraisement, as therein provided, the title of said lot or land shall vest in the board of directors or board of education aforesaid for use in trust for the district and the purposes for which the same was so selected and located. All laws or parts of laws in conflict with this law are hereby repealed."

By statute the title to all classes of school property is vested in the district. Section 9269, R. S. Mo. 1929, provides as follows:

"The title of all school house sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district."

Under Section 9284, R.S. Mo. 1929, paragraph "Eleventh", at the annual school meeting, the patrons of the district have the following power:

"To change the location of schoolhouse site when the same for any cause is deemed necessary; Provided, that

in every case a majority vote of the voters who are resident taxpayers of said district shall be necessary to remove a site nearer the center of said district; but in all cases to remove a site farther from the center of said district, it shall require two-thirds of the legal voters who are resident taxpayers of such school district voting at such election."

General rules relating to "Reversion or Forfeiture" are contained in 24 R.C.L., Par. 35, as follows:

"Where land is granted for school purposes, the question frequently arises as to whether the condition of the conveyance has been broken with a resulting reversion or forfeiture. The general rule is that a construction involving a forfeiture is not favored, on the theory that since the deed is the act of the grantor it will be construed most strongly against him. The recital in the deed of a substantial consideration negatives the idea of a trust, and will prevent a reverter, unless expressly provided for. In some of the cases it is held that where the condition is once performed, it is satisfied and extinct. And the subsequent discontinuance of the use will not work a reversion or forfeiture. Where there is a dedication of property to school uses, the situation is different. Where the purposes of the dedication fail, the land will revert. Abandonment, in law, is a question of intention, though cessation of use is evidence of abandonment. If land is deeded to a school district for specified school purposes, it cannot be deeded away for other purposes, and so it has been held that ground deeded for use as a public school cannot

be deeded away to be used as a normal school. The owner of lands may devote and dedicate them to public use, and it is now well settled law that a dedication of lands to public use does not require the existence of a corporation in which to vest the title. Such a dedication will be valid, without any specific grantee in existence at the time the dedication is made. The public is an ever existing grantee, capable of taking a dedication for public uses, And if necessary a court of equity will appoint a trustee to hold the title. In general mere statements in the deed that the property is conveyed for school purposes, or is to remain for such purposes, are not construed as conditions or limitations of the grant."

The general rule in regard to what you have termed in your letter as "non-user" is contained in 20 Corpus Juris, Par. 595, p. 1235, as follows:

"In the absence of statutory provision, the general rule is that mere non-user is not sufficient to constitute an abandonment, if for a period less than the statutory period of limitations, unless accompanied with a failure to pay the compensation, or there must be both a nonuser and an intention to abandon. By statute, a failure for a specified period to construct or operate the public work for which the land was taken will constitute an abandonment. Nonuser in connection with other circumstances may be sufficient to show abandonment."

The general rule with respect to property acquired when the property condemned or acquired vests a fee and when right acquired is an easement, is contained in 20 Corpus Juris, Par. 598, p. 1236, as follows:

"Where the condemnation vested a fee the general rule is that the land does not revert to its former owner when it ceases to be used for the purpose for which it was condemned. Where a qualified or terminable fee is acquired, and the right to use the land has been lost in one of the ways mentioned above, the title and rights revert to the original owner. Where an easement only was acquired and the right to enjoy the easement is lost, the owner of the fee has the right to reenter and to use the property just as if it had never been condemned, except that the condemning party has the right to enter and remove its property, although it has been held that the right of removal terminates with the consummation of the abandonment by the condemnor, and also that where condemnor's structures are necessary for the protection of the land of the owner of the fee the condemnor cannot remove such structure. If in the process of removal of condemnor's property the fee owner's property is damaged he may recover therefor."

It appears from your letter dated March 11, 1938, in reply to the letter from this office dated March 8th, that the deed to the school land in question provided that the land would revert to the original owner, and that this school land was purchased by the district in 1927.

In the case of Powell v. Bowen, 214 S.W. 1. c. 144, on the question of abandonment, the court said:

"The defense of abandonment, disassociated from other defenses, e. g., adverse possession, or a failure to pay taxes, has never been recognized as affecting title to real property at common law. For at common law, whatever the rule may have been under the Spanish or Civil law (Tayon

v. Ladew, 33 Mo. 207), title to real property can neither be gained nor lost by abandonment operating along * * *."

In the case of Hatton v. Railroad, 253 Mo. l.c. 676, the court said:

"Abandonment in law is defined to be 'the relinquishment or surrender of rights or property by one person to another. * * * Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect.'"
"To constitute an abandonment there must be the concurrence of the intention to abandon and the actual relinquishment of the property, so that it may be appropriated by the next comer." * * *"

On the question of ownership of the school building, if the land has been abandoned for school purposes and has reverted to the original grantor or his assigns, we do not find a Missouri case where the title to school buildings on such lands is involved, but we do find some railroad cases where the title to the railroads, fences, and depots on abandoned railroad property is involved, and as we think these cases are somewhat analagous to the school building cases, we are referring to them here.

In Hatton v. Railroad, 253 Mo. l.c. 677, the court said:

"But even should we be in error as to this, and even if defendant has already abandoned rather than simply expressed an intention to abandon when it shall have sold its fences and its bridges, and shall have taken up its rails, does this transfer the title to these rails from the defendant to the plaintiffs, as assignees--presumably--of the original grantors? This is the itching question in this case. Shall defendant lose its rails because from the early part of the

year 1902 till the month of May or June, 1905, it ran no engine, or cars, or trains over the road? There can be no natural justice in such a claim. Upon the facts before us defendant has been guilty of no acts making meet as fit punishment such a severe penalty; nor have plaintiffs by anything appearing in the record, done any acts or expended money for labor, or erected improvements on the right of way, or suffered any losses or hardships at defendant's hands which entitle them to so great compensation. The law, as has been said, views a forfeiture with the same dislike as nature looks upon a vacuum. If there is so harsh a rule it ought to be well settled in reason, before it shall be allowed to override the crying equities of the facts before us.

"We think that there is but one view that, where the railroad is a trespasser and in most cases and for most purposes, rails, ties, bridges and other paraphernalia formerly personal property, when affixed to the soil, become real estate. But that is not the case when a dispute arises between the railroad company, or its assignees, and the owner of the servient estate, in those cases where the dominant estate has arisen from consent express or implied. Where a house, a depot or other structure is erected by the railroad upon the land of another pursuant to an act of trespass, or without any permission, then the structure becomes a fixture and may not be removed. (Hunt v. Railroad, 76 Mo. 115.) This is but a stating as a truism, the converse of the general rule as to fixtures, which is: That structures erected upon the land of another with the consent of such owner, continue to be personal property."

In the same case, at l.c. 679, the court also said:

"The presumption is that rails and similar structures placed by a railroad company upon land taken by it for a right of way are affixed to the land with a manifest intention to use them in the operation of the railroad, and hence, are not to be regarded as fixtures forming part of the real estate.' * * * *"

Again, at l.c. 681-682, the court in said case said:

"The fact that the estate conveyed by the grantor to the grantee reverted to the former, upon the abandonment of the railroad, and that the grantor entered upon the possession of the land, did not in our opinion prevent the vendee of the grantee from removing the structure erected by the former, in accordance with the terms of the grant. The erection was entirely consistent with the grant and with the uses and purposes for which it was made. It did not, therefore, become a part of the realty, but was a part of the estate granted, and, upon the reversion thereof, remained the property of the grantee. The right to sell the same was no greater than the right of removal and, then sold, the vendee had the same right to remove as had his vendor.'

"The rule deduced by 33 Cyc. 226, upon the several questions of abandonment, reverter and forfeiture of the rails and other alleged fixtures to the owner of the servient estate, is in entire consonance with these views, and is thus stated:

"Where a railroad company having an easement in land for a right of way or other railroad purposes abandons or forfeits the right to the same or a portion thereof, the title and right to the land abandoned

or forfeited reverts and entitles a recovery thereof by the grantor, or the then owner of the servient estate; and even where the servient estate has been transferred to another, the abandoned or forfeited land reverts to the original grantor if the deed or grant expressly so provides, or the reversionary interest has not otherwise passed out of such grantor. Under some statutes this reversion takes place without a reconveyance or order of court, upon the owner's retaking possession of the property. If the grantor who is in possession and control of the property in the bona fide belief that the company has abandoned the same conveys it to a bona fide purchaser, the railroad company is estopped to assert any easement under its deed against such purchaser. A reversion for an abandonment, however, does not take effect until there is an actual abandonment. Where the company's occupation of the land is not illegal, its rails and other structures thereon do not become a part of the realty, and it should have a reasonable time in which to remove them, upon abandonment; and the fact that the landowner has been allowed to take possession of the land embraced in the right of way and hold it for a term of years less than is required to extinguish the company's easement does not imply relinquishment by the company of its right to enter and remove its structures."

CONCLUSION

From the foregoing authorities, if the school district has actually abandoned the school site for school purposes, then the lands revert to the original grantor or his assigns. However, such abandonment does not carry with it the school building or other buildings placed on such lands by the

Hon. Paul J. Dillard

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Aug. 23, 1938

school district. By the rules stated in the foregoing authorities, the buildings belong to the school district, which has a reasonable time to remove them from its lands if and when the same are abandoned.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General .

TWB:HR

INSURANCE:
MAKING AND CAUSING TO BE PUBLISHED
UNTRUE STATEMENTS:

The statement that the "State of Missouri guarantees insurance" is untrue and persons making and causing to be published such statements violates the provisions of Section 4308, R.S. Mo. 1929, and is liable for the penalties imposed therein.

April 18, 1938

Mr. Elvin S. Douglas,
Prosecuting Attorney,
Polk County,
Bolivar, Missouri.



Dear Sir:

This is to acknowledge yours of April 13, 1938, for an official opinion from this office based on the following letter and advertisement:

"I herewith hand you a copy of an advertisement by H. S. Rainwater of this city, which appeared in the Bolivar Free Press in the upper left hand corner of page eight of its issue of April 7th, 1938.

I am also at this time inviting the attention of the Insurance Department to the same advertisement, and invite the attention of both of you to the part which I have underlined.

I would appreciate your opinion on just what penal section he has violated, if any."

"I SELL THE FOLLOWING KINDS OF LIFE INSURANCE:

MORTGAGE: To clear your farm or home if you die.

TEACHERS' RETIREMENT: To assure teachers a regular monthly income for

life.

EDUCATION: To provide a fund to send children to college.

ENDOWMENT: A savings account plus death benefit. If you start a savings account it will be matured whether you live or die.

OLD AGE INCOME: To provide a monthly check for life, beginning at the age of 60, 65, or 70.

I have 62 different kinds. All insurance I sell is guaranteed by the State of Missouri. I am licensed by the state.

H.S. Rainwater
Insurance Salesman."

By Section 4308, R.S. Mo. 1929, it is provided as follows:

"Any person, firm, corporation, or association who, with intent to sell or in anywise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire the title thereto, or an interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any

other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor, and shall upon conviction thereof be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than ten days nor more than ninety days, or by both such fine and imprisonment; providing that nothing herein shall apply to any proprietor or publisher of any newspaper or magazine who publishes, disseminates or circulates any such advertisement without the knowledge of the unlawful or untruthful nature of such advertisement."

By this section any person * * * who with intent to sell or in anywise dispose of * * * anything offered by such person * * * to the public for sale or distribution * * * makes, publishes * * * or causes to be made or published or placed before the public in a newspaper in this state, an advertisement of any sort regarding anything so offered to the public, which advertisement contains an untrue statement of fact, is guilty of a misdemeanor and subject to the penalty therein imposed.

The advertisement accompanying your letter represents to the public that the insurance which the agent sells is guaranteed by the State of Missouri.

In our research on this question, we do not find that the State of Missouri under any circumstances ever guarantees any insurance contracts. Therefore, that part of the advertisement which states "All insurance I sell is guaranteed by the State of Missouri" is untrue.

Mr. Elvin S. Douglas

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April 18, 1938

CONCLUSION

It is, therefore, the opinion of this department that an advertisement which contains a statement that the State of Missouri guarantees insurance is untrue, and that the person who makes and causes to be published such advertisement, has violated the provisions of said Section 4308, R.S. Mo. 1929 and is subject to the penalties imposed therein.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

April 27, 1938.

Honorable John J. Downey
Police Commissioner
5th and Francis Streets
St. Joseph, Missouri



Dear Sir:

We acknowledge your letter of April 22d, 1938 requesting an opinion of this department, which letter reads as follows:

"The State law provides that the Police Department may receive up to one-sixth of the revenue for the running of the Police Department. The City authorities claim this means one-sixth of the General Revenue, which would be \$150,000.00.

"It requires about \$175,000.00 to run our Police Force at its present capacity. One-sixth of the revenue would amount to considerable over \$200,000.00.

"Will you not please check up this matter for me and advise me what the construction of the Attorney General's office is regarding same at your earliest possible convenience? The Mayor and City Council took off 60% of the Police pay-roll from April 1st to April 15th, as we had run over our appropriation of \$170,000.00 that amount. We will have another pay-roll to meet on April 30th and should have the information several days in advance so that we might know what action to take if the Mayor and City

Council cut the annual appropriation, as has been threatened."

St. Joseph operates as a city of the first class under the provisions of Article II, Chapter 38, R. S. Mo. 1929.

Section 6364, Laws Mo. 1937, page 389, provides for the police personnel and gives the Police Board power to appoint police officers, as the service requires, but fixes and limits the number, salaries and the term of office of said police officers. By this section the Legislature has set up a scheme of organization for the Police Department which the Board is bound to follow in the performance of their duties.

Section 6369, R. S. Mo. 1929 provides as follows:

"It shall be the duty of said board, prior to the 25th day of April of each year, to estimate what sum of money will be necessary for each current fiscal year to enable them to discharge the duties hereby imposed upon them, and they shall forthwith certify the same to the common council of such city, who are hereby required, in each monthly appropriation or ordinance of that fiscal year, to set apart and appropriate the one-twelfth part of the amount so certified, which sum shall at once be paid by the city treasurer to the treasurer of the board of police upon a warrant drawn by the president and countersigned by the comptroller: Provided, that if the said board shall be required to create an extra police force, as provided herein, and the expense of such extra force be contemplated in their said estimate, they shall immediately certify the expense of such additional force to the common council, who are hereby required, as soon as possible, to set apart and appropriate the additional amount so required, agreeably

to this section. The said board of police are hereby authorized to make requisition from time to time upon the mayor, auditor, treasurer, comptroller or other proper disbursing officer or officers of the corporation of such city for such sums as they may deem necessary for executing their duties under this article, and the sums so required shall be paid by said proper disbursing officer or officers out of any money in the city treasury not otherwise appropriated: Provided, that in no event shall a common council be required to appropriate for the use of the police board in any fiscal year an amount of money in excess of one-sixth of the revenue of such year; and provided, also, that the amount so required or drawn shall not exceed in any one year the amount certified as aforesaid to the common council for that year, including any additional amount which may have been ordered by said common council to be paid for or on account of any extra police force as hereinbefore provided; that the common council of the city shall have no power or authority to levy or collect any tax or appropriate and disburse any money for the payment of any police force other than that to be organized or employed under this article, and the power of the mayor and common council of such city to appropriate and disburse money for the payment of the police force to be organized or employed under this article shall be exercised as in this section directed, and not otherwise: Provided further, that said police board shall not increase any salary and shall not increase the number of men on the force unless authorized so to do by the city council; but it may reduce the number of men or officers, or both, at any time that it may think proper or necessary."

As we understand it, your question might be stated thus: What revenue is meant in the foregoing proviso which reads as follows: "Provided, that in no event shall a common council be required to appropriate for the use of the police board in any fiscal year an amount of money in excess of one-sixth of the revenue of such year"?

In the case of *State ex rel. vs. Gordon*, 266 Mo. 394, the Supreme Court discussed the question of the meaning of the word "revenue", as used in connection with state finances. After enumerating the various definitions of the word "revenue", the court said: (l.c. 407-8)

"Clearly the word 'revenue' is broader than and includes taxation, as well as all other sources of municipal income. Revenue may be said to be the genus, while taxation is but a species. We are convinced therefore that the word 'revenue,' as used in the appropriation act under discussion, when standing alone, and when not modified by the word 'ordinary' (which we shall later discuss, when we come to sum up our conclusions), means: The annual and current income of the State, however derived, which is subject to appropriation for general public uses. This excludes such income as the Constitution, or any permanent existing law, may specifically devote to a special purpose, in contradistinction to a general public use or which is not required to be paid into the State Revenue Fund, but into a special fund, e. g., the collateral inheritance tax, specifically collected for the support of the State University and its departments (Sec. 312, R. S. 1909); the money derived from license fees on motor vehicles (Laws 1911, p. 331, sec. 13); fees paid into the State Treasury to the credit of the 'Insurance Department Fund' (Sec. 6884, R. S. 1909); and others of similar sort."

April 27, 1938

Following the foregoing definition and applying same to city finances, the meaning of the word "revenue", as applied to city revenue, would be the annual and current income of the city, however derived, which is subject to appropriation for general public uses. Such a definition would automatically exclude such revenue as the city collects for specific purposes, since such revenue is "ear-marked" when it comes into the treasury. For example, money derived from a library tax is not subject to appropriation by the common council for general public uses, such as street repairs, street lighting, etc., and hence such money would not be a part of the revenue of the city as that term is used in the statute under discussion. Likewise, money derived from other special taxes would not be a part of the revenue of the city which could be appropriated by the common council for general public uses.

CONCLUSION.

It is, therefore, the opinion of this office that the word "revenue", as used in Section 6369, R. S. Mo. 1929, means the annual and current income of the city, however derived, which is subject to appropriation by the common council for general public uses.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

COUNTY TREASURER: If County Treasurer elects to give surety
bonds and County Court accepts same, the
BONDS: premiums are to be paid by the County Court.

July 29, 1938

Hon. Elvin S. Douglas
Prosecuting Attorney
Folk County
Bolivar, Missouri



Dear Mr. Douglas:

We have received your letter of July 20 which reads
as follows:

"I direct your attention to Section 1
relating to Bonds, of the Sessions acts
of 1937, page 190.

"Our County Treasurer gave a surety bond
when he took office. It was accepted by
the County Court, with the express under-
standing that he paid for same himself, and
that the County would not be expected to
pay the premiums on same.

"Of course, besides the County, the Schools
and Special Road districts are protected
by the surety bonds, as well as the Capitol
School fund.

"If no such agreement had been made by the
County Court and Treasurer, in your opinion
would the County have been liable for the
total amount of the premiums on said surety
bonds, or would the various bodies and funds

July 29, 1938

protected have been liable for their pro rata share of such costs.

"Assuming that the above agreement is binding on the treasurer, in your opinion did this relieve other bodies and funds protected by said bonds from their liability to pay their pro rata share of such premiums, if they are liable in any case, absent agreement to the contrary, by the bodies themselves."

You state that the County Treasurer gave a surety bond when he took office and that the same was accepted by the County Court. This procedure fully satisfies the requirements outlined in the Laws of Missouri, 1937, at page 190 in connection with the posting of a surety bond. This particular law with respect to county officers provides in effect that whenever any officer of any county of this State shall be required by law to enter into any official bond "he may elect, with the consent and approval of the governing body of such * * county" to enter into a surety bond or bonds with a surety company or surety companies authorized to do business in Missouri. Consequently, since the County Treasurer has elected to file a surety bond and since the County Court has accepted and approved same, the requirements of this statute have been fully met and the surety company bond is proper.

This law passed by the 1937 Legislature further provides that the cost of every such surety bond shall be paid by the public body protected thereby. In this connection we are enclosing herewith a copy of an opinion dated October 5, 1937, rendered by this office to the Honorable Alvin H. Juergensmeyer, Prosecuting Attorney of Warren County, which holds that if the County Treasurer elects to file a surety bond and the governing body, that is the County Court, approves, then in that event the County Court would be required to pay the premium on such surety bond; that if these two requirements are met, it is incumbent upon the County Court as the governing body to pay the premium on the same.

Assuming that the County Court had agreed to accept a particular surety bond or bonds and that there was no additional

agreement whereby the County Treasurer agreed to pay the premiums on the same, you ask whether the county would be liable for the total amount of the premiums on the surety bonds or "would the various bodies and funds protected have been liable for their pro rata share of such costs."

This particular question was answered by this department in an opinion dated February 28, 1938 and addressed to the Honorable Virgil L. Ratabun, Prosecuting Attorney of Nodaway County, Missouri. In this opinion we said:

"It is also the opinion of this office that the county court is liable for the premium on a surety bond lawfully consented to and approved by the county court in the full amount of the premium for the reason that the public body protected is the governing body of the county, in other words, the county court. The county treasurer is not compelled to give separate bonds to the state township or various school districts, but only under the general law and under the special law providing for surety bonds, to the county court."

It is therefore our opinion that the County Court must pay the premiums on all surety bonds accepted and approved according to law in connection with the office of County Treasurer under the terms of the Laws of Missouri, 1937, at page 190.

For the purposes of this opinion you also asked us to assume that the agreement between the County Treasurer and the County Court was binding and with this assumption you desired to know whether such agreement would "relieve other bodies and funds protected by said bonds from their liability to pay their pro rata share of such premiums." We think what we have said above likewise answers this question. If the Treasurer submits a surety company bond for any statutory purpose and it is accepted and approved, the County Court is liable for the premium.

July 29, 1938

The County Court is expressly made liable as the governing body, and there is no liability placed on the separate bodies or funds. The statute does not say that any fund shall be liable, but rather the governing body. It is a well recognized general rule of law that no payments can be made out of a public fund, nor is a public body liable for the payment of any obligation nor can it pay out any amounts whatsoever, without direct statutory authorization for such payment. We are not aware of any law which specifically permits the payment of such expenditures out of the several funds you mention, particularly in connection with the office of the County Treasurer.

CONCLUSION

It is, therefore, our conclusion that if the County Treasurer offers corporate surety bonds, and the same are accepted by the County Court, the County Court is liable for the payment of the premiums thereon; that the said premium or a portion thereof cannot be paid out of certain funds, such as the School Fund, held by the County Treasurer even if the County Court can legally contract away its statutory duty to pay for any of such bonds which it approves.

Respectfully submitted

J. F. ALLERBACH
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

JFA/w

COUNTY OFFICERS - Prosecuting Attorney may tender resignation
to the Governor.

3/10

March 7, 1938



Honorable Edward L. Drum
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

We acknowledge your request for an opinion
in your letters of February 27, 1938 and March 3,
1938, which said letters read as follows:

"Please provide me with a form and
instructions, for an elective of-
ficer of this county, who desires
to file his resignation of such
office.

"To whom should such resignation be
forwarded and is there any formal
proceeding for such resignation
to become effective."

"Referring to the enclosed letter,
please be advised, the office re-
ferred to is Edward L. Drum, Prose-
cuting Attorney within Cape Girar-
deau County, Missouri, elected at
General Election 1936, for a period
of two years.

"I am contemplating running for Mayor
of the City of Cape Girardeau. I
intend to make the race and if elected,
offer my resignation as Prosecuting
Attorney, before qualifying as Mayor,
which time for such qualification would
be one week after general city elec-
tion.

"Would this resignation take effect immediately upon filing it?

Article XIV, Section 5, Missouri Constitution, sanctions the right of a Prosecuting Attorney to resign from office during his official term, and provides:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Article V, Section 11, Missouri Constitution, relating to filling vacancies in office, provides:

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

We find no statutes in Missouri touching upon filling vacancies in the office of Prosecuting Attorney. Article V, Section 23, Missouri Constitution, provides as follows:

"The Governor shall commission all officers not otherwise provided for by law. All commissions shall run in the name and by the authority of the State of Missouri, be signed by the Governor, sealed with the Great Seal of the State of Missouri, and attested by the Secretary of State."

In the case of State ex rel. vs. Augustine, 113 Mo. 21, 1.c. 24, the Supreme Court said:

"It is well established law, that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment. ***

"By section 11, article 5, Constitution of Missouri, it is provided that: 'whenever any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy,' etc. It seems that no provision exists in our statutes for filling the vacancy of county treasurer. Hence it follows that the power of appointment remains, as directed by the constitution, with the Governor. And the authority to fill the vacancy being with the Governor, here likewise rests the power to accept the resignation. In order then to create a vacancy in the office held by Augustine his resignation must have been lodged with the Governor, and by the Governor accepted. There being no particular mode pointed out by statute or by the Constitution, this resignation may be in writing or by parol. No particular form is required. It is only necessary that the incumbent evince a purpose to relinquish the office -- that this purpose be communicated to the proper authority, and that this resignation be accepted either in terms, or something tantamount thereto, such as appointing a successor, etc. ***

March 7, 1938

"When this resignation shall have been communicated to the proper authority and the same shall be accepted -- whether formally or by the appointment of a successor -- it is beyond recall, it cannot then be withdrawn."

CONCLUSION

In view of the above citations, we are of the opinion that since no specific mode of resigning from the office of Prosecuting Attorney is pointed out in the Missouri Constitution or statutes, it is merely necessary that you evince to the Governor, by writing, or by parol, your purpose to relinquish your office. No particular form of resignation being prescribed by law, we cannot furnish you any form, as requested. Your resignation becomes effective whenever the Governor evidences his intention of accepting same by word or overt act, and the appointment of a successor to the office is all the overt act necessary to a valid legal acceptance of your resignation.

One holding the office of Prosecuting Attorney in Missouri, under our Constitution, as you do, holds over until his successor be appointed, should you tender your resignation.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

CONTRACTS:) Contract may be amended to permit a retention
STATE OFFICE BUILDING:) of 10% on payments to the contractor on
monthly estimates.

March 25, 1938



Honorable Edgar M. Eagan
Executive Secretary
Permanent Seat of Government
Jefferson City, Missouri

Dear Mr. Eagan:

This Department wishes to acknowledge your request for an opinion under date of March 22, 1938, wherein you state as follows:

"Our contract documents for the construction of the State Office Building provides for a fifteen per cent (15%) retainage on the monthly estimates. This figure was inserted in the original forms in compliance with our general statutes.

A question has arisen on this point. Mr. A. L. Lehr, of the Lehr Construction Company, has called my attention to Section 3, at page 414, Laws of Missouri, 1937, under which we operate, in which it provides that 'Such per centage not less than ten' may be retained.

It seems that the fifteen per cent (15%) retainage works an unusual hardship upon the contractor and, therefore, Mr. Lehr has requested the reduction in conformity with the work under the State Building Commission. Please give me your opinion as to whether or not the retainage can be reduced to ten per cent (10%) under the law."

Article 7 of the Agreement for the construction of the state office building at Jefferson City, Missouri, entered into by the State of Missouri acting by and through the Board of Permanent Seat of Government and the Lehr Construction Company of St. Joseph, Missouri, makes the following provision for progress payments:

"The State of Missouri shall make payments on account of the contract as provided herein, as follows: On or about the tenth day of each month, 85% of the value, based on the contract price, of labor and material incorporated into the work and of materials suitably stored in reasonable quantities at the site thereof, up to the last day of that month, as estimated by the Architects, less the aggregate of previous payments; and upon completion of the entire work, the sum sufficient to increase the total payments up to 85% of the contract price."

Section 13746 R. S. Missouri 1929, is a general statute relating to public buildings and improvements and provides the manner of payment of contractors where more than Five thousand dollars has been appropriated by the General Assembly for the erection of a new building, as follows:

"All appropriations made by the general assembly amounting to five thousand dollars or more, for the erection of new buildings on state account, or for the repairing of buildings already erected on state account, shall be drawn from the state treasury only in the manner herein provided. After being furnished with satisfactory evidence that a bona fide contract has been entered into for the erection or repairing said building or buildings, and not less than thirty days after the contractor has commenced work, the state auditor may draw his

warrant on the state treasury, in favor of the contractor entitled thereto, for 85 per cent. of the value of all labor and materials incorporated in the work, or for materials which have been delivered on the site of the building and accepted by the architect or engineer in charge, such value being calculated in proportion to the contract amount; and thereafter not oftener than once each month the state auditor may draw his warrant on the state treasury in favor of the contractor for 85 per cent. of the value of all labor and materials furnished and computed in the same manner, less all previous payments made; and upon being furnished satisfactory evidence that the contract has been satisfactorily completed and the work accepted, the state auditor shall draw his warrant on the state treasury in favor of the contractor, for the balance due on contract; Provided, that all estimates of labor and materials furnished shall be prepared and certified correct by the architect or supervising engineer in charge, and approved by proper officials of the institution, commission, or board responsible for such construction: Provided further, that in no event shall an amount exceeding 85 per cent. of the entire contract price be paid to the contractor until the final payment is made after the contract is satisfactorily completed and work accepted; and, provided further, that in no case shall the amount contracted therefor exceed the amount appropriated by the general assembly for such purpose."

The 59th General Assembly authorized the construction, furnishing, equipping and maintenance of a state office building at Jefferson City, Missouri, and appropriated the sum of \$850,000.00 for such purposes (Laws of Missouri 1937, Sec. 48-c, page 46).

March 25, 1938

Section 3 of the Laws of Missouri 1937, page 414, is a special statute and provides the manner of payment to the contractor who holds a contract for the erection of the state office building, in part as follows:

"Such percentage not less than ten, as in its judgment the board shall deem proper, shall be reserved from payments on the monthly estimates or work contracted for, until such contract or the portion thereof to which such payments are applicable shall have been completed, inspected and accepted by the Board."

In the case of State vs. Brown, 68 S. W. (2) 55, 1. c. 59, 334 Mo. 781, the Court in holding that a special statute, if later than the general one relating to the same subject matter, will be regarded as an exception to or qualification of a prior general one, said:

"Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; * * *"

The latter statute authorizing the Board of Permanent Seat of Government in its judgment to retain not less than 10% from payments to the contractor on the monthly estimates is a qualification of the general statute which requires a reservation of at least 15%.

From the foregoing we are of the opinion that the Board may in its judgment amend Article 7 supra of the contract it has with the Lehr Construction Company for construction of the State Office Building, to permit a retention of 10% on the payments to the contractor on the monthly estimates instead of the present 15% retention.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

**POLL TAX: What poll tax may be levied and collected in
counties under township organization.**

March 25, 1938



Mr. Charles F. Elmore
Salisbury, Missouri

Dear Sir:

Pursuant to your request, I have prepared the following opinion concerning the poll tax law of Missouri in counties under township organization.

At the 1937 session of the legislature, Laws of 1937, page 440, the following bill was passed:

"That Sections 7879, 7880, 7881, 7882, 7883, 7884, 7885, 7886, 7887, and 7888 of Article Three (3), Chapter Forty-two (42) of the Revised Statutes of the State of Missouri for the year 1929 and Sections 8157, 8158, 8159 and 8160 of Article Fifteen (15), Chapter Forty-two (42) of the Revised Statutes of the State of Missouri for the year 1929, be and the same is hereby repealed."

This act repeals all the statutes providing for the levying and collection of poll taxes by counties in this State, with the exception of those poll taxes which cities and villages are authorized to collect. Sections 8157 to 8160, inclusive, R.S. Missouri, 1929, relate to the levying of poll taxes in counties under township organization. Section 8158, R.S. Missouri, 1929, provides that township boards shall, at the regular April meeting, levy a poll tax for road purposes, and that this levy shall be made in the same manner, collected in the same way, and subject to the same restrictions as is provided for in those counties not under township organization.

Section 7880, R.S. Missouri 1929, provides the manner in which poll taxes shall be collected in counties not under township organization. This section provides that the tax levied shall apply to all able bodied males between the ages of twenty-one (21) and sixty (60) on March 1 of the current year for which the tax was levied, except persons residing within incorporated cities. The tax levied shall not exceed \$4.00. Those who desire to work out the tax at the rate provided by statute must be given two days' notice before the work is to be done.

The provisions of Section 7880, R.S. Missouri 1929, apply to the collection of poll taxes in counties under township organization with the additional requirement made in Section 8158 that if the township adopts the contract system of working roads, said taxes shall be paid in money.

Section 7881, R.S. Missouri 1929, provides that the district road overseer shall notify all poll taxpayers by at least four written notices posted in said district on or before June 1st of the amount of poll tax levied. The taxpayer then must pay the tax or make arrangements, by giving fifteen days' notice to the road overseer, to pay his tax in labor. If the tax is not paid by July 1st, then a suit may be instituted in the name of the road district before any Justice of Peace to recover the tax. Section 7886, R.S. Missouri 1929, provides that suit shall be filed not later than September 1st of each year, but the failure to file by this time shall not be a defense to the action.

Section 7887, R.S. Missouri 1929, makes it the duty of the prosecuting attorney to represent the road districts in an action to enforce the tax.

The act repealing the poll tax law became effective on September 6th, 1937, after the poll tax for the year 1937 had accrued and become due and payable on or before July 1st.

Section 660, R.S. Missouri 1929, is as follows:

"The repeal of any statutory provision shall not affect any act done or right accrued or established in any proceedings, suit or prosecution, had or commenced in

any civil case previous to the time when such repeal shall take effect; but every such act, right and proceeding shall remain as valid and effectual as if the provisions so repealed had remained in force."

In *Union Pacific Railroad Company v. Board of Commissioners*, 217 Fed. 540, a case in which many decisions are cited and considered, it is held that: Laws repealing an act providing for the levying and collection of taxes do not act retrospectively; the time the tax accrues fixes the rights and duties of the public and taxpayers; and that the remedies which the law afforded before the repeal follows the tax until collected. To the same effect is 61 C.J. 1012, and *Cooley on Taxation*, Vol. 2, page 1181.

In *State ex rel. v. Hackman*, 270 Mo. 1.c. 609, the court, in construing what is now Section 660, R.S. Missouri 1929, along with other relative sections, said:

"These sections, construed together, so modify a repealing statute, as to not only render valid initiatory or preliminary acts in the exercise of a power conferred by a former statute, but authorize such subsequent acts as may be necessary to effect the purpose originally contemplated. * * * * * The limitation of the operative effect of these sections to judicial transactions as contended for by respondent, is not in accord with their terms, nor with the evident purpose of their enactment. Their general nature authorizes the conclusion that they were intended to continue in force repealed laws until proceedings commenced thereunder, regardless of their nature, might be completed."

Therefore, it is clear that the poll tax levied and assessed for the year 1937, having accrued and become payable before the poll tax act was repealed, is collectible in the same manner as though the repealing act did not exist.

Section 8181 provides for a poll tax in Special Road Districts in counties under township organization. This section provides that the Board of Commissioners of any such Special Road District shall, on or before the 30th day of April of each year, levy a poll tax on all male inhabitants over twenty-one (21) and under fifty (50) years of age. The levy thus made is certified to the County Clerk and the tax is to be collected by the township collector as other personal taxes. This section provides "the Commissioners shall levy such poll tax as may be levied by the township boards". The provision just quoted refers the commissioners of the Special Road Districts for their authority to fix the amount of the tax to the same authority that township boards have. The authority for township boards to assess the poll tax is found in Section 8158, R.S. Missouri 1929, which has been expressly repealed.

In State ex rel. v. Patterson, 207 Mo. 129, 143, it is said:

"Where a repealing statute expressly repeals certain sections of a statute by numbers, or a specified portion of another act, or even repeals one clause of a certain section, it follows that in the judgment of the Legislature no further repeal was necessary or intended."

While the above is correct, there are other rules of construction, as stated by our courts and text writers, which are pertinent to the question of whether or not the poll tax provided in Section 8181, R.S. Missouri 1929, is also repealed by the enactment in Laws of 1937, page 440, in so far as said section relates to the levy and collection of a poll tax in Special Road Districts.

In *State v. Williams*, 237 Mo. l.c. 182, the rule is stated as follows:

"The rule of construction where one statute adopts another, is that, if the adopting statute specifically designates the title or date of the statute adopted, then the repeal or amendment of the statute thus adopted will not affect the adopting statute. (*Culver v. People*, 161 Ill. 89).

"When a statute like the one now under consideration refers to the general provisions of the law on a given subject for its interpretation, then an amendment of the general laws on that subject effects a corresponding amendment of the statute adopting them. (2 Lewis's *Sutherland on Statutory Construction*, (3 Ed.), p. 790, sec. 406.)"

In *Culver v. People*, 161 Ill. 89, 92, it is further held:

"Where, however, the adopting statute makes no reference to any particular act by its title or otherwise, but refers to the general law regulating the subject in hand, the reference will be regarded as including, not only the law in force at the date of the adopting act, but also the law in force when action is taken, or proceedings are resorted to."

The Supreme Court of Missouri in *Gaston v. Lamkin*, 115 Mo. l.c. 33, has said concerning this, that:

March 25, 1938

"The general rule governing in such cases seems to be, that where one statute refers to another for rules of procedure prescribed by the former, the former statute if specifically referred to, becomes a part of the referring statute, and the rules of procedure prescribed by the earlier statute so far as they form a part of the second enactment, continue in force, although the earlier statute be afterwards modified or repealed. But when the subsequent statute, being a general one, does not refer specifically to a former statute for the rule of procedure to be followed, but generally to the established law, by some such expression as 'the same as is provided for by law' in given cases, then the act becomes a rule for future conduct to be found when needed by reference to the law governing such cases at the time when the rule is invoked."

To the same effect is the holding in *Newman v. City of North Yakima*, 34 Pac. 921 (Wash.).

Section 8181, R.S. Missouri 1929, refers the Board of Commissioners of the Special Road District, not by specific reference by numbers, to the general law regulating township boards in the levy of poll taxes by saying "the commissioners shall levy such poll tax as may be levied by the township boards". This general reference causes this section to fall within the rules as stated above; the rule for levying poll taxes under Section 8181 is to be taken from the law as it exists at the time the rule is invoked, or that is to say, when the tax is levied.

The poll tax provided for in Section 8181 is collectible for the year 1937 for the same reasons we have heretofore pointed out with reference to the poll tax provided in Sections 8157 to 8160 inclusive, that is, because said tax accrued before the act was repealed.

Sections 8156, pp. (1), R.S. Missouri, 1929, makes it the duty of the road overseer to make a list of all persons residing in his district subject to the payment of poll taxes, and to file the same with the township clerk before March 20 of each year. Subsection (1) of Section 8156, R.S. Missouri, 1929, is repealed by implication because no tax being provided for, after that for the year 1937 is collected, the duty of the road overseer to submit a list of persons subject to the tax becomes unnecessary.

CONCLUSION

Therefore, the repeal of Sections 8157 to 8160, inclusive, in R.S. Missouri, 1929, abolishes poll taxes in counties under township organization, except those taxes levied and accrued for the year 1937 before said sections were repealed. These are to be collected as though the repealing act was never enacted. The poll tax provided for in Section 8181, R.S. Missouri, 1929, the amount being governed by Sections 8157 to 8160, inclusive, of the general law pertaining to poll taxes in counties under township organization, is also abolished except for the tax levied and accrued for the year 1937 for the reasons aforesaid.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

PENITENTIARY: Measure of punishment upon conviction as habitual criminal.

October 3, 1938

10-8



Mr. Robert C. Edson
Director of Probation and Parole
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 29 which reads as follows:

"Dan Adamson, #49625, was sentenced to the penitentiary for a term of six years from March 30, 1937, for Carrying Concealed Weapons, and was sentenced under the Habitual Criminal Act, Section #4461, Revised Statutes of Missouri, 1929.

This man served three prior sentences in the penitentiary; three years for Stealing Chickens in the Night time; two years for Stealing a Car; and two years for Stealing Chickens in the Night time.

The prisoner complains that the sentence of six years under his charge is excessive by four years and that the trial court only had jurisdiction to sentence him for a maximum of two years.

What is the legal maximum sentence which the court could impose on one convicted of Carrying Concealed Weapons under the Habitual Criminal Act?"

Section 4461, R.S. Missouri, 1929, provides as follows:

"If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

Our Supreme Court has held that the above statute does not create a separate offense, but merely subjects the second offender to heavier punishment, and in *State v. Hefflin*, 89 S.W. (2nd) 938, 103 A.L.R. 1301, the court said:

"It has been held several times, the habitual criminal statutes themselves do

not create any separate offense, but merely subjects second offenders to heavier punishment for the crimes they commit."

This additional punishment to which a second offender is subjected is based upon the offender's guilt for the subsequent offense charged after pardon or discharge for a prior crime, and said additional punishment is measured by the maximum punishment prescribed for the subsequent crime, and in *State v. Krebs*, 80 S.W. (2d) 196, 1.c. 198, 336 Mo. 576, the court said:

"It will be noted that the section contains three numbered divisions. The first provides that if the subsequent offense, for which the defendant is on trial, be such that upon a first conviction he would be punishable by imprisonment in the penitentiary for life, or for a term which might extend to imprisonment for life, then the punishment to be assessed under the section shall be life imprisonment. Under the second division, if the punishment for the crime upon a first conviction would be imprisonment in the penitentiary for a limited term of years, then imprisonment under the section shall be for the maximum term thus prescribed."

Section 4029, R.S. Missouri, 1929, makes it a crime to carry concealed weapons and provides that one found guilty "be punished by imprisonment in the penitentiary not exceeding two years".

CONCLUSION

The maximum punishment for one guilty of carrying concealed weapons is two years in the penitentiary. Where one is charged as a habitual criminal with the crime of carrying concealed weapons, the trial court, on conviction, only had jurisdiction to sentence the prisoner for the

Mr. Robert C. Edson

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October 3, 1938

maximum punishment of two years in the penitentiary, and any sentence of six years on such a conviction is excessive by four years.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

WOS:VAL

CITIZENSHIP: A defendant does not lose his citizenship even though convicted of a felony, if the punishment is a jail sentence or fine; if the court paroles him he is restored to citizenship rights under Section 3820, R. S. 1929.

October 24, 1938

Honorable Robert C. Edson
Director of Probation and Parole
State of Missouri
Jefferson City, Missouri



Dear Mr. Edson:

Some time ago you submitted a question to this Department as to whether or not one Carl Darrow had lost his citizenship by reason of a certain conviction. Your letter is as follows:

"Pursuant to our telephone conversation concerning the restoration of citizenship of one Carl Darrow, I am herewith submitting to you the details of this case.

"Carl Darrow was arrested by J. W. McFarland, Deputy Constable, in St. Joseph, Missouri, charged with flourishing a deadly weapon, to-wit, a rifle, on March 2, 1935; he had preliminary hearing before Justice Balch, and his case was certified to the May term of Circuit Court in 1935. On June 5, 1935, he was tried in Division No. 3 of the Circuit Court before a jury, and found guilty, and given one year in jail. His case was appealed to the Supreme Court, where the decision of the Circuit Court was affirmed on March 11, 1937. He then applied for a parole through his attorney, Charles F. Keller.

This request was turned down and he was sent to jail May 5, 1937. Later he again applied for a parole through Mr. Keller, and this time he was granted a parole and released from jail November 20, 1937. The same Carl Darrow addressed a communication to Honorable Lloyd C. Stark, Governor of Missouri, in which he requested that Governor Stark restore him to full rights of citizenship. This in brief is a summary of the facts in the case.

"It will be greatly appreciated if we might have an opinion from you as to whether this subject, having been charged with a graduated felony and sentenced to serve one year in the county jail of Buchanan County, lost his citizenship as a result of this conviction and sentence to the county jail, and whether it will be necessary for Governor Stark to issue an order restoring him to full rights of citizenship."

In determining the ultimate conclusion it will be necessary to consult various statutes which bear directly or indirectly on the question.

We assume that Darrow was convicted under Section 4029, R. S. Mo. 1929, under the following provision:

"* *or shall, in the presence of one or more persons, exhibit any such weapon in a rude, angry or threatening manner, or shall have any such weapon in his possession when intoxicated, * * *"

The punishment prescribed by the statute is,

"he shall, upon conviction, be punished by imprisonment in the

penitentiary not exceeding two years, or by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than one year, or by both such fine and imprisonment:"

We note that the statute is, insofar as the punishment is concerned, what is commonly known as graduated felony, in that the person convicted may be sentenced to the Penitentiary or to the county jail. In the instant case Carl Darrow was given one year in jail.

Section 4471, R. S. Mo. 1929, defines a "felony" as follows:

"The term 'felony,' when used in this or any other statute, shall be construed to mean any offense for which the offender, on conviction, shall be liable by law to be punished with death or imprisonment in the penitentiary, and no other."

Section 4029, referred to above, has been construed as a felony section in the decision of *State v. Brown*, 267 S. W. 864, wherein the court said:

"Defendant was convicted in the circuit court of the city of St. Louis of the crime of carrying concealed weapons, and was sentenced upon the verdict of the jury to imprisonment in the workhouse of said city for six months. His appeal was properly lodged here, for the reason that the crime for which he was convicted, as defined by section 3275, R. S. 1919, is punishable by imprisonment in the penitentiary, and is therefore a felony. Section 3712, R. S. 1919."

Other decisions of the court which have declared an offense punishable by imprisonment in the Penitentiary not a misdemeanor because a fine or jail imprisonment was assessed, are: State v. Gilmore, 28 Mo. Ap. 561; State v. Melton, 117 Mo. 618. Therefore, irrespective of the fact that the defendant received a sentence of one year in jail and was not confined in the Penitentiary, we are of the opinion that he was convicted of a felony within the meaning of the statute.

By Article V, Section 8, of the Constitution of Missouri, the Governor is empowered to grant pardons, paroles and commutations. By Section 3798, R. S. Mo. 1929, the Governor is empowered by statute to grant pardons, which said section is as follows:

"In all cases in which the governor is authorized by the Constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper."

Numerous statutes, such as Sections 3928, 3947, 3963, 4035, 4212 and 4404, R. S. Mo. 1929, define what crimes shall constitute or cause loss of citizenship. We find no section which specifically states that a crime committed under Section 4029, supra, shall cause loss of citizenship.

Section 4172, R. S. Mo. 1929, is as follows:

"Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust

or profit, within this state; Provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years; Provided further, that in all cases where persons have been convicted under this article the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."

The above section appears to be general in its terms but contains, like all other sections relating to the loss of citizenship, the clause, "under the provisions of this article." It therefore becomes necessary to consult the Constitution of the State of Missouri. Article VIII, Section 2, provides in part:

"* * no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Noting that the Constitution says that persons "may * * * convicted of a felony, be excluded from the right of suffrage," it is necessary for us to consider Section 10178, R. S. Mo. 1929, which prevents persons convicted of a felony from voting. Said section provides in part as follows:

"* * *nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a

full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

A collateral issue which enters into the question but which should be disposed of is the question of the circuit court's authority to grant Darrow a parole after he had appealed to the Supreme Court and the court had affirmed the sentence. We cite *State ex rel. Gentry v. Montgomery*, 317 Mo. 811, 1. c. 814, from which we herein quote. It will be noted in the decision, however, that the circuit court paroled the defendant at the time of his conviction and the parole became a part of the judgment. The situation differs as to Darrow in that he was not paroled at the time he was convicted but after the mandate was received and the case affirmed and he was placed in jail, the court later paroled him. Quoting from the above case, it is said:

"When this court reviewed the judgment of the circuit court in the case of *State v. Horton*, the parole law of the State was a part of that judgment. We affirmed the judgment on the first count as a whole. When the trial court received our mandate with directions to execute the judgment, it clearly had the power to grant a parole to the defendant, for the reason that the judgment at all times, whether it be considered a judgment of the circuit court or a judgment of this court, contained our parole law as a part of the judgment. Therefore, it is of no consequence whether the judgment be considered a judgment of the circuit court or a judgment of this court at the time of its execution. While the parole law is a part of the judgment in some felony cases, the trial court loses the power to grant a parole in a felony case on affirmance of the judgment, for the reason that by

Section 4095 and 4096 this court is directed to have its marshal execute the sentence pronounced. This court having no authority to grant a parole, must execute the sentence according to the punishment assessed on the trial."

The reason mentioned by the court that the Supreme Court had no power to grant a parole in a felony case on affirmance of the judgment for the reason that under Sections 4095 and 4096, R. S. Mo. 1929, the marshal is directed to execute the sentence pronounced, we think is not always applicable for the reason that the marshal has no authority to carry out the mandate of the Supreme Court only in the event the defendant is actually sentenced to the Penitentiary. In other words, the above decision can be followed if the facts in the individual cases are such that the decision covers.

We think under Section 3810, R. S. Mo. 1929, which is as follows:

"The courts named in section 3809 of this article, or the judge thereof in vacation, subject to the restrictions hereinafter provided, may, in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed by said court, or any person actually confined in jail under judgment of a justice of the peace, or sentenced to the state industrial home for girls, or to the Missouri training school for boys, will, if permitted to go at large, not again violate the law, parole such person and permit him or her to go at large upon such conditions and under such restrictions as the court or judge granting the parole shall see fit to impose; such court or judge may at any time, without notice to such persons, terminate such parole by simply

directing execution to issue on the judgment, or, in case the person, shall have been actually confined in jail, the parole may be terminated by directing the sheriff or jailer to retake such person under the commitment already in his hands. After a parole has been terminated, as above provided, the court or judge may, in his discretion, after the payment of all costs in the case, grant a second parole, but no more than two paroles shall be granted the same person under the same judgment of conviction. If a parole shall be terminated, the time such person shall have been at large on parole shall not be deducted from the time he or she shall be required to serve; but the full amount of the fine shall be collected or the full time in jail, or the state industrial home for girls, or the Missouri training school for boys, be served the same as if no parole had been granted."

the court had the power to parole Darrow even though he had been convicted of a felony and the same had been affirmed, for the reason that he did not receive a penitentiary sentence. If we are correct in this conclusion, then the terms of Section 3820, R. S. Mo. 1929, relating to what is commonly referred to as "parole law" apply. Said section being as follows:

"Any person who shall receive his final discharge under the provisions of sections 3809 to 3821, inclusive, shall be restored to all the rights and privileges of citizenship."

Oct. 24, 1938

Conclusion.

We are of the opinion that Darrow by reason of the fact that he has been convicted of a felony has thereby lost his right of suffrage under the Constitution and the statutes, but if he has been finally discharged, under the terms of the parole which was granted him, his citizenship will thereby be restored under the terms of Section 3820, supra; but if he has not been finally discharged from his parole, then, if his citizenship is to be restored, it will be necessary for the Governor to restore the same by pardon.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

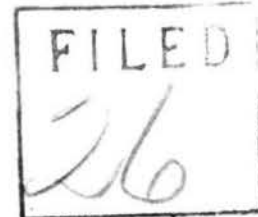
J. W. BUFFINGTON
(Acting) Attorney-General

OWN:EG

ROADS AND BRIDGES: Special road district cannot make claim and receive funds on a general levy of fifty cents on the \$100.00 valuation unless the levy is made under Section 7890 R.S. Mo. 1929.

November 2, 1938

Mr. George L. Elam
Clerk of the County Court
Ralls County
New London, Missouri



Dear Mr. Elam:

This Department is in receipt of your request for an opinion of sometime ago, and for convenience your letter is herewith quoted in full:

"In the year 1937 the County made a levy for county purposes of 50¢ on the \$100. valuation on all taxable property in the County. There was no levy made by the Court under Section 7890 for county road purposes. We have one special road district in the County, namely, the Nadine Special. On the money derived from the 50¢ County levy they demanded that they receive a part of that revenue and presented a claim to the County Court in the amount of \$417.02, which the Court allowed.

"Since that time this question has been debated here in the County as to whether or not the Nadine Special Road District was entitled to receive this money, and before it comes up again I would like for you to give me a written opinion setting out whether or not this Special road district would be entitled to any of the funds received from the county revenue rate."

We later wrote you for additional information and in your letter of October 27th you very kindly favored us with the same, which is as follows:

"In answer to your letter of July 22, will state that a levy of 15¢ on \$100. valuation was made under Section 7891 for the last several years on all valuation in the county, except in our only Special Road District (Nadine Special) so of course they are not entitled to any money from this levy.

"For a number of years before, and including 1935, the court made a levy of 10¢ under Section 7890. Since 1935 the Court has done away with this levy and at the same time raised the county levy from 40¢ to 50¢. This was done on account of the budget law and the court is now using Class #3 to take care of road expenses, other than the part paid by 7891 levy.

" In 1936 the Court budgeted \$10,000. in Class #3, which was approximately 10¢ on the County's entire valuation including Nadine Special Road and all cities. During the summer of 1937 the county was audited by State auditors.

"Mr. Bryan Tout, one of these auditors, informed me that Nadine Special District was entitled to a part of this levy of 50¢. I arrived at the amount of \$417.02 for Nadine Special District by giving them 10¢ on \$100. for their valuation of real and personal property. The Court has since been informed that they should not

only refuse to pay anything more but should demand that the \$417.02 be refunded to the County. I am sure the Court is not intending to ask for this refund. One reason the Court is confused is that if Nadine Special District is entitled to part of the 50¢ levy then our cities, seemingly, would also have something coming."

Since receiving the additional information we find it necessary to revise our opinion written under the facts as contained in your original letter.

Under Section 9867 R.S. Missouri 1929, certain taxes are to be assessed, levied and collected. Said section being as follows:

"The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz.: The state tax and the tax necessary to pay the funded or bonded debt of the state, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages and for schools."

Formerly under Section 9874 R.S. Missouri 1929, the revenue of a county was apportioned into five classes without priority payment. In 1933 the Legislature enacted a budget law which also apportioned the revenue of every nature for county purposes into five classes, each class receiving priority of payment over the succeeding class. Class 3, page 341, Laws of Missouri 1933, being as follows:

"The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

The above class refers only to the repair and upkeep on bridges and specifically excludes special road districts therefrom. Any funds which might have been allocated under the above class would not entitle the Nadine Special Road District to a claim for any amount of money.

We next consider Section 7890 R.S. Missouri, which is as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

Under this Section it has been construed that it is the mandatory duty of the county court to levy in some amount discretionary with the Court, of course not to exceed twenty cents on the One hundred dollar valuation. It has further been construed that when timely application is made by a special road district for its proportionate share of the funds derived under Section 7890 that said special road district is entitled to the same. State ex rel. vs. Burton, 283 Mo. 41; Billings Special Road District vs. Christian County, 319 Mo. 964. You state in your last letter that the County Court did not make any levy under Section 7891, therefore, the Nadine Special Road District is not entitled to demand or have any claim insofar as this section is concerned. It is needless to discuss Section 7891

for the reason that any levy made under said section is discretionary with the county court and you state in your letter that no levy in fact was made by the County Court. Therefore, this section is eliminated.

There must be some authority by statute for the payment of the same as was said in the case of Billings Special Road District, 5 S.W. (2d) 378, 1. c. 382:

"The revenues of a county are not the property of the county in the sense in which the revenue of a private person or corporation is regarded. A county being a public corporation existing only for public purposes connected with the administration of a state government, its revenue is subject to the control of the legislature, and when the legislature directs the application of a revenue to a particular purpose, or its payment to any party, a duty is imposed and an obligation created on the county."

CONCLUSION

A special road district under the statutes creating the same and defining its powers and limitations, is authorized if it so desires to levy its own tax and of course is entitled to the funds derived under its own levy, but in the absence of any such levy and in the absence of any levy being made under the sections heretofore discussed, the Nadine Special Road District insofar as the levy of fifty cents on the One hundred dollar valuation, is in the same position as a common or any other road district in the county. Under the facts which you have outlined, the Nadine Special Road District is not entitled to any more consideration or is in any better position to demand a claim than an individual or other political subdivision of the

Mr. George L. Elam

-6-

November 2, 1938

county. The total levy of fifty cents was a general levy on all the taxable property of the county, and for the further reason that there is no authority under any statute for the same we are of the opinion that the claim of \$412.02 demanded and paid by the Nadine Special Road District is illegal and should not have been paid.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

OWN:MM

CIRCUIT CLERK AND) : Cannot retain fees set out in Section 3248
EX-OFFICIO RECORDER: R.S. Missouri, 1929, in addition to salary.

January 4, 1938

FILED
27

Hon. Melvin Englehart
Prosecuting Attorney, Madison County
Fredericktown, Missouri

Dear Sir:

This department is in receipt of your letter of
December 21, 1937, which reads as follows:

"In re: Section 3248 R.S. Mo. 1929,
Article 2, Chapter 26.

"The above mentioned section provides:

'For making the transcript provided
for in Section 3246 in this Article,
the recorder shall be entitled to
such compensation as may be allowed
by the County Court, not to exceed
eight cents for every hundred words
and figures so transcribed, to be
paid out of the county treasury.'
Section 3246 provides that when any
books or records belonging to the
recorder of deeds in any county are
in a ruinous condition, the court
shall direct the recorder of deeds
to transcribe such record in a new
and suitable book. Is the compen-
sation provided for in Sec. 3248 a
part of the fees earned as provided for
in Section 11786, laws of 1937?

"Under the present law, passed by the
Legislature in 1937, the Circuit
Clerk now receives a salary of \$1700.
per year, exclusive of deputy hire, in
a county of the population of Madison
County, Missouri, and I would like to
know if the fees provided in Section
3248 are a part of his salary of \$1700
per year, or does he receive the fees
set out in Sec. 3248 in addition to his
salary?"

Salaries of Circuit Clerks are governed by Section 11786, page 445, Laws of 1937.

In the case of Perkins v. Burks et al., 78 S.W. 2nd 845, 1.c. 849-50, will be found a thorough discussion of the various statutes relating to the compensation of Circuit Clerks, and from that discussion, which is too lengthy to include in this opinion, it is clear that the legislature intended by the present act (Section 11786) to provide full compensation for this officer for his services as Clerk of the Circuit Court and ex-officio Recorder of Deeds by the salary therein provided for and the change of venue fees therein mentioned. In said case, after discussing the history of such legislation, the court said (1.c. 850):

"It is only possible to clear up the meaning of these sections by going to the Laws of 1915 for the original enactment. When this is done, it is clear that section 10995, R.S. 1919, now section 11786, R.S. 1929, is the only statute which provides for the compensation of circuit clerks."

In the foregoing case, the court was considering Section 11786, R.S. Missouri, 1929. That section was repealed in 1933 (page 369, Laws of 1933) and a new section bearing the same number was enacted. The said section of the 1933 laws was repealed in 1937, and the present Section 11786, page 445, Laws of 1937, was enacted. There is no change in the present statute in the method of payment of this officer, but the 1937 statute, together with Section 11813, page 447, Laws of 1937, further clarifies the intention of the legislature to provide a method of compensating the Circuit Clerk and ex-officio Recorder of Deeds by having him turn all fees collected by his office, except change of venue fees, into the county treasury and receive back from that treasury a salary.

Section 11786, as it now appears in Laws of 1937, after determining the amounts of salaries for Circuit Clerks in the various counties, reads as follows:

"Provided, that in any county wherein the Clerk of the Circuit Court is ex-officio Recorder of Deeds, said

offices shall be considered as one for the purpose of this Section; Provided, it shall be the duty of the Circuit Clerk, who is ex-officio Recorder of Deeds, to charge and collect for the county in all cases every fee accruing to his office as such Recorder of Deeds and to which he may be entitled under the provisions of Section 11804 or any other statute, such Clerk and ex-officio Recorder shall, at the end of each month, file with the County Clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such Circuit Clerk and ex-officio Recorder of Deeds, upon the filing of said report, to forthwith pay over to the County Treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the County Clerk, and every such Circuit Clerk and ex-officio Recorder of Deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County treasury as herein provided; Provided, further, that the Clerks of the Circuit Courts shall be allowed to retain in addition to the sums allowed in this Section, all fees earned by him in cases of change of venue from other counties."

It is clear from the foregoing that the fees provided by Section 3248, R.S. Missouri, 1929, are a part of the fees accruing to the office of the Recorder of Deeds and should be turned over to the County Treasurer.

Hon. Melvin Englehart

- 4 -

January 4, 1938

CONCLUSION

It is, therefore, the opinion of this department that the Circuit Clerk and ex-officio Recorder of Madison County cannot retain the fees set forth in Section 3248, R.S. Missouri, 1929, in addition to the salary provided for him by Section 11786, page 445, Laws of 1937, but it is his duty to turn said fees into the county treasury.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED BY:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

STATE BUDGET DEPARTMENT - Charles F. Carter not entitled to
back pay for services as Chief Clerk.

March 3, 1938

3-24



Honorable Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 15, 1938, in which you request the opinion of this office as to whether you could lawfully pay the claim of Charles F. Carter for back pay for a period of January 1 to June 10, 1937, as Chief Clerk, said claim being set forth in the letter of Mr. Carter to you which you enclosed and which reads as follows:

"Complying with your request permit me to submit the following statement in reference to my salary from January 1, 1937 to June 10, 1937 as your Budget Officer.

"First, I am asking for this back pay for the reason that the law and custom provides for readjustment of salaries during the early months of each biennium, it has always been done and it is necessary in order to have the salaries conformed to the appropriation.

"Second, I was paid \$300.00 per month during the biennium of 1933-1934 and the title for two months was known as 'Budget Commissioner' later, on opinion given by the Attorney General's office to the State Auditor, I was paid this \$300.00 per month but designated as 'Chief Clerk' for the remainder of that biennium, all of which the records will show.

"Third, During the early months of the 1935 Biennium I was still paid the \$300.00 per month but when the Legislature cut the appropriation my salary was readjusted to conform to the appropriation act and for the month of May 1935, I did not receive any salary and for the month of June I received \$198.98, all the while the records show I was designated as Chief Clerk of the Department of Budget.

"Fourth, On September 27, 1933, the Attorney General, Roy McKittrick, gave a written opinion to the Auditor. After discussing the law and the Constitution at length in his last paragraph he used this language. 'It is our opinion the Governor may also fix the amount of compensation to all employees hired by virtue of this act. While the administration of this act is left entirely to the discretion of the Governor as to hiring and fixing the amount of compensation of the employees, yet, he is limited to \$10,000.00 during the biennium for the payment of all salaries.' This opinion was accepted by the Auditor and salaries were paid accordingly.

"Fifth, The language of the appropriation act of 1937, so far as the Budget is concerned, is identical with the language of the appropriation act in 1933. The language of the 1935 act is not quite the same is the reason that the salary was cut during that biennium.

"Sixth, Mr. McGregor, the present Budget Officer, is paid \$300.00 per month, and properly so under the appropriation act. I am informed that he is designated as Assistant Director and Accountant, which title of course conforms with the opinion

of the Attorney General in 1933, in other words, since neither the law creating the Budget Department nor the appropriation act specifies exactly what shall be paid these employees it is left to the discretion of the Governor and the Director of the Budget to fix the salaries of these employees and to give them whatever title they wish, keeping in mind that they cannot exceed the department appropriation for personal service.

"Seventh, Mr. Wilcox compiled this section on the Budget, he not only approved it in conference with the Governors but Governor Park and Governor Stark likewise approved Mr. Wilcox's recommendation. The present Tax Commission and Governor Stark have also given approval to my request for this back pay, so according to the appropriation act and in conformity with the opinion of the Attorney General as above cited, I respectfully submit my claim to you for \$355.58."

It will be noted that the first three paragraphs of Mr. Carter's letter give a history of his connection with the Budget Department, and in the fourth paragraph he says: "Third, During the early months of the 1935 biennium I was still paid the \$300.00 per month but when the Legislature cut the appropriation my salary was readjusted to conform to the appropriation act **."

The appropriation act of 1935, to which he makes reference, provides for a salary of a Chief Clerk of \$2800.00 per annum (L. 1935, p. 36), and therefore, when he says his salary was readjusted to conform to that appropriation act, we take it his salary was set at \$2800.00 per annum. No further reference is made in his letter to any other determination or setting of his salary, and

March 3, 1938

we therefore assume that he continued to work over into the year 1937 and up until June 10th of that year without any further adjustment or setting of his salary, and that over that period of January 1 to June 10, 1937, he was paid a salary at the rate of \$2800.00 per annum.

While Mr. Carter's letter does not set out exactly what his claim is, we infer that it is this: That since he had, during the years 1933-1934, been paid a salary as Chief Clerk at the rate of \$3600.00 per year, and since the man who succeeded him after June 10, 1937, is being paid a salary at the rate of \$3600.00 per annum, he should now be paid such an amount of money as back pay as will make his salary over the period of January 1 to June 10, 1937, have amounted to \$300.00 per month.

As stated by Mr. Carter in his letter, this office ruled, under date of September 27, 1933, in an opinion addressed to the State Auditor, that the Governor had the authority to hire the employees of the Budget Department and fix their compensation. That being true, Mr. Carter will have to show that his salary over the period in question, viz: January 1 to June 10, 1937, had been set at the rate of \$300.00 per month by the Governor, for, as was said in the case of State ex rel. Buder vs. Hackmann, 305, Mo. l.c. 351:

"Before the State can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment."

We think the foregoing rule requires Mr. Carter to show that his salary had been set for the period of January 1 to June 10, 1937 at \$300.00 per month. If it was not set at that figure for said period, then he has no lawful right to such salary. Nothing in Mr. Carter's letter indicates that his salary for that period had been set at \$300.00 per month. The statutes governing the Budget Department do not set the salary of the Chief

March 3, 1938

Clerk, and, as heretofore pointed out, this office has ruled that the Governor has the authority to set such salary. The appropriation act of 1937, p. 49, L. 1937 does not set apart any definite amount for the salary of the Chief Clerk of this department. Therefore, Mr. Carter has not pointed out the law authorizing payment of the amount claimed by him, and we are unable to find any such law.

The fact that Mr. McGregor received \$300.00 per month over the remainder of the biennium in which Mr. Carter served, presumably for doing the same work as Mr. Carter did, does not render any assistance in determining our question. Evidently, Mr. McGregor's salary has been set at \$300.00 per month by the proper authority. If it has not, then he would not be entitled to such salary. We think the question is not what title an employee served under, or what work he did, or what would have been fair compensation, nor what his predecessor or successor received for the same work. It is purely a question of whether the salary claimed has been set or established by the proper authority.

CONCLUSION

It is, therefore, the opinion of this office that the claim of Mr. Charles F. Carter for back pay for services as Chief Clerk of the Budget Department for the period of January 1 to June 10, 1937, as set forth in the foregoing letter of his dated February 15, 1938, cannot be legally paid.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:FE

TAXATION:

Trustees must pay the annual corporation franchise tax to this state when such receivers or trustees are operating the business of the corporation which is undergoing a reorganization under the provisions of the Bankruptcy Act.

April 1, 1938

State Tax Commission
of Missouri
Jefferson City, Missouri

Attention: Mr. Clarence Evans.

Gentlemen:

This will acknowledge receipt of your request for an opinion reading as follows:

"A question has arisen whether or not a corporation being operated by a receiver or trustee is liable for corporation franchise tax.

Former receiverships have been subjected to the tax but since the 77B Bankrupt Act, some corporations question the right of the State to impose this tax.

Will you kindly furnish this Department, at your early convenience, an opinion on this point?

Thanking you in advance for your usual prompt attention, we are,"

The Missouri Statute levies a tax upon the right of a corporation to transact business in this state. That is to say, the tax is levied on the franchise. State ex rel. Marquette vs. State Tax Commission, 282 Mo. 213. It is to be further observed that in the case of State vs. Pierce Petroleum Corporation, 318 Missouri 1020, the court in effect and substance said that the tax was imposed upon the privilege of transacting business in this state as a corporation. To the same effect was the ruling in the case of Ozark Pipe Line Company vs. Monier, 266 U. S. 567, 69 L. Ed. 439,

Apparently from these considerations the tax is levied upon the privilege of transacting business in this state as a corporation and would not extend to a corporate business operated by receivers or trustees appointed by a Federal



Court, when the corporate business is undergoing reorganization under the provisions of 77B of the Bankrupt Act. We say, apparently, because prior to the enactment by Congress of Section 124A of 28 U. S. C. A., the trustee would have not been subjected to the payment of a tax upon the corporate franchise. This view was substantiated in the cases of *In re International Match Corporation*, 79 Fed. (2nd) 203; *In re Century Silk Mills*, 12 Fed. (2nd) 292; *In re Continental Candy Co.*, 291 Fed. 773.

But Section 124A, *supra*, has affected a material change in the law and reads as follows:

"Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

In the case of *In re Preble Corp.* 15 Fed. Supp. 775 in the Federal District Court, had occasion to consider the above section of the statute, and said:

"Since the passage of the Amendment to Section 64, above referred to, Congress, by Act of June 18, 1934 (28 U. S. C. A. Section 124A), has made it still more clear that business conducted by Federal trustees is subject to all local taxes."

From what has been said, it might be argued that our Franchise Tax Act does not impose a tax on any trustee and, hence, trustees appointed by a Federal Court would not be subject to the payment of a franchise tax under the provisions of our law. This, of course, would be upon the principle that taxation by implication is not favored and, unless the statute expressly included a trustee, such trustee would not be subject to any franchise tax. On the other hand when we consider that Section 124A, *supra*, does not require that the state statute be applicable to a trustee, then this argument would seem to fall with the premise. This is because that Section 124A, *supra*, imposes a duty

upon the trustee to pay all state taxes applicable to such business as is being operated by the trustee.

It is fundamental in the construction of statutes, that the courts will take judicial notice of legislative journals and proceeding in Congress, insofar as they may aid in determining intent. *Connole vs. Norfolk and Western Railway Company*, 216 Fed. 823, Atla. C. L. R. Co. vs. *Riverside Mills*, 219 U. S. 196.

That it was the intention of Congress to require all trustees to pay a tax applicable to the business that such trustees were operating is made evident by referring to House Report #1138, 73rd Congress on June 6, 1934, which accompanied the bill that subsequently became the Section 124A. It should be pointed out, however, that this report refers specifically to receivers, but is equally true to a trustee operating a business. The report reads as follows:

"The purpose of this bill is to subject business conducted under receivership in Federal Courts to state and local taxation. The same as if such businesses were being conducted by private individuals or corporations.

"The United States District Court for the Western District of Missouri, in the case of *Howe vs. Atlantic, Pacific and Gulf Oil Company* recently held that the receiver operating a gasoline and oil distributing business, under appointment by the Federal Court, was not liable for a sales tax and motor fuel levied by the State of Missouri. As a consequence of this decision, your committee is advised, the State of Missouri and other states having similar statutes are losing thousands of dollars of revenue per month.

"No good reason is perceived why a receiver should be permitted to operate under such an advantage as against competitors not in receivership, and the state and local governments be deprived of this revenue."

April 1, 1938

It is obvious, from the above report, that it was the intention of Congress to subject receivers appointed by a Federal Court to all taxes which had theretofore been applicable to the business while it was in the hands of the corporation. This is manifested by the phrase in Section 124A, supra, reading: "All * * * taxes applicable to such business, the same as if such business were conducted by * * * corporation." It is clear that this phrase indicates that, if a corporation was subjected to a franchise tax then the trustee would also be subjected to such taxes, the same as if the business were still being operated by the corporation.

While it is true, in determining the intent of Congress, from a review of the House Report, supra, did not mention trustees, it is believed that the inclusion of trustees in Section 124A, supra, makes the liability upon them the same as receivers.

CONCLUSION

It is, therefore, the opinion of this department that trustees are liable for the payment of a Corporation Franchise Tax when operating the business of a corporation which is undergoing reorganization under the provisions of 77B of the Bankrupt Act.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:LB

COUNTY CLERK:

DUTY OF DRAWING WARRANTS ON ILLEGAL
DEMANDS:

COUNTY COURTS NUNC PRO TUNC ENTRIES:

County clerk should not draw
warrant on claim illegally allow-
ed by county court, providing he
has knowledge of such illegal
allowance.

County court not authorized to
make nunc pro tunc entries unless
there is some record upon which
to base such order.

May 26, 1938

Mr. Melvin Englehart,
Prosecuting Attorney,
Madison County,
Fredericktown, Missouri.

Dear Sir:

This is in reply to yours of May 23, 1938 for an
official opinion from this department based upon the
following letter:

"In the year of 1935 the sheriff
of Madison County, Missouri col-
lected \$186.00 in fees for attend-
ing the County Court and in 1936
he collected \$171.00 for the same
service. According to the court
records the court was not in session
a sufficient number of days to make
the earning of this amount of fees
possible. The record shows that he
should have received only \$108 in
1936 and \$102.00 in 1935. When the
audit of the county records was com-
pleted in March, 1937, this matter
was called to the attention of the
sheriff and he repaid the county
\$147.00, March 25, 1937. The audit
also shows that the members of
county court received pay for the
days that they were not in actual
session as shown by their record,
the same number of days that the
sheriff has repaid the county. The
county court has refused to turn



back to the county the amount of excess fees that they received and in the May Term, 1938, of said court, the sheriff requested the county court to return the sum of \$147.00, which he had returned to the county as above stated. The court ordered the warrant written but the clerk is doubtful of his authority to write the warrant and has requested me to secure an opinion from you on that question. Does the county clerk of Madison County, Mo., have authority to write or draw a warrant on the county for the above purpose?

Is it possible for the County Court of Madison County, Missouri, to correct it's record now, so as to show the action of the court the business transacted during the years of 1935-36 on the days that they have no record to show that they were in session?

If necessary, I shall bring the auditor's report to Jefferson City, Mo., and discuss the case with the assistant to whom the case is assigned."

I.

From your letter it is evident that the county court has attempted to pay to the sheriff the sum of one hundred forty seven dollars (\$147.00) which the audit has revealed that he was not entitled to. It appears that the sheriff of your county after the auditors had filed their report showing that he had collected one hundred forty seven dollars (\$147.00) too much on account of claims for attendance of county court when the court was not in session; that pursuant to such report the sheriff paid into the county treasury the said sum of one hundred forty seven

dollars (\$147.00) thereby balancing his account with the court, and that thereafter the court attempted to refund this amount to the sheriff. Section 11789, R.S. Mo. 1929 sets out the fees to which the sheriffs are entitled and an officer is only entitled to such fees as are prescribed by statute. Under this section the sheriff is entitled to three dollars (\$3.00) per day for his attendance upon the county court when it is in session. In the case of State ex rel. v. Brown, 146 Mo. 401, l.c. 406, the court said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed." * * * * *

Section 1826, R.S. Mo. 1929 provides as follows:

"The supreme court of the state of Missouri, the courts of appeals, the circuit courts, the county courts and the probate courts in this state shall be courts of record, and shall keep just and faithful records of their proceedings."

In the case of Henry County v. Salmon et al., 201 Mo. 136, l.c. 151, the court said:

"In the first place, a county court is a court of record. (R. S. 1899, sec. 1580.) Therefore, it must speak through its record. (Morrow v. Pike County, 189 Mo. l.c. 620.) The inherent power of a court of record to supply entries nunc pro tunc which have been omitted through the misprision of its clerk, where sufficient data exist in the clerk's office, ought not to be gainsaid. This power does not depend on statute,

but is a necessary incident to the jurisdiction of every court of record-- inasmuch as, by a presumption of law, the record imports verity, therefore, it is essential to the administration of justice that records should speak the very truth they are held to import. (Jillet v. Bank, 56 Mo. l.c. 306; Turner v. Christy, 50 Mo. 145; Loring v. Groomer, 110 Mo. l.c. 639; State ex rel. v. Bird, 108 Mo. App. l.c. 168.)

The confusion and distress that would arise from the denial of this sensible power to a county court whereby the business affairs of the county would be left at the mercy of the caprice, wiles, slips, lapses or other inadvertences of a clerk, are apparent. In this case there was a memorandum of the filing of the bond on May 7th, 1903, and on the back of the bond was a memorandum under date of June 1st, 1903, of its approval, certified to by the presiding judge. The presiding judge, while the court was in session, had power to keep minutes ex officio-- an act of the clerk in that behalf not being indispensable. (State ex rel. v. Sheppard, 192 Mo. l.c. 514.) His narration on the back of this bond may, therefore, be laid hold of as a minute of the court's action, in the absence of better evidence."* * * * *

Therefore, if there is no court record or other memoranda in the court files or clerk's office showing that the county court was in session on the dates the sheriff claimed fees for such service, then the audit is correct in charging the sheriff with the amount for which he had made claims for attending the court when it was not in session.

It did follow that the sheriff was right in refund-

May 26, 1938

this amount to the county and the order of the county court attempting to repay this amount to the sheriff would be unauthorized and illegal.

Then the question is, should the county clerk issue the warrant for this refund upon the order of the county court.

Section 12169, R.S. Mo. 1929 provides as follows:

"When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, and unless otherwise provided by law, in the following form:

Treasurer of the county of ____: Pay to _____ dollars, out of any money in the treasury appropriated for ordinary county expenditures (or express the particular fund, as the case may require).

Given at the courthouse, this ____ day of ____, 19____, by order of the county court.

Attest: C D, clerk. A B, president."

Section 12170, R.S. Mo. 1929 provides in part as follows:

"Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman letters, without ornament. It shall be signed

by the president of the court whilst the court is in session, attested by the clerk, and warrants shall be numbered progressively throughout each year:"* * * * *

The county clerk is a ministerial officer and he acts ministerially in the performance of his duties of issuing warrants which had been ordered by the county court, and if the order of the county court is a legal order such officer may be compelled by mandamus to perform the duty of issuing such warrants. In the case of State of Missouri ex rel. Thomas et al. v. The Treasurer of Callaway County, 43 Mo. 228, 1.c. 230, the court said:

"* * * * But where the allowance by the court has been regularly had upon a claim they are required to pass upon, and the warrant has been drawn and presented, and the court adjourned for the term, the treasurer has but one duty; and no subsequent court, not of superior jurisdiction, can excuse him from the performance of that duty. There is no doubt of the jurisdiction of this court by mandamus against county treasurers who refuse to pay claims properly audited. They are ministerial officers, and can be compelled to perform their plain duties."* * *

However, such officer cannot be compelled to do that which is expressly forbidden by statute. In the said Thomas v. Treasurer of Callaway County case, supra, the court further said:

"But in entertaining the application we will look into the claim allowed by the court. It does not follow that, because it is the duty of the treasurer to pay, we will necessarily, in this form of action, order him to do so. If it should appear that the

County Court has, by mistake or otherwise, audited an illegal claim--one which should have been rejected--we will leave the parties to such remedies as they may have by ordinary proceedings."* * * * *

In the case of State ex rel. Yountkin, 108 Kansas 634, 637, the county board attempted to issue bonds for the payment of road machinery. The issuance of the bonds was unlawful and the clerk of the board refused to sign and register the bonds. The court said at l.c. 367:

"The county clerk balks at this large bond issue against 'Project D' and refuses to sign and register the bonds and coupons. The state highway engineer who must sanction the outlay, also declines to give his official approval that all this vast sum be charged against 'Project D'. Hence the lawsuit. So far as the county clerk is concerned he has neither responsibility or discretion in the matter. His functions in the matter of this bond issue are only clerical; and yet it has been held that a public officer ought not be required by mandamus to perform an act which in itself is merely incidental and ministerial to that which other officials are unlawfully seeking to accomplish. Thus in National Bank v. Heflebower, 58 Kansas, 792, the Board of School Fund Commissioners who were charged with the unlawful investment of state school funds, purchased some county bonds at a price somewhat but not greatly in excess of their market value, and drew orders on the state treasurer for the payment of the agreed price. The treasurer declined to register the warrants and pay them. The court declined to compel the treasurer to perform these mere ministerial duties."

Volume 38 Corpus Juris, section 108, page 621, the rule is stated as follows:

"Where the duties of a clerk of court

are ministerial, as they usually are, in conformity to general rules, resort is very generally had to the writ of mandamus to compel the clerk to perform a function which he has refused to perform; but mandamus will not lie where there is another adequate and appropriate remedy, such as an application to the court for an order directing the clerk to act; or where there is an adequate remedy by appeal; or where there is a specific remedy provided by statute; or where the right thereto is not clear; or where the performance of the act sought to be compelled would be necessary to give effect to an unlawful act undertaken by a board of county commissioners,"* * * * *

From the facts which you have submitted it appears that the county clerk is familiar with all the facts surrounding this allowance to the sheriff. As stated above, if the court was not in session on the dates for which it is attempting to pay the sheriff for attendance, then it is not authorized to order the warrant issued for a payment of such service.

While the county clerk acts ministerially in the issuance of this warrant, yet knowing the facts as he does he would be pursuing the safer course by refusing to issue the warrant and then let the claimant proceed to force him to perform this ministerial duty, at which time the clerk can set up his reasons for such refusal.

In the case of State ex rel. Watkins v. Macon County, 68 Mo. 29, the court held that an officer cannot be compelled to do that which he is expressly forbidden to do, and we are convinced that the clerk is not authorized to issue this warrant under the circumstances. In the said Macon County case, 68 Mo. l.c. 41, the court said:

"In the case of Supervisors v. United States, 18 Wall. 77, it is

observed that 'a mandamus will not be awarded to compel county officers of a State to do any act which they are not authorized to do by the laws of the State, from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being.'" * * * * *

CONCLUSION

From the foregoing it is the opinion of this department that when the county court has made its order allowing the claim, the clerk's duties in drawing the warrant are ministerial. However, in this particular case knowing the facts as he does, and by authority of the cases cited above, it is our opinion that the clerk would be justified and would be pursuing the safer course by refusing to issue the warrant, thereby compelling the complainant to resort to mandamus to force him to write it. At that time the clerk could interpose his reasoning for such refusal, which in this case would be sufficient in our opinion to authorize a refusal of an order of court requiring him to issue the warrant.

II.

On the question of whether or not it is now possible for the county court to correct its records so as to show the action of the court the business transacted during the days, of which there is no court record, we find that such an entry would come within the class of nunc pro tunc entries. In the case of Shepard v. Grier et al, 160 Mo. App. 613, 1, c. 614, the court said:

"* * * Nunc pro tunc entries can only be made by the court at a subsequent term when sustained by some entry or memorandum on file in the case, or on the minutes of the clerk or docket of the court, made at the prior term.

They cannot be made on the recollection of the judge himself or on any testimony aliunde the record."

In the case of State v. Bush, 136 Mo. App. 608, the court had under consideration the question of a county court making a nunc pro tunc entry of the record so as to show that the court had adjourned to the various days of the term which the record showed the court was in session, and in that case the court said at l.c. 614:

"* * * It is evident, taking into consideration the whole record, that all the different sessions of the court alluded to were adjourned terms of the regular May term for 1906. The recitation in the record at the beginning of each session that the court met pursuant to adjournment of the one last preceding and the final order of adjournment made on the 18th day of July seem to us ought to be construed as showing a continued session of the court from its first regular meeting until the order was made for its final adjournment. Such being the case, it was competent for the court to enter the said nunc pro tunc orders. And, as the court had not finally adjourned when the entries referred to in the first instance were made, that the court met pursuant to adjournment, it had ample evidence of record for the nunc pro tunc orders."

In the case of Ainge v. Corby, 70 Mo. 257, l.c. 260, the court said:

"* * * The order of court approving the sale recites that the report is fully approved, 'it appearing * * * that the order of this court has

been fully complied with in all things.' Plaintiffs, for the purpose of showing that the probate court of Buchanan County was not in session on the 18th day of September, 1863, offered in evidence the record of said court, which showed that the court stood adjourned from the 14th day of September, to the 19th day of September 1863. This evidence was received over defendant's objection, and the action of the court in receiving it is assigned for error.

The defendant then offered to prove by the judge of said court that it was in session on the 18th day of September, 1863, transacting business, but that by mistake in writing up the records they failed to show the fact. This evidence was rejected, and this action of the court is also assigned as error. The trial court was fully justified in receiving the evidence offered by plaintiffs and rejecting that offered by defendant, by the decision of this court in the case of Mobley v. Nave, 67 Mo. 546, where the precise questions here presented were passed upon." * * * * *

In the case which you have submitted it appears that there is no record entry of the court being in session at any of the dates for which the sheriff has claimed his fees and for which the auditors disallowed such claims in the audit. That being the case and as said in the case of Shepard v. Grier, supra, the record cannot be made up on the recollection of the judge or any testimony aliunde the record.

CONCLUSION

It is, therefore, the opinion of this department that the county court is not authorized to make a record

Mr. Melvin Englehart

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entry now showing that the court was in session on days in 1935-1936 unless there is some record entry or some memoranda in the court files or clerk's office showing that court was in session on said days.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

INTOXICATING LIQUOR:

Interpretation of Section 44-a-9,
page 283, Laws of Missouri, 1935.

July 11, 1938



Mr. Melvin Englehart,
Prosecuting Attorney,
Madison County,
Fredericktown, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated May 26, 1938 for an official opinion from this department which is as follows:

"I would like to have an opinion from you interpreting the meaning of the following statement found in the above described Section: (Any room, house, building, boat, vehicle, structure of any kind where intoxicating liquor is sold, manufactured, kept for sale, or bartered, in violation of this Act; etc.)

To prove a prima facie case under the above provisions, is it necessary that the State show that the intoxicating liquor is sold, manufactured, kept for sale, and bartered; or, is proof of either sale, manufacture or bartering, sufficient?

I am filing a petition in the Circuit Court of this County under this section, and if you have any authority on the above question, I would appreciate very much securing it."

Section 44-a-9, Session Laws of Missouri, 1935,
page 283, reads as follows:

"Any room, house, building, boat,
vehicle, structure or place of any
kind where intoxicating liquor is
sold, manufactured, kept for sale
or bartered, in violation of this
act and all intoxicating liquors
and all property kept and used in
maintaining such a place and any
still, doubler, worm, worm tub,
mash tub, fermenting tub, vessel,
fixture or other property of any
kind or character used or fit for
use in the production or manufac-
ture of intoxicating liquor is
hereby declared to be a public and
common nuisance, and any person who
maintains or assists in maintaining
such public and common nuisance shall
be guilty of a misdemeanor and upon
conviction thereof shall be fined
not less than one hundred dollars nor
more than one thousand dollars or by
imprisonment for not less than thirty
days nor more than one year or both."
* * * * *

This section is in the disjunctive for the reason that the words "manufactured, kept for sale, and bartered," are entirely different charges and are not synonymous. If an information is drawn charging that the defendant sold, manufactured, kept for sale, or bartered, it would be objectionable on account of more than one count in the same charge, and also for the reason further that the defendant would be compelled to defend upon four separate offenses.

In the case of State v. Coffee, 35 S.W. (2d) 969, the defendant was found guilty in the lower court upon an information charging him with working and permitting those in his employ to labor on Sunday. In that case the court held that the information charging him with working and

permitting those in his employ to labor on Sunday, the two offenses were conjunctive and were not repugnant and were synonymous. The court, in affirming the judgment of the lower court, said:

"It is urged that the information charges two separate and distinct offenses in the same count, and should have been quashed for duplicity. The information is based on section 3596, R.S. Mo. 1919, which provides that 'every person who shall either labor himself, or compel or permit his apprentice or servant * * * to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity * * * on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars.' It is evident that the information follows the language of the statute. It charges defendant with both laboring himself and permitting his servants to work on Sunday. It is well settled, as urged by defendant, that an information charging two separate and distinct offenses in one count is bad for duplicity. State v. Huffman, 136 Mo. 58, 37 S.W. 797; State v. Young (Mo. App.) 215 S.W. 499. However, it is equally well settled that, where a statute enumerates offenses in the alternative and provides one and the same punishment therefor, if such offenses are not repugnant, an information charging all of such offenses conjunctively in one count is not open to the objection of duplicity or multifariousness." * * * * *

In the case of State v. Tiemann, 253 S.W. 453, the

defendant was charged in the same information with failure "to maintain and provide for his lawful children under the age of sixteen years". In this case the court held that where a statute denounces various distinct acts as criminal in the disjunctive, the words of the statute must be used so as to apprise accused of the specific crime charged, and unless so charged the information would be fatally defective, since the word "provide" includes many things which the father would not be required to furnish in order to exempt him from criminal prosecution and the word "maintain" is synonymous with "provide." But in view of the words "maintain" and "provide" being held synonymous terms, the court further said:

"* * * In State v. Thierauf, 167 Mo. 429, 67 S.W. 292, it is held that ordinarily, in charging a statutory offense, the words of the statute must be used, so as to apprise the defendant of the specific crime with which he is charged, and it is there stated that:

'When a statute denounces various distinct acts as criminal in the disjunctive, as this act does, then it is the constitutional right of the defendant 'to demand the nature and cause of the accusation against him.'

The word 'provide,' as used in the information and in some statutes, has a broad meaning, and may include many things which the father would not have to furnish in order to exempt him from criminal prosecution. He would only be guilty, under the statute in question, for failure to provide the 'necessary' food, clothing, or lodging. There was no attempt to follow the statute in this case, or to use words of similar import and meaning in order to describe the offense, and to apprise the defendant of the charge he had to meet."

In the case of State v. Bragg et ux., 220 S.W. 25, 1.c. 27, it was held:

"* * * As said in State v. Cameron, 117 Mo. 371, 375, 22 S.W. 1024, 1025:

'Where a statute in one clause forbids several things or creates several offenses in the alternative, which are not repugnant in their nature or penalty, the clause is treated in pleadings as though it created but one offense; and they may all be united conjunctively in one count, and the count is sustained by proof of one of the offenses charged.'

This rule, however, does not apply when the disjunctive words are mere synonyms having the same meaning and used to describe or characterize the same act or thing, nor to words which are merely different names for the same thing. Thus it was held in State v. Larger, 45 Mo. 510, not to be bad pleading to charge that defendant abandoned his wife and failed to 'maintain or provide' for her, since the words 'maintain' and 'provide' mean substantially the same thing, and that a failure to do one is a failure to do the other. So in State v. Nelson, 19 Mo. 393, the indictment charged defendant with permitting a gambling device adapted and designed for the purpose of playing games of chance for money or property, and this was held good. In State v. Moore, 61 Mo. 276, the court ruled that--

'An indictment for arson is not fatally defective for describing the property burned as a 'house or building,' the words being evidently used in a synonymous sense, and to designate the same object.'

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It was ruled by this court in State v. Keithley, 142 Mo. App. 417, 423, 127 S.W. 406, that the terms 'bawdy-house' and 'assignment house' mean the same thing, and are synonymous words, designating the kind of house the keeping or maintaining of which is made an offense. This assignment of error is overruled."

There can be no question but that Section 44-a-9, supra, would be considered a disjunctive statute for the reason that the words "sold, manufactured, kept for sale, or bartered," are not of the same nature in any respect and describes the commission of a separate form of violation of the intoxicating liquor act.

CONCLUSION

In view of the above authorities, it is the opinion of this department that Section 44-a-9, Session Laws of Missouri, 1935, page 283, describes four separate crimes in violation of the Intoxicating Liquor Act, and in order to prove a prima facie case under the act it would only be necessary to allege one of the four violations in the information and introduce evidence proving one of the four violations as set out in the information, and as said before if all four violations are charged in one count of the information, it would be objectionable for duplicity or multifariousness.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

Taxation: Freight depot of a Railroad not used by the Railroad Company but leased to private company should be assessed locally for taxes.

July 23, 1938

Hon. Clarence Evans, Chairman
State Tax Commission
Jefferson Hotel
St. Louis, Missouri



Dear Sir:

This will acknowledge receipt of yours of the 22nd which reads as follows:

"The question on which we desire an opinion arises from the following condition:

"The Missouri Pacific Railroad Company has a freight depot on their property in the City of St. Louis which is leased to another company. The Company to which said property is leased uses the building as a store room for the gathering of freight in small quantities to be shipped in car load lots. The Missouri Pacific Railroad Company being the principal customer of the operating Company. The question is:

"Should the freight depot in question be subject to local assessment or should it be assessed as a part of the distributable property of the Missouri Pacific Railroad Company? The Company who leased this property from the Railroad Company is a separate corporate entity and not under the control of the Railroad Company.

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"Assistant Attorney General, Hewitt, sat in conference with the assessing authorities of St. Louis, the officers of the Railroad Company and the Tax Commission several weeks ago and he was expected to furnish an opinion concerning same.

"Mr. Corwin, Attorney for the Railroad Company, writes this Commission, today, that he has not received the opinion as yet. The hearing in St. Louis will be held Tuesday, July 26. If an opinion can be furnished in time for our use next Tuesday, kindly mail same to Clarence Evans, Chairman of the State Tax Commission, c/o Jefferson Hotel, St. Louis, Mo. If the time is too short or the information given not sufficient that you feel justified in offering an opinion, the Company will have to rely on their own counsel and the Assessor of St. Louis County likewise."

The determination of your question involves a consideration of certain statutes relating to the taxation of railroad property. Section 10012, R.S. Mo. 1929 reads as follows:

"On or before the first day of January in each and every year, the president or other chief officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state auditor a statement, duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so

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far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of June in each year, and the actual cash value thereof. (R. S. 1919, Section 13002.)"

Section 10017, R. S. Mo. 1929, provides in part as follows:

"The said board shall proceed to assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 10012."

Section 10025, R. S. Mo. 1929, reads as follows:

"All property, real, personal or mixed, including lands, machine and workshops, roundhouses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this state not hereinbefore specified, shall be assessed by the proper assessors in the several counties,

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cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this article. (R. S. 1919, Section 13027.)"

To determine your question, it is necessary to determine whether the freight depot inquired about in your letter is a part of the property required to be returned to the State Tax Commission under Section 10012, or whether it is local property mentioned in Section 10025. If it belongs to the class described in Section 10012, then the State Tax Commission should make the assessment, but if it is local property described in Section 10025, then the local authorities should assess the property. To make this determination, it is necessary to read the two sections of the statutes together.

In the case of *State ex rel v. Railroad*, 117 Mo. 1, the Supreme Court was considering the same question with regard to land purchased for future yard purposes of a railroad with the intention of building terminal facilities thereon in the future, but it was not in fact used for such purposes at the time of the assessment. In discussing the case the court said, l.c. 7:

"The property specified in section 6866, which is to be assessed by the state board, is that required to be returned to the state auditor, namely, the entire length of the road in this state and the length of double and side-tracks, with depots, water-tanks and turn-tables. This description taken by itself is not clear, but the uncertainty is, to a large extent,

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removed when taken in connection with section 6876. That section provides that all other property of the railroad company, real, personal, including lands, machinery and workshops, round-houses and other buildings shall be assessed by the local assessors. There can be no doubt but section 6866 includes the road, road-bed, bridges and that property actually used for the purposes of a right of way, but it is equally clear that it does not include lands used for shops, engine-houses, and warehouses. And we think it is equally clear that section 6866 does not include land which may have been purchased for future yard purposes, and which is in fact not used for such purposes at the time of the assessment."

In that case the land being considered was under lease to private parties also. The court further said, l.c. 9:

"The property here in question was not used for railroad purposes when assessed, but was in the possession of defendant's tenants, under an eight year lease, and used by them for manufacturing purposes, with the right reserved by the tenants to remove their buildings at the expiration of the lease. There is no claim made in this case that it was by any specific description returned to the state auditor, and the only claim is that it should be deemed and taken to be property embraced within that property assessable by the state board. That it did not fall within that class of property is in our opinion too clear to call for further remarks."

Sections 6866 and 6876 referred to in the foregoing opinion correspond respectively to Sections 10012 and 10025, R. S. Mo. 1929.

In *Red Willow County v. Chicago, B. & Q. R. Co.* (1889) 26 Neb. 660, 42 N.W. 879, under a statute providing for the assessment by the state board of equalization of the roadbed, right of way, and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property, necessary for the construction, repair, or successful operation of the railroad, and providing for the assessment of other railroad property by local authorities, the court stated:

"There is no material conflict in the testimony. The land in controversy was not a part of the roadbed or right of way of the railway of the defendant in error. The most that can be said is that it was purchased by the railway company in anticipation that sometime in the future it might be necessary for tracks, etc. But this is not sufficient. Land to constitute roadbed and right of way must in fact be used for that purpose. . . . A corporation will not be permitted, however, to purchase real estate for which it has no immediate use as a part of its right of way, and return the same for taxation as a part thereof, if in fact it is not used for that purpose."

In view of the foregoing authorities, we think the rule is that in order for property to be classed as a part of the roadbed or right of way of a railroad, such property must actually be used for that purpose. By similar reasoning, in order for a building to be classed as a depot, we think that the building would actually have to be used for that purpose by the railroad company. From the information in your letter, it is clear that the depot inquired about is not used by the railroad company as a part of its transportation facilities, but it is used by a private company for the convenience of such latter company in assembling freight for shipment. The use of the building clearly

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is not a part of the operation of the railroad, but is more in the nature of a store room operated by a private company. We do not think the building can be classed as a depot of the railroad since it is not used by the railroad as a part of its transportation system.

CONCLUSION

It is, therefore, the opinion of this office that a freight depot owned by a railroad company and situated on the right of way of such company but leased to another company which uses the building as a store room, is subject to assessment by the local assessing authorities as local property and is not subject to assessment by the State Tax Commission.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. W. LUFFINGTON
(Acting) Attorney General

HHK/w

SCHOOLS: The entire fund of a school district which has been placed in a "general fund" if any surplus remains at the close of the year, should be distributed according to the original amounts which should have been placed in the various funds under Section 9312, R. S. Mo. 1929.

December 5, 1938

Honorable Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri



Dear Sir:

This Department is in receipt of your letter of some time ago in which you request an opinion on the following facts:

"Fredericktown, School District, #20, a Town School, during the school year of 1937-38, placed all of the state aid, and income from the county and township funds, the taxation from railroads and public utilities and also the taxes derived from the levy of \$1.00 upon the \$100 valuation of property, in a general fund. There was no distinction between the teachers fund and the incidental fund, all warrants for teachers salary and for incidental expense were drawn on this "General Fund."

"In May 1938, the Board of Education voted to set up a distinct Teachers Fund and an Incidental Fund, and that the taxes derived from the \$1.00 levy per \$100. valuation should be divided on the basis of thirty cents (\$.30) to the teachers fund and seventy cents (\$.70) to the incidental fund. At the close of the fiscal year of the school, it was found that there was

a balance of \$5,481.69 in this 'General Fund.' Can this \$5,481.69 be divided on the basis of the ratio for the year of 1938-39, that is, thirty cents to the teachers fund and seventy cents to the incidental fund?

"The amount derived from the State Aid in 1937-38 was \$12,904.54, and from all other sources that was to be placed in the teachers fund in the sum of \$1,491.54, making a total of \$14,396.54. The total expenditure for teachers salaries for the year of 1937-38 was \$20,000. The total amount to be derived from taxes and which was derived from taxes during the year of 1937-38 was \$12,962.86. Although, there was no distinct teachers and incidental fund in 1937-38 there was a record of the Board of Education showing that of the \$1.00 levied in 1937-38 for teachers and incidental purposes, ten cents was to be applied to the incidental fund and ninety cents to the teachers fund.

"I have been unable to determine an answer to this situation from Sections 9233 and 1311 R. S. Mo. 1929. You will note from the above statistics that the taxes derived from the levy of \$1.00 on the \$100 valuation of 1937-38 was about 43 per cent of the money in the 'General Fund.' Would it be illegal to divide this surplus now on hand according to that ratio of percentage? Section 9311, provides, 'and all moneys not herein specified that now belong to any school district shall be placed to the credit of the "teachers fund" of such school district.' I am unable to determine whether this clause applies to this state of facts.

"Please inform the Board, first, Can this surplus be divided? If so, should it be divided on the basis of the present apportionment of the taxes of seventy per cent to the incidental fund and thirty cents to the teachers fund? If it can be divided or apportioned, should it be done on the basis of the amount of taxes of 1937-38 to the total 'General fund' of that year? "

Briefly, your question is to the effect, should the surplus mentioned in your letter in the amount of \$5,481.69 be divided on the basis of 30% to the teachers' fund and 70% to the incidental fund, using the basis of the division on the amount of taxes for 1937 and 1938?

Section 9233, R. S. Mo. 1929, relates to the application of moneys arising from taxation. Said section provides as follows:

"All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; but the income from state, county and township funds shall be applied only to the payment of teachers' warrants, issued by order of the board to legally qualified teachers for services rendered according to law. No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such funds in accordance with section 9257, and no school warrant shall bear interest."

Section 9257, R. S. Mo. 1929, relates to the apportionment of public school fund by the State Superintendent of Schools, but is not quoted for the reason that its contents are not pertinent to the issues involved.

Section 9261, R. S. Mo. 1929, relates to the duties of the county clerk in the assessment of estimates. It contains the following provision:

"Provided, that the levy thus extended shall not exceed in any one year as follows: For building purposes, one per centum in town school districts, and not more than sixty-five cents on the one hundred dollars in other districts; for school purposes, one per centum in town school districts, and not more than sixty-five cents on the one hundred dollars in other districts; for sinking fund, forty cents on the one hundred dollars' valuation, and a sufficient amount to pay interest on bonded indebtedness; all of which shall be extended by the county clerk upon the general tax books of the county for said year in separate columns arranged for that purpose; and the county clerks shall list the names of all persons owning any personal property who do not reside in any school district, and the value thereof; also, list all lands and town lots in any territory not organized into a school district, and shall levy a tax of forty cents on the one hundred dollars' valuation on all such taxable property, said taxes to be collected as other taxes and distributed as provided in section 9257; and it shall be the

duty of the county assessor in listing property to take the number of the school district in which said taxpayer resides at the time of making his list, to be by him marked on said list, and also on the personal assessment book, in columns provided for that purpose."

Section 9312, R. S. Mo. 1929, contains provisions as to the manner in which the treasurer of the school district shall carry or open accounts for the various funds, said section being as follows:

"The warrants thus drawn shall be in the following form, and shall be signed by the president of the board and countersigned by the district clerk:

"Teachers' Fund

"\$_____ No. _____
Treasurer of _____ county, Missouri:
Pay to _____, or order, for
services as teacher in district
No. _____, _____ dollars, out of
any funds in your hands for the
payment of teachers' wages belong-
ing to said district.

Done by order of the board, this
_____ day of _____, 19____.
_____, president. _____ clerk.

"Incidental Fund.

"\$_____ No. _____
Treasurer of _____ county, Missouri:
Pay to _____, or order, the sum of
_____, dollars, for _____ furnished
district No. _____, out of any funds
in your hands for the payment of
incidental expenses belonging to
said district.

Done by order of the board, this
_____ day of _____, 19____.
_____, president. _____ Clerk.

"Building Fund.

"\$ _____ NO. _____
Treasurer of _____ county, Missouri:
Pay to _____, or order, the sum
of _____ dollars, for _____ furnished
in the erection of a schoolhouse in
district No. _____, out of any money
in your hands belonging to the
building fund of said district, and
not otherwise appropriated.

Done by order of the board, this
_____ day of _____, 19____.
_____, president. _____ clerk.

The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from the taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers' fund; the money derived from taxation for incidental expenses shall be credited to the 'incidental fund; all money derived from taxation for building purposes, from the sale of school site, schoolhouse or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the 'building fund; and all moneys not herein specified that now belong to any school district, or that may hereafter be received by such school district, shall be placed to the credit of the 'teachers' fund' of such school district. No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon

any school warrant, nor shall any interest be paid upon any such warrant: Provided, that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided further, that in the event of a balance remaining in the building fund after the purpose for which said fund was levied is accomplished, the said board shall have the power to transfer such unexpended balance to the incidental fund: Provided further, that by a majority vote of the school board tuition fees may be used to liquidate indebtedness accrued in the building fund."

It would appear by the facts as contained in your letter that the district did not follow the terms of Section 9312, supra, in that the moneys received from various sources were not divided and placed in the proper funds but instead in a "general fund." This was irregular but we assume that all outstanding indebtedness for the years in which the "general fund" occurred have been discharged and that no outstanding warrants for prior obligations exist and that no harmful results appear as the irregularity exists in the technical misappropriation of the school funds.

With these preliminary observations, we pursue the question further, viz.: How to allocate the surplus which exists in the various funds. The only logical way that we can determine the same is by following the provisions of Section 9312, quoted supra. It should (1) be determined as to the amount which should have been placed to the credit of the teachers' fund; (2) the amount which should have been placed to the credit of the incidental fund; and (3) the amount which should have been placed to the credit of the building fund, if such fund existed.

Hon. Melvin Englehart

-8-

Dec. 5, 1938

When the above is ascertained the allocation or division or percentage of the surplus fund in the amount of \$5,481.69 should be divided on the basis or percentage of the amounts in the various funds, as should have been determined for the prior year.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

(Acting) J. E. TAYLOR
Attorney-General

OWN:EG

TAXATION:

**COSTS OF SALE FOR DELINQUENT
TAXES:**

Under the delinquent tax laws prior to the Jones-Munger Act, a county court is not authorized to pay for the costs of publication of lands sold for delinquent taxes.

December 16, 1938



Mr. Edw. T. Eversole
Prosecuting Attorney
Jefferson County
Festus, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department based upon the following letter:

"The Jefferson County Republican, a newspaper published at DeSoto, has presented a demand to the County Court of Jefferson County in the total amount of some three hundred and fifty dollars (\$350.00).

"This claim is based upon service by publication in taxes brought at the direction of the County Collector Jefferson County under the old law prior to the Jones-Munger Act.

"It seems that after these suits were brought and the publications made for service in some instances the taxes were paid before sale and in collecting the taxes the Collector and his attorney failed to collect the cost of publication, in other instances defendants died and it was necessary for new publication, and still other instances other heirs were discovered requiring a new publication

and in the meantime the Jones-Munger Act was past and practically nullified the full effect of the original orders and the suits were never pressed for judgment. In all cases the taxes involved in the original suit have been adjusted to the satisfaction of the Collector and County Court and the records are all clear and everyone seems to have received his money except the newspaper carrying the publication.

"I would appreciate your writing me your opinion on whether or not the County Court has the legal authority to pay this demand."

Your request goes to the question of the authority of the county court to pay out the public funds. Such authority must be found in the statutes. Prior to the enactment of the Jones-Munger Law in 1933, the county collectors advertised lands for sale for delinquent taxes. The statute which fixed the fees and compensation for such services and publication charges was Section 9969, R. S. Missouri, 1929. This section provides as follows:

"Fees shall be allowed for services rendered under the provisions of this article as follows: To the collector, except in such cities, four per cent. on all sums collected; in such cities two per cent. on all sums collected--such per cent. to be taxed as costs and collected from the party redeeming. To the county clerk, for making the 'back tax book,' twenty-five cents per tract, to be taxed as costs and collected from the party redeeming such tract. To the circuit clerk, justice of the peace, sheriff and printer, such fees as are allowed by law for like services in civil cases, which shall be taxed as costs in the case: Provided, that in no case shall the state, county or

city be liable for any such costs,
nor shall the county court or state
auditor allow any claim for any
costs incurred by the provisions of
this article." (emphasis ours)

This section was repealed by the Jones-Munger Act, yet the provisions of the section apply to all publications made prior to the Jones-Munger Law.

We find that the Kansas City Court of Appeals in the case of Pollard v. Atwood, 79 Mo. App., 193, 197, discussed the provisions of similar statutes in relation to the liability of the state, county and city for payment of costs which may have accrued in connection with the sale of delinquent lands, and in that case at l.c. 197, the court said:

"Section 7626 provides, that in suits for delinquent personal taxes, in no case shall the state, county, city or collector be liable for any costs, nor shall any be taxed against them, or any of them, and the same provision is contained in the Acts of 1895, page 245.

"We find the same provision also in regard to taxes on real estate. Revised Statutes, section 7688, and also to the collection of delinquent taxes in the cities and towns organized under special charters. Acts 1897, p. 213.

"Hence it is plain that no costs in any tax suit could be taxed against a city or town, and therefore the judgments for costs entered against the city of Ferguson are nugatory and absolutely void, being wholly prohibited by our statutes."

It is quite evident from the provisions of this statute and the case cited above that the county court has no authority to pay the publisher for publication of delinquent lands for sale.

Mr. Edw. T. Eversole

-4-

December 16, 1938

In 1935 the lawmakers provided that the publication charges shall be paid by the county and then when the lands are finally sold that such charges shall be taxed as costs and refunded to the county, but that act would not apply to publications which were made prior to 1935.

CONCLUSION

We are, therefore, of the opinion that the county court is not authorized to pay publication costs for sale of lands sold for delinquent taxes prior to the passage of the Jones-Munger Act and as amended in 1935.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SCHOOLS: (1) Annual school meeting under Section 9283, R. S. 1929, may be extended until six o'clock on the day of the election to enable all patrons of district to participate therein; (2) Under Section 9289, R. S. 1929, no member of the board shall receive any compensation for performing duties of a director.

December 29, 1938

Honorable Edw. T. Eversole
Prosecuting Attorney
Jefferson County
Festus, Missouri



Dear Sir:

This Department is in receipt of your letter of December 24th wherein you request an opinion involving two questions.

I.

Your first question is as follows:

"Section 9283 of the Missouri School Laws says in part, 'the annual meeting of each school district shall be held on the first Tuesday in April of each year at the district school house commencing at two o'clock P. M.'"

"A good many of the school patrons of many of the school districts in the North part of our County work in St. Louis and in several instances the annual meeting and special meetings have been held open until six o'clock to enable those residents who work in St. Louis to return home in time to vote. The law does not clearly state whether or not this can be done. We would like to have your opinion on this matter."

We are also in receipt of a request by the Clerk of Bowles School District in your County, involving the same matter. We assume this is the school district which you have in mind.

Section 9283, R. S. Mo. 1929, is as follows:

"The annual meeting of each school district shall be held on the first Tuesday in April of each year, at the district schoolhouse, commencing at 2 o'clock p. m. If no schoolhouse is located within the district, the place of meeting shall be designated by notices, posted in five public places within the district fifteen days previous to such annual meeting, or by notice for same length of time in all the newspapers published in the district, giving the time, place and purposes of such meeting."

The statute referring to a special meeting states that the same shall be conducted in the same manner as the annual meeting. Hence, the time the meeting is to begin is at two o'clock, but the statute does not state how long the school meeting shall last.

The usual manner of conducting the annual school meeting in a common school district is for the patrons of the district to meet at two o'clock and transact the business of the district in accordance with Section 9284, R. S. Mo. 1929, and as soon as the same is transacted to adjourn. However, noting the facts contained in your letter and in the request made by Mr. Murphy, Clerk of the District, we note a possible injustice and unfairness in a meeting if it would preclude many of the patrons of the district from expressing their choice of directors, taxation and other matters as set forth in Section 9284, supra.

If the patrons desire the meeting to be held and voting to continue until six o'clock in the evening, we

think the first requisite would be for the notice to contain such a statement. As a matter of right every patron or voter of a district should have an opportunity to express his will on all questions arising in the district and the courts of our states have decided that the election laws governing schools should be liberally, rather than strictly, construed. In fact, all statutes relating to school laws should be construed to the beneficent end of facilitating education of the children residing therein, as was said in the case of *State v. McKown*, 290 S. W. 123, 1. c. 129:

"The object and purpose of the organization of this district was beneficent, in that it afforded added facilities for the education of the children residing therein. We have uniformly held that statutes in regard to the public school system, having to do with the creation and the conduct of the business of country districts should be liberally construed to effect the purpose for which they were enacted. Formed and conducted as they are by ordinary citizens, not learned in the law, any other construction would tend to defeat the purpose, and lessen the educational advantages, of such districts. *State ex inf. v. Bird*, 295 Mo. 344, 244 S. W. loc. cit. 940; *State ex inf. v. Jones*, 266 Mo. 191, loc. cit. 201, 181 S. W. 50; *State ex inf. v. Gill*, 190 Mo. 79, 88 S. W. 628; *State ex rel. v. Foxworthy*, 301 Mo. 376, 256 S. W. loc. cit. 468."

We are of the opinion that even though the law does not state the duration of the annual school meeting under Section 9283, such meeting can be extended until six o'clock on the day of the election so as to enable all patrons of the district to participate therein, in the absence of fraud or other illegal procedure.

II.

Your second question is as follows:

"Are directors of a common school district allowed to pay themselves for expenses incurred while looking after their particular school's business. In several instances it has been necessary for directors to travel quite a bit in the interest of their school but we are not sure whether or not they can legally pay themselves for this expense."

It appears that the office of school director, even though such a director has been classified as a public officer by the courts, serves from a sense of duty and a desire to be of service to his community, rather than for compensation. Section 9289, R. S. Mo. 1929, seems to be specific in its terms, said section being as follows:

"The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a quorum for the transaction of business: Provided, each member shall have due notice of the time, place and purpose of such meeting; and in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all the meetings of the board. No member of the board shall receive any compensation for performing the duties of a director."

Therefore, it would appear by the above section that a member of a school board is not entitled to any compensation in any manner for performing the duties as a member the board of a school district.

Respectfully submitted

OLLIVER W. NOLAN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

BANKS & BANKING:) Court orders in sales of real estate of
LIQUIDATIONS:) banks in liquidation, need not be recorded
in counties where liquidation is being had.

June 21, 1938

6-24



Mr. J. E. Felkins
Circuit Clerk & Recorder of Deeds
Taney County
Forsyth, Missouri

Dear Sir:

This is to acknowledge your letter of June 18th, in which you request the opinion of this Department. Your letter is as follows:

"I wish to ask a little information for the benefit of this office and it relates to a matter of this nature as to who would be liable or if any one would be as to recording the following named instruments.

"There is on file in this office about 50 or more instruments which have not been recorded and which has to do with the sale of real estate in the liquidation of two banks in this County. The Deputy Finance Commissioner has in the last five years filed in this office a petition and Court Order in the sale of real estate in the liquidation of these two banks and they deal with real estate in this County and they have not been placed of record and different Attorneys and Abstracters contend that should be made a matter of record to connect the chain of title on these particular pieces of real estate.

"The Finance Department say that they do not care if they are recorded or not and do not want to pay for same out of the proceeds collected in liquidating the real estate in question and what this office desires to know if it would be allowed or lawful to have this recording done and present a bill for same to the Finance Deputy for payment under an Order signed by the Circuit Judge."

We have previously written an opinion on substantially the same question asked in your letter.

For answer to your question we refer you to Section 5330, R. S. Mo. 1929, which provides in part as follows:

"The commissioner is authorized, upon taking possession of the property and business of such corporation or private banker, to liquidate the affairs thereof * * * *. He may, upon an order of the circuit court or judge thereof in vacation * * * * sell or otherwise dispose of all or any of the real and personal property of such corporation or banker. In case any of the real property so sold is located in a county or city other than the county or city in which the application to the court or judge thereof in vacation for leave to sell the same is made, the commissioner shall cause a certified copy of such order and the application therefor to be filed in the office of the recorder of the county or city in which such real property is located." (Underscoring ours.)

We interpret this to mean that if the real estate is located in a county outside of the county where the liquidation is being had that in that event it is the duty of the Commissioner of Finance to file a certified copy of said order and the application therefor in the office of the recorder of the county or city where such real property is

June 21, 1938

located. However, if the real estate is located in the county where the liquidation is being had there is no duty on the commissioner to file the certified copies of the order and application in that county. If the certified copies of the petition and order are filed in the county outside the county where the liquidation is being had, we think it is the duty of the commissioner to pay the filing expenses. However, if the purchaser of real estate, sold by the special deputy, desires to have a certified copy of the application and order of sale filed and recorded in the office of the recorder of deeds, of the county where the liquidation is being had, he may do so but there is no obligation on the commissioner to pay such expenses.

It is, therefore, our opinion that the Commissioner of Finance should file a certified copy of the order and the application in the county where the real estate to be sold is located if same is outside the county where the liquidation is being had, and it is his duty to pay filing fees therefor, and if the real property is within the county or city wherein the liquidation is being had there is no obligation on the Commissioner of Finance to have same filed and pay the fees therefor.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

SCHOOLS AND WARRANTS: School warrants may be issued up to the amount of the anticipated revenue for the year in which such warrant is issued and not in excess thereof.

September 6, 1938

9-6

Mr. George V. Farris
Attorney at Law
402 Miners Bank Bldg.,
Joplin, Missouri



Dear Sir:

This is in reply to yours of August 29, 1938, requesting an official opinion from this department, which is as follows:

"The Central City School District, Jasper County, Missouri, has a property valuation of over \$200,000.00 and no indebtedness whatever except a \$5,000.00 bond issue, which outstanding bond, however, doesn't enter into this matter.

"It is necessary for said school district to condemn about three acres of land for an athletic field, and the preliminary expenses of abstracting, surveying and attorney fees will run in the neighborhood of \$400.00. In this county there is hardly anyone who pays his taxes before the latter part of December, so that there is no money in the treasury before the 15th of January to pay the school indebtedness. The school district desires to issue warrants payable the 1st day of February 1939 for these expenses, and this would be well within the amount of revenue for the year; that is, these warrants together with all other expenses of maintaining the school would not exceed the amount of revenue for the fiscal year.

"This being a country district, the board obtains the advice of the County Treasurer that it cannot issue a school warrant payable at a future date. I cannot find anything in the statute which would prohibit issuing these warrants for this purpose, payable when the revenue comes in, and I believe your office has given an opinion to this effect. However, to set the matter at rest I should like your opinion in this matter as the Board desires to get this started before the school year commences."

School boards are limited in their powers in regard to spending school moneys by Section 12, Article X, of the Constitution of Missouri, which provides in part as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county

purposes previous to the incurring of such indebtedness; such proposition may be submitted at any election, general or special; * * * ."

Section 9233, R. S. Mo. 1929, provides in part as follows:

"* * * No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; * * * ."

By this section the school year is fixed at July 1st to June 30th following, and it is for this period that the board of directors shall anticipate the revenues for the period it may issue warrants.

The office of a school director is created by statute, and he must look to the statute for his authority. In the case of Consolidated School District No. 6 v. Shawhan, 273 S. W. 1. c. 184, the court said:

"Plaintiff district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it."

Section 9333, R. S. Mo. 1929, provides in part as follows:

"The board of education of any town, city or consolidated school district shall, except as herein provided, perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts acting under the general school laws of the state: * * * ."

Section 9311, R. S. Mo. 1929, provides in part as follows:

"Upon the order of the board of directors, it shall be the duty of the district clerk to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted, either for services as teacher, for material purchased for the use of the school, or material or labor in the erection of a schoolhouse for said district--the said warrant to be paid out of any moneys in the appropriate funds in the hands of the said treasurer and belonging to the district. * * *"

Section 9312, R. S. Mo. 1929, provides in part as follows:

"The warrants thus drawn shall be in the following form, and shall be signed by the president of the board and countersigned by the district clerk:

TEACHERS' FUND.

\$_____ No. _____
Treasurer of _____ county, Missouri:
Pay to _____, or order, for services
as teacher in district No. _____,
dollars, out of any funds in your hands for
the payment of teachers' wages belonging to
said district.
Done by order of the board, this _____ day
of _____, 19____.
_____ president. _____ clerk.

* * * * *

No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant: * * * * *"

By this section it is evident that the Legislature has not intended that a board of directors would be authorized to issue a warrant postdated, nor that a school warrant could be protested.

In the case of Jacquemin & Shenker v. Andrews, 40 Mo. App. 1. c. 510, the court in discussing the issuance of school warrants when there was no money in the fund but where the money was expected to come in that year, the court said:

"We take it, that, while the board of directors were, by the implication of the statute, prohibited from drawing said warrant on the treasury, unless there was money on hand of that fund, out of which it could be paid, still this prohibition must not be construed so as to preclude the directors from anticipating this fund, if the amount of their warrant could subsequently be paid out of any money coming into the county treasury for that school year, from either or all of the three sources from which that fund, by law, is derived.

"The provisions of the school law must be construed liberally so as to give them a practical effect. It might have been that the collection of the amount of the estimate of the annual meeting, for carrying on the school for that year, was delayed for some reason or that the income into the teachers' fund from the state or county may have been delayed, by reason of the default or mis-carriage of some officer intrusted by law with the collection or disbursement of this fund, and thus it may have been prevented from reaching the county treasury at the proper time. We cannot think a warrant drawn upon the county treasury, under such circumstances when there was no fund then on hand to pay it, would hardly be deemed illegal or unauthorized."

And in the case of Clark County v. Hackmann, 280 Mo. 686, the court in discussing what constituted a valid warrant, said, l. c. 696:

"The county authorities know from the assessed values and the tax rates just what revenue should come in for the year. They often issue warrants up to the very limit of the anticipated revenue, and these warrants we have held to be valid obligations of the county. This, on the theory that the warrants represent valid contracts made during the year. By valid contracts we mean contracts within the anticipated revenue of the year."

And at l. c. 698, the court further said:

"So, too, when this court has said (and rightfully so) that the purpose of Sections 11 and 12 of Article X of the Constitution was to place the business of the counties upon a cash basis, we did not mean that debts contracted within the anticipated revenues of the year were invalid because the collected revenues were insufficient to meet all of such debts. Nor did we mean by such expression that warrants issued for such debts were invalid because all of them could not be paid out of the revenue actually collected. Nor did we mean that each debt should be met with cash, but we did mean that during the fiscal year the cash would be available to meet the debt if the anticipated revenue was collected and rightfully disbursed."

In the case of State ex rel. v. Johnson, 162 Mo. l. c. 629, the court said:

"It was ruled in Book v. Earl, 87 Mo. 246, that 'the evident purpose of the framers of the Constitution and the people

who adopted it was to abolish in the administration of county and municipal government, the credit system, and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year.' But it was at the same time said: 'Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.'

"It was then anticipated that, though the county court might not issue warrants in excess of the levy for a year's current expenses, and that a creditor might rely upon the fact that his contract was within the amount of revenue levied and provided, and trust to the power of the State to enforce its taxes, still it might happen from some unforeseen cause enough of the estimated amount of revenue might not be collected to pay all the warrants drawn against it in anticipation. Under such circumstances it has never been ruled that such a creditor's warrant was absolutely void and extinguished by the non-payment in the year in which it was drawn. On the contrary, this court has often said in no uncertain terms that it was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years."

CONCLUSION

From the foregoing, it is the opinion of this department that a board of directors of a consolidated school district has no authority to issue warrants payable at some future date, that is postdated warrants, but that such warrants must be issued in the form as provided by the statute and as hereinbefore set out.

We are further of the opinion that the fiscal year for a school district is from the 1st of July to the 30th of June next, and that although at the time of the issuance of a warrant there is not sufficient funds in the school treasury to pay it, yet if the indebtedness for which the warrant is issued is within the anticipated revenue for the school year, then such warrant is valid, and should be paid by the treasurer out of funds derived from the revenue of that year when it is collected.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

APPROPRIATIONS: State Cancer Commission ^{may} can expend funds to
STATE CANCER : establish hospitalization for Cancer patients
HOSPITALS : prior to construction of State Cancer Hospitals.

February 21, 1938.

Dr. Ellis Fischel,
Chairman, State Cancer Commission,
400 Metropolitan Building,
St. Louis, Missouri.



Dear Dr. Fischel:

We hasten to acknowledge your request for
an opinion under date of February 18th:

"Possibly before this reaches you
Colonel Jameson has approached you
in reference to an opinion on the
interpretation of Committee Substi-
tute for Senate Bill No. 3. The
members of the Cancer Commission
have passed a resolution indicating
the willingness of the Cancer
Commission to assume the operation
of the tumor clinic at Fulton and
also the tumor clinic at St. Joseph,
now being operated by the Eleemosy-
nary Board, as soon as beds are made
available for hospitalizing patients.

"As you know, the last Legislature
appropriated \$100,000.00 for "Opera-
tion". This appropriation was cer-
tainly intended for the care of in-
digent cancer patients just as soon
as the Cancer Commission could provide
hospital facilities. Since it is
obviously impossible to erect a State
Cancer Hospital during the present
biennium, the Cancer Commission feels
that the intent of the legislators
could best be carried out by provid-
ing such hospitalization in the tumor
clinics already established at State
Hospital No. 1 and State Hospital No.
2. However, the Cancer Commission
feels it cannot go further in the
matter without a clear statement from
your office that it has the power to
do so."

Dr. Ellis Fischel, Chairman, -2- February 21, 1938.

Senate Bill No. 3, to which you refer, was passed by the 59th General Assembly and provided for the establishment of a State Cancer Hospital for the treatment of cancer and allied diseases, (Laws of Missouri, 1937, page 495-500). Section 15 of said bill, page 500, provided that the General Assembly shall appropriate such sums necessary to establish and maintain the hospital, thus:

"The General Assembly shall appropriate out of the State Treasury such sums of money as is deemed necessary to establish and maintain an Institution to be known as the Missouri State Cancer Hospital."

The General Assembly made the following appropriation for the establishment and maintenance of the hospital, (Laws of Missouri, 1937, Section 145-J, page 166:

"There is hereby appropriated out of the State Treasury, chargeable to the general revenue fund, the sum of Six Hundred Thousand Dollars (\$600,000.00) for the building, equipment, and operation for one year of the Cancer Hospital for the State of Missouri in compliance with the provisions of committee substitute for Senate Bill No. 3, as follows:

"For construction of	
Cancer Hospital.....	\$400,000.00
For equipment of	
Cancer Hospital.....	100,000.00
For operation of Cancer	
Hospital for one year...	100,000.00
Total.....	\$600,000.00"

The primary rule in the construction of statutes is to give force and effect to the lawmaker's intent, (Meyering vs. Miller, 51 S. W. (2d) 65, 330 Mo. 885).

Dr. Ellis Fischel, Chairman, -3- February 21, 1938.

It is self evident that the legislature, in appropriating funds for the "Operation" of the hospital, was well aware of the fact that it would take some time to determine a proper site for the hospital, employ the necessary architect to design the building, and enter into contracts for its construction. To hold, that the legislature did not intend any part or all of the funds appropriated for operation of the hospital to be spent for the relief of those unfortunate people afflicted with cancer and allied diseases, until such time that the hospital was erected, would be to cast an unwarranted shadow on the high humanitarian purposes which it displayed by the very creation of the Act.

In the case of Bowers vs. Missouri Mutual Association, 62 S. W. (2nd) (Mo.) 1058, 1. c. 1063, the court said:

"Laws are passed in a spirit of justice and for the public welfare and should be so interpreted if possible as to further those ends and avoid giving them an unreasonable effect."

And in the case of Hawkins vs. Smith, 147 S. W. 1042, 1. c. 1045, 242 Mo. 688, the court, in holding that in the construction of a statute it will not convict the legislature of doing a useless and unreasonable thing unless there is no other reasonable construction possible, said:

"It is consequently necessary to hold the right of action given to be transmissible in case of death, or we must convict the Legislature of doing a useless and reasonless thing in appending section 4 to the act of 1907. This kind of a construction is not put upon statutory provisions unless there is no other reasonable construction possible. Strottman v. Railroad, 211 Mo. 1. c. 251, 252, 109 S. W. 769."

The only reasonable construction that can be advanced, is that the legislature intended the commission to begin immediately upon the Act taking effect, and to seek every means possible to provide hospital facilities for

Dr. Ellis Fischel, Chairman, -4- February 21, 1938.

the care of those afflicted, until such time as a permanent hospital can be established for their care.

From the foregoing we are of the opinion that the State Cancer Commission ~~may~~ establish hospitalization for the care of indigent cancer patients in the tumor clinics already established, at State Hospitals Nos. 1 and 2 and spend such funds as are necessary out of the amount appropriated by the legislature under "Operation".

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney-General.

MW:LB

CITIES: No person under the age of twenty-five years may be elected to the council of a ~~state~~ ^{CITY} of a third class.

April 12, 1938

4-16



Dr. M. S. Slaughter,
Mayor-elect,
Webb City, Missouri.

Dear Sir:

Under date of April 9, 1938 Woodson Oldham, an Attorney at Law of your city requested that we furnish you an official opinion upon the following state of facts:

"Dr. M. S. Slaughter, Mayor-elect, of Webb City, Missouri, has requested that I obtain the opinion of the attorney-general's office concerning the right of a young man, less than twenty-five years of age, to serve as a councilman of a city of third class. At the general city election, held on April 5th, a young man about twenty-two years of age was elected to the council from one of the wards of Webb City, and his right to serve as such councilman has been questioned.

The city council passed an ordinance reducing the age of councilmen to twenty-one, and the right of the council so to reduce the age limit of councilmen, has been questioned in the face of Section 6736, R. S. Mo. 1929."

We invite your attention to applicable statutes which govern the question presented by Mr. Oldham's request.

Section 7289 of R. S. Mo. 1929, relating to municipalities enacting ordinances in conformity with the state laws, reads as follows:

"Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

In the case of City of Richland vs. Null, 185 S. W. 250-51, the appellate court, in discussing the powers granted to a city, said:

"We would not adhere to the rules insisted upon by the defendant. That plaintiff city can exercise only such powers as are granted in express words or those necessarily incident to, or implied in the powers expressly granted; * * * ."

Obviously Section 7289 limits municipalities to the passage of ordinances regulating subjects, matters and things upon which there is a general law of this state to and in conformity with such general laws. Section 6736 of R. S. Mo. 1929, relating to the qualifications of councilman, reads, in part, as follows:

"No person shall be a councilman unless he be at least twenty-five years of age, a citizen of the United States, and an inhabitant of the city for one year next preceding his election, and a resident of the ward from which he is elected six months next preceding his election."

The above section clearly contemplates that no person shall be a councilman unless such person be at least twenty-five years of age, a citizen of the United States and an inhabitant of the city for one year next preceding

his election. No other construction, in this respect, may be rationally implied from the words used. Consequently no room for construction exists. *Cummings vs. Kansas City Public Service Company*, 66 S. W. 1. c. 931; *State vs. Thatcher*, 92 S. W. (2nd) 1. c. 643.

Section 6744 provides, in part, as follows:

"Every officer of the city * * * and every councilman, before entering upon the duties of his office, shall take and subscribe to an oath * * * that he possesses all the qualifications prescribed for his office by law; * * *."

From these statutory considerations, it is evident that the young man who is less than twenty-five years of age and who has been elected to the council of a city of a third class, could not serve as a councilman in view of the plain and unequivocal requirements of the statute. It should also be pointed out that such person could not take the required oath that he possesses all the qualifications prescribed for his office by law, since one of the qualifications of a councilman is that such councilman be, at least, twenty-five years of age prior to his election.

It should also be observed that even though the city council has passed an ordinance reducing the age of councilmen to twenty-one years, it is clearly in conflict with Section 6736, *supra*, which requires that the councilmen be at least twenty-five years of age. These considerations are in accordance with the general fundamental rule of law that a city may only enact ordinances which are in harmony with the general laws of the state. As was said in the case of *Wood vs. Kansas City*, 162 Mo. 303-09:

"The power to enact ordinance by defendant city can only be exercised within the limits of its charter, and in harmony with the constitution and statutes of the state."

This principle of law has had consistent application and has most recently been reaffirmed in the case of *Fishback Brewery Company vs. City of St. Louis*, 87 S. W. (2nd) 648.

Dr. M. S. Slaughter

-4-

April 12, 1938

CONCLUSION

In view of the above, it is our opinion that no person under the age of twenty-five shall be elected to the council of a city of the third class, even though the city has enacted an ordinance which reduces the age of councilmen to twenty-one years.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

RCS:LB

**SCHOOLS:
AUTHORITY OF
DIRECTORS TO ISSUE
COMMERCIAL PAPER:**

School directors are only authorized to issue warrants as provided by statute and are not authorized to issue commercial paper for payment of erection of school buildings. Directors are not authorized to issue warrants in anticipation of revenue for any year except the current year.

September 13, 1938

9-15

Mr. M. L. Fishback, Secretary
Kingsville Schools
Consolidated District No. 7
Kingsville, Missouri



Dear Sir:

This is in reply to yours of recent date requesting an official opinion from this department based upon the following letter:

"Our District (Kingsville Consolidated Number Seven) have voted transportation and have abandoned 5 rural schools within the district, from which according to the Statutes the District is entitled to \$1000.00 each or a total of \$5000.00. This amount is acknowledged due the District by the State Department of Public Schools. We have made an application to the PWA asking for a grant to match the \$5000.00 due us from The State, with which we contemplate the building of two rooms and other improvements approved by The Department of Public Schools to our present system. The Government sent a representative to ascertain where we were going to acquire the funds to match their grant. The Board of Education had made arrangements with a Bank in Holden where on demand, by the Board signing the note, the Bank would loan this amount to our District.

We know that the law and construction of the Constitution provides that no school district shall be allowed to become in-

debted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the consent of two thirds of the voters and are very strict in holding what would be included in the term income and revenue provided for the year.

In view of the law, the Board hesitates to take this step, and the question is whether this would be an indebtedness or anticipated revenue?

We feel that this is anticipated revenue, or a gift from The State of Missouri and we are in no way contracting a debt that is binding on the taxpayers of our district. This amount (\$5000.00) will not be paid by the State before August 1939.

If the board is not violating any law in securing this loan from the Bank, would the Board borrow \$5000.00, or \$5000.00 less the interest for one year?

Should this request come through a prosecuting attorney please send through Chamberlain, Prosecuting Attorney of Cass County, if not I would appreciate your opinion sent direct to me."

Your request involves the right of the directors of a school board to bind the district for payment of an obligation in excess of the anticipated revenue for the current year in which the indebtedness is incurred and becomes due.

The directors of a school district are limited in their powers as to the spending of school moneys by Section 12, Article X, of the Constitution, which is as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner

or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes previous to the incurring of such indebtedness; such proposition may be submitted at any election, general or special; * * *."

In the case of Tate v. School Dist. No. 11 of Gentry County, 23 S. W. (2d) 1. c. 1022, the court in discussing the provisions of the Constitution as it applies to the authority of schools to spend moneys, said:

"Section 11, art. 10, of our State Constitution, is a limitation upon the annual rate of taxation to be levied for county, city, town, and school purposes, and limits the annual rate of taxation for school purposes in school districts, other than those composed of cities of 100,000 inhabitants, or more, to 40 cents on the hundred dollars valuation of the taxable property in the school district. Section 12, art. 10, of the

Constitution, is a limitation upon the annual debt-creating power of such political corporations. It provides: 'No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting (on such proposition) at an election to be held for that purpose. * * *'

It is contended by appellant that the contract between plaintiff and defendant school district, dated December 18, 1924, created a debt of the school district in anticipation of the income and revenue of the school district to be provided for the school year 1925-26, which, by statute (section 11155, R. S. 1919), 'shall commence on the first day of July and end on the thirtieth day of June following'; * * *."

As is stated in the above case, the school year begins July 1st and ends on June 30th following. It is for that period that the board of directors must anticipate the revenue when considering entering into a contract incurring the spending of district moneys, and if the contract is one which will be completed during such year, then the revenue for that year is the income of the district which the board must take into consideration as the limit to which it may incur debts.

Section 9233, R. S. Mo. 1929, provides in part as follows:

"All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; but the income from state, county and township funds shall be applied only to the payment of teachers' warrants, issued by order of the board to legally qualified

teachers for services rendered according to law. No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; * * *."

The office of a school director is purely statutory and he must look to the statutes and the provisions of the Constitution for his authority. In the case of Consolidated School District No. 6 v. Shawhan, 273 S. W. 1. c. 184, the court said:

"Plaintiff district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it."

You speak in your request of the board of directors executing a note to the bank, payable on demand, for the amount of money which it expects to receive from the State Department of Education in August of 1939. From our research on this question, we find that the statutes do not authorize a board of directors to execute negotiable paper such as a note and bind the district. In Vol. 56 C. J., page 571, Sec. 688, the rule is laid down as follows:

"As a general rule a school district or other local school organization has no power to make and issue, or indorse, commercial paper, unless authority to do so is expressly granted by statute or by necessary implication therefrom."

The only obligations such directors are authorized to execute, and by which the district is bound, are the warrants issued under authority of Sections 9311 and 9312, R. S. Mo. 1929.

Section 9311 provides as follows:

"Upon the order of the board of directors, it shall be the duty of the district clerk to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted, either for services as teacher, for material purchased for the use of the school, or material or labor in the erection of a schoolhouse for said district--the said warrant to be paid out of any moneys in the appropriate funds in the hands of the said treasurer and belonging to the district. The species of indebtedness must be clearly stated and should be drawn on its appropriate fund; all moneys for teachers' wages on the teachers' fund; all moneys used in the purchase of a site, erection of building thereon, and furnishing the same, on building fund; and all other expenses to be paid out of the incidental fund: Provided, however, that no order for the payment of teachers' wages shall be drawn in favor of any person not holding a certificate of qualification, signed by the county superintendent, state superintendent or a certificate or diploma conferred by a teachers college of this state, or in favor of any teacher delinquent in his monthly or term reports; and further provided, that before drawing any such warrant, the president of the board shall first visit the office of the county or township treasurer, and record his signature in a book to be kept in the office of said treasurer for that purpose, and for making such trip such president of the board shall be allowed one dollar per day and his necessary traveling expenses, payable out of the incidental funds of his district."

Section 9312 provides in part as follows:

"The warrants thus drawn shall be in the following form, and shall be signed by the

president of the board and countersigned
by the district clerk:

TEACHERS' FUND.

\$ _____ No. _____
Treasurer of _____ county, Missouri:
Pay to _____, or order, for services
as teacher in district No. _____,
dollars, out of any funds in your hands for
the payment of teachers' wages belonging to
said district.
Done by order of the board, this _____ day
of _____, 19____.
_____, president. _____, clerk.

* * * *

No treasurer shall honor any warrant unless
it be in the proper form and upon the ap-
propriate fund; and each and every warrant
shall be paid from its appropriate fund, and
no partial payment shall be made upon any
school warrant, nor shall any interest be
paid upon any such warrant: * * * *."

If the school district is not bonded beyond the
constitutional limit, then by proceeding as directed by
Article X, Section 12, of the Constitution, the voters of
the district can authorize the board to execute obligations
within the limitations set out in said constitutional
provision, but we are convinced that the board, on its own
initiative, has no authority to execute a note payable on
demand and bind the district for the payment of same.

If the district does not have the money in its treasury
at the time the contract is entered into, and if the contract
is to be completed before June 30, 1939, and if the board
anticipates that it will have the money in the treasury be-
fore the end of the fiscal year, then it can issue a warrant
for the payment of the same in the form prescribed by Section
9312, supra, and such warrant will be legal and payable out
of the revenues for the current year when a sufficient amount
comes into the treasury, but there is no authority to post-
date said warrant or pay interest on same.

While the \$5,000 that the district expects to get from the State for the building may be classed as anticipated revenue, yet as it is not anticipated revenue for the year ending June 30, 1939, therefore it could not be taken into consideration for an indebtedness incurred for the current year and which is to be paid during the current year.

CONCLUSION

Therefore, we are of the opinion that the board of directors of a school district has no authority to execute a note payable on demand for moneys to erect a school building, which note is to be paid out of anticipated revenues of the district for the year following the one in which the indebtedness is incurred and becomes due and payable. We are further of the opinion that under no circumstances is a board of directors authorized to execute a note and bind the district for the payment of same, but that all obligations of the district should be paid by warrants drawn as provided by the statutes.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

CERTIFIED PUBLIC
ACCOUNTANT:

Styling himself C. P. A. is a personal privilege granted under Chapter 110, R. S. Mo. 1929, and cannot be used to style non-resident partners or non-resident firms or individuals.

October 13, 1938

Hon. David W. Fitzgibbon
Associate Prosecuting Attorney
Municipal Courts Building
St. Louis, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of October 7th, 1938, requesting an official opinion from this department, which reads as follows:

"Referring to my letter dated September 30th, 1938 relative to the opinion requested in the matter of Certified Public Accountants, in digesting the letter it appears to me that the question submitted is not very comprehensive, and I am herewith rephrasing the question -

"Is it legal for a firm or an individual operating branch offices in Missouri to hold themselves out as certified public accountants, the partners certified public accountants of other states, but not holding Missouri degrees, but the resident partner or manager a Missouri certified public accountant."

Section 13710, Article 1, Chapter 110, R. S. Mo. 1929, reads as follows:

"Any citizen of the United States, or person who has declared his intention of becoming such, having a place for the regular transaction of business as a professional accountant in the state of Missouri, and who, as in this chapter required, shall have received from the

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secretary of state for the state of Missouri a certificate of his qualifications to practice as a public accountant, as hereinafter provided, shall have the authority to style himself and be known as a certified public accountant, and to use the abbreviated title C. P. A. for and during the term mentioned in his certificate. "

It will be noticed that this section specifically states, "any citizen * * * or person who has declared his intention," and further mentions, referring always to "any citizen", "shall have received from the secretary of state for the state of Missouri a certificate of his qualifications to practice as a public accountant." It will also be noted that in referring to the certificate it refers to the word "his." In no way can this section be construed to mean a partnership, copartnership, or partnership operating under a fictitious name as provided in Section 14342, R. S. Mo. 1929. This section also provides that the applicant, to qualify, must have a place for the regular transaction of business as a professional accountant in the state of Missouri. By that it means that the certified public accountant must have a place for the regular transaction of business as a professional accountant, and does not mean that he can be represented in this state by an agent or employee.

There is a great difference between an ordinary accountant and a certified public accountant for the reason the privilege of styling himself as a C. P. A. can only be accorded to accountants who have met the qualifications and taken the examinations as set out in Chapter 110, supra.

Section 13712, R. S. Mo. 1929, reads as follows:

"The board of accountancy, the majority of which shall in all cases have the powers of the board, shall determine the qualifications of persons applying for certificates under this chapter, shall make rules for the examination of same, which shall embody the following:

"(a) Examinations shall be held by the board at least once in each year, at such times and places as may be determined by them. The time and place of holding such examinations shall be advertised for not less than three consecutive days, not less than thirty days prior to the date of each examination, in at least two daily newspapers printed and published in this state. The examination shall be in 'theory of accounts,' 'practical accounting,' 'auditing' and 'commercial law as affecting accountancy.'

"(b) Applicants for certificates, before taking the examination, must produce evidence satisfactory to the board that they are over twenty-five years of age, of good moral character, a graduate of a high school with a four years' course, or have an equivalent education, or pass an examination to be set by the board and that they have had at least three years' practical accounting experience. * * *"

It will be noticed that by this section the board of accountancy is required to hold examinations of applicants, and it also states upon what subjects the examination shall be given. It further provides that the applicant must meet certain qualifications, such as over twenty-five years of age, of good moral character, a graduate of a high school with a four years' course, etc. It also further provides that they shall have at least three years' practical accounting experience. In other words, Chapter 110, supra, by granting the privilege of C. P. A. to accountants, is really raising the plane of ordinary accountants to professional accountants.

Section 13713, R. S. Mo. 1929, reads as follows:

"The board may, in their discretion, waive the examination of any person of competent age, of good moral character, and who has been engaged in reputable practice as a public accountant for a continuous period of three years, one of

which shall have been in the state of Missouri immediately preceding the passage of this chapter, or who has been employed as an accountant by reputable firms of accountants for a continuous period of five years immediately preceding the passage of this chapter, one of which shall have been in the state of Missouri, and who shall apply in writing to the board for such certificate within six months after the taking effect of this chapter."

Under this section the board, in its discretion, may waive the examination of certain persons and refers to accountants who have been employed as an accountant by reputable firms of accountants for a continuous period of five years immediately preceding the passage of this chapter. It does not mean that they may waive examination of accountants who have been employed by a duly qualified certified public accountant, and does not by innuendo mean that a certified public accountant who is not a resident of the state of Missouri but who has a place of business in the state of Missouri can be allowed to style himself as a certified public accountant in accordance with Section 13710, supra.

There is a difference between a public accountant and a certified public accountant in that the public accountant cannot style himself as a C. P. A., and is not considered as of a learned profession but as merely a professional man. It was so held in the case of *Curry v. Inland Revenue Commission*, (1921) 2 K. B. 332. It was also so held in the case of *United States ex rel. Liebmann v. Flynn*, District Director of Immigration, 16 Fed. (2d) 1006. Also in the case of *In re Ellis*, 124 Fed. 1. c. 643, the court held:

"Whatever may have been the intention of Congress in 1885 and 1891 as to skilled labor imported from abroad--whether it sought only to keep out 'the lowest social stratum who live in hovels on the coarsest food,' or sought also to give to skilled labor which uses brains as well as hands

somewhat of the protection which it had secured to manufacturing capital--there can be no doubt as to its meaning in 1903, for the inhibition of the fourth section is against the importation of aliens 'to perform labor or service of any kind, skilled or unskilled.' Moreover, the exception has been amended so that it no longer covers 'persons belonging to any recognized profession,' but only 'persons belonging to any recognized learned profession.' The definition of the word 'profession' given in the Century Dictionary and approved in U. S. v. Laws is a broad one, and it seems not unreasonable to assume that Congress qualified it with the adjective 'learned' for the express purpose of restricting the scope of the exception. Certainly in the ordinary use of language an 'accountant,' however expert he may be, would not be included as belonging to one of the learned professions. Apparently counsel for both relators practically concede this, for they make no effort to differentiate between professions. 'All professions are learned, because they require special knowledge,' says the counsel for Charalambis. 'All professions are learned. It is an inherent part of the word "profession,"' says the counsel for Ellis. But Congress did not so understand it, or it would not have inserted the word 'learned,' and the courts must give that word a meaning. However broad such meaning may be, it would seem that an accountant would fall without it."

Section 13714, R. S. Mo. 1929, reads as follows:

"The board may, in their discretion, issue a certificate to the secretary of state, to the effect that any person who is the lawful holder of a certified public accountant's certificate issued under the law of another state which provided for similar registration, and which established a standard of qualifica-

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tion as high as that required under this chapter, and upon the reception of such certificate, the secretary of state shall issue to such person a certificate of registration, which shall entitle the holder to practice as such certified public accountant and to use the abbreviation C. P. A. in this state."

Under this section, in accordance with the comity between states which applies to doctors, lawyers, dentists, and practitioners of optometry, it specifically states that in order for this comity to be acknowledged by the board of accountancy, that state in which the applicant is similarly registered must have the same standard of qualifications as that required under this chapter.

Chapter 110, supra, which applies solely to the state board of accountancy, has not been passed on in this state by either the Supreme Court or the Court of Appeals. The only analogous situation that could be cited as authority under the same reasoning would be constructions based upon other provisions such as dentistry, practice of the law, and practice of optometry.

Chapter 101, R. S. Mo. 1929, page 3511, sets out the method of obtaining a certificate of registration for the practice of optometry. This chapter also sets out certain qualifications and subjects for examination to be given the person. It does not mention partnerships or firms operating under fictitious names.

In this state Chapter 101, supra, in reference to qualifications to practice optometry was construed by the Appellate Court in the case of State ex inf. McKittrick, Attorney General v. Gate City Optical Co., 97 S. W. (2d) 89. This was a case of quo warranto against the Gate City Optical Company and Sears, Roebuck & Co. It was an attempt to oust the Gate City Optical Company and Sears, Roebuck & Company from practicing optometry. On account of exemption (b) as set out in Section 13502, R. S. Mo. 1929, the court held that the corporation was not practicing optometry in violation of Chapter 101. Paragraph (b) reads as follows:

"The following persons, firms and corporations are exempt from the operation of this chapter:

* * * * *

"(b) Persons, firms and corporations who sell eyeglasses or spectacles in a store, shop or other permanently established place of business on prescription from persons authorized under the laws of this state to practice either optometry or medicine and surgery."

But the Legislature of this state, in 1931, added another limitation or exemption so as to prevent a corporation from practicing optometry by way of a subterfuge, by paragraph (c) of Section 13502, Laws of Missouri, 1931, page 283, which reads as follows:

"(c) Persons, firms and corporations who manufacture or deal in eye glasses or spectacles in a store, shop or other permanently established place of business, and who neither practice nor attempt to practice optometry, and who do not use a trial case, trial frame, test card, vending machine or other mechanical means to assist the customer in selecting glasses."

This alone shows that it is the intention of the Legislature in such provisions, in granting certificates of registration not only to certified public accountants, but to dentists, lawyers, or practitioners of optometry, that they follow their profession by personal contact between the practitioner and the public, and not allow a corporation, firm, partnership, or anyone acting under a registered fictitious name to follow that profession.

In the case of State ex rel. Beck v. Goldman Jewelry Co., 142 Kan. 881, 51 P. (2d) 995, 102 A.L.R. 334, 1. c. 337, the court said:

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"It would seem axiomatic that where the statute requires a practitioner of optometry to be a person (R. S. 65--1502) and that to be entitled to practice persons must have heretofore lawfully registered (as of June 9, 1923) and every person twenty-one years of age, of moral character, possessing specified educational qualifications, being a graduate from a recognized school of optometry of specified requirements, must have passed a requisite examination, that no corporation could be registered and thereby be entitled to practice."

In this case the statute of Kansas provided that a practitioner of optometry should be a person, and under Chapter 110, R. S. Mo. 1929, Section 13710, in reference to granting certificates to certified public accountants, provides, as set out before, that he must be a citizen of the United States, or one who has declared his intention, etc., and does not provide for a registered fictitious name.

In the case of Winslow v. Kansas State Board of Dental Examiners, 115 Kan. 450, 223 P. 308, plaintiff sought to enjoin the board from enforcing an order revoking his license to practice dentistry. It appears the Eastern Dental Company, a Missouri Corporation, had obtained authority to do business in Kansas and maintained an office in Kansas City, Kan. On the door of its reception room, its name appeared in large letters and plaintiff's name appeared below in small letters. Plaintiff was the company's dental operator and was paid a salary and commissions for his work. He made no contracts with patients. One of the stated causes for cancellation of plaintiff's license was that he did not practice under his own name. The board demurred to plaintiff's petition and appealed to this court from an order overruling the demurrer. In disposing of the appeal, the court said:

"Dentistry is a profession having to do with public health, and so is subject to regulation by the state. The purpose of regulation is to protect the public

from ignorance, unskillfulness, unscrupulousness, deception, and fraud. To that end the state requires that the relation of the dental practitioner to his patients and patrons must be personal."

In view of the above case, which is analogous to the practice of a certified public accountant, it is the intention of the Legislature of the State of Missouri that his relation with the customers must be personal and should not be controlled in any manner by a corporation, firm, partnership, or anyone acting under a registered fictitious name.

Under Chapter 110, Section 13710, supra, which applies to certified public accountants, a fictitious name such as Haskins and Sells could not take an examination as set out in said chapter.

As to the registration of fictitious names, as set out in Section 14342, supra, it does not apply to a provision which is limited and powers granted by other special acts of the Legislature such as the qualifications and mode of examination of applicants for the certification of being certified public accountants. This was so held in the case of *In Re Co-operative Law Company*, 198 N. Y. 479, 92 N. E. 15, 32 L.R.A. (N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879, where the right of a corporation to practice law was under consideration, and the court said:

"A corporation for the practice of law is not authorized by a statute permitting the organization of a corporation for any lawful business, since the practice of the law is not a lawful business except for members of the bar, who have complied with all the conditions required by statute, and the rules of the courts: and a corporation cannot perform the conditions."

Also in the case of *In Re Otterness*, 181 Minn. 254, 232 N. W. 318, 73 A.L.R. 1319, it was held:

"A corporation cannot itself practice law, nor can it lawfully do so by hiring an attorney to conduct a general law practice for others for pay, where the fees earned are to be and are received as income and profit by the corporation."

In the case of State v. Kindy Optical Co., 216 Iowa, 1157, 248 N. W. 332, 335, decided in 1933, it was shown the company was a maker and seller of optical goods. Jensen, a licensed optometrist, was an employee of the company, which operated an optical department in a store in Des Moines. The company entered into a lease with Jensen in which it agreed to pay Jensen, and at the same time it made a contract with Jensen, subject to cancellation on seven days' notice, to employ him, and Jensen agreed to remain in its employ for two years. It was provided Jensen should be manager, subject to the direction and control of the company's officers. All moneys from the business belonged to the company, which agreed to pay Jensen a stipulated salary and commissions. The state brought action to enjoin and the defendant contended it was not practicing optometry; that Jensen was its lessee and was not under its control in the practice of optometry; and that the company did not profess to be an optometrist or to assume the duties incident to said profession. It did not appear that defendant's name was used, the business being advertised in the name of the department store, but the advertisements were prepared and paid for by the company. The company owned the equipment. In its opinion the court said:

"The subtle attempt on the part of the defendant to evade the provisions of the Iowa statutes in reference to the practice of optometry, by employing a licensed optometrist to conduct its business, and by the execution of the alleged lease with its employee, is too patent to appeal strongly to a court of equity. Younker Bros. probably should have been made a party defendant in this action, as that institution had no more right to hold itself out to the public as being engaged in the practice of optometry than did the defendant."

"The execution of the so-called lease between the defendant and its employee Jensen, in connection with the contract of employment between the same parties, was also a sham and fraud and a too evident plan, purpose, and intent to evade the provisions of the statutes herein referred to. It is true that the name of the defendant did not appear publicly in connection with the business, but the record shows without controversy that the business was in fact owned and operated by the defendant company. The defendant company controlled the conduct and policies of the business. Jensen was simply its employee on a stipulated salary. The so-called lease between Jensen and the defendant, under the terms of which the defendant, as lessor, was to pay Jensen, as lessee, \$281 per month, was only a clever attempt to change the character of Jensen from an employee to a lessee, and does not change the fact that Jensen was an employee of the defendant company.

"The defendant company could not conduct a business without a license. It could not obtain a license, and we can conceive of no reason why it should be permitted to continue to conduct a business under the license of an optometrist. We hold therefore that the defendant company was and is engaged in the practice of optometry and that it is so engaged in violation of the statutes of this state."

In the case of Stern v. Flynn, 154 Misc. 609, 278 N.Y.S. 598, 599, plaintiff sought to compel the secretary of state to accept for filing a proposed certificate of incorporation, a part of the proposed purpose being "to do, render and perform optometrical and oculists' work and services" and "to engage in the practice of optometry, provided it employs only licensed optometrists to do the work." The court, after citing authorities holding that a corporation can neither practice law nor

hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it, said:

"If it is repugnant to the policy of the state to have the profession of medicine, of dentistry, and of the law practiced by a corporation, it would seem to be quite as repugnant to have the profession in optometry practiced by a corporation. The rule laid down of Matter of Cooperative Law Co., supra, is as applicable to the practice of optometry as to the practice of the law. The practice of optometry may be carried on only by those persons who have complied with the statute and have met the required qualifications as to moral character and educational fitness. It necessarily follows that the right to practice optometry is a personal one and confined to real persons and not to legal entities. A corporation as such cannot meet the requirements of the statute; it cannot have completed a course in a high school or in a university where optometry is taught, nor present the necessary certificate of character. It cannot pass a state board examination or present a degree earned in a university."

In the case of Funk Jewelry Co. v. State (1935), 50 P. (2d) 945, it was held that a corporation which employed a registered optometrist, as a part of its business, to examine the eyes for defects and prescribe glasses to correct them, was engaged in the practice of optometry in violation of a statute which provided that a person desiring to engage in the practice of optometry must be over twenty-one years of age, of good moral character, and possess certain specified educational qualifications, and must pass an examination before the state board of optometry, and obtain a certificate of registration.

In the case of McMurdo v. Getter, 10 N. E. (2d) 139, (Mass.) the court said, l. c. 143:

"Although the statute does not show an uncompromising determination to apply purely professional standards to optometrists, we think that they are in effect placed on a professional plane. A certificate of registration may be revoked for 'unprofessional conduct' (section 71), although the statute speaks of an 'optometric practice or business.' The general principle is recognized that there should be direct professional relations between an optometrist and the members of the public who engage his services. Section 72 declares that 'No optometric practice or business * * * shall be conducted under any name other than that of the optometrist or optometrists actually conducting such practice or business.' That provision, unless this case falls within some exception to it, makes illegal what was done in this case. It prohibits, as a general rule, the practice of optometry by a layman or a corporation through servants who are registered optometrists."

In view of the holding in this case, there is no question but what a certified public accountant should have direct professional relations between himself and the public who engages his services, and he should not be employed, for the reason that he holds a certificate of public accountancy in the state of Missouri, by a layman, corporation, or firm holding a registered fictitious name, but under Chapter 110, supra, in order to avail himself of the privilege granted him under said chapter to style himself as a C. P. A., it would be unprofessional to allow his name to be used as an employee of a corporation, partnership, firm or anyone doing business under a lawfully registered fictitious name.

In *People v. Marlowe*, (1923), 203 N. Y. S. 474, it was held that the degree of Certified Public Accountant which had been conferred upon the defendant by the National Association of Certified Public Accountants, a private membership organization in the District of Columbia, would not entitle him to hold himself out to the public as a public expert accountant in the State of New York, the use of such a degree lawfully obtained from any board or other institution outside of the state of New York being prohibited unless the General Business Laws have been fulfilled. And the appending of the name of the Association, "N. A.," after the title of "certified public accountant" did not take the defendant out of the prohibition of the statute. The court said in this New York case:

"As I view it, the statute affecting Certified Public Accountants in this State was enacted not alone to prevent frauds, but as well to assure the public that persons practicing public accountancy as experts, certified as such, have met our standards of qualifications, and tests fixed by law or in accordance with rules and regulations authorized thereunder. To rule otherwise under these circumstances would mean that other states, boards, associations, and institutions could prescribe a course of study, determining their own tests of proficiency of the applicant, and then issue a degree to him as a Certified Public Accountant which, according to the claim of the defendant, would entitle the recipient thereof to come into this State and practice expert public accountancy. I cannot agree with this view which has been urged upon us for our consideration."

In the case just quoted from, *People v. Marlowe*, 203 N. Y. S. 474, it was held that unless defendant could plead some other defense, he should be held guilty of violation of the New York law as to Certified Public Accountants.

A note in 43 A. L. R. 1095 says that *Frazier v. Shelton*, 320 Ill. 253, 150 N. E. 696, 43 A. L. R. 1086, holds that the state may require one to comply with the act before

acting as a certified public accountant or a public accountant, but is unconstitutional when it goes so far as to prohibit one from working at the business of accountancy for more than one person. This case recognizes that "there is in the public mind a marked distinction between a public accountant and a certified public accountant."

In the case of Henry v. State, 97 Tex. Crim. Rep. 67, 260 S. W. 190, wherein it was held that one could act as a public accountant but not as a Certified Public Accountant unless certified by the state of Texas under its laws, the court said among other things:

"Appellant's criticisms of the charge of the court are directed against that phase of it which declines to sanction his contention that his act in advertising himself as a Certified Public Accountant was illegal inasmuch as he did not state in his advertisement that he was such Certified Public Accountant of the State of Texas. The objection cannot be sustained."

In other words, the court held that it was just as much a violation of the law to practice as a Certified Public Accountant in Texas as if the defendant had expressly stated in his announcements or advertisements that he was certified by the State of Texas. To the same effect is the case of Crowe v. State, 97 Tex. Crim. Rep. 98, 260 S. W. 573. In People v. National Association C. P. A., 204 App. Div. 288, 197 N. Y. S. 775, the defendant was enjoined from operating a school which conferred the C. P. A. degree in the State of New York because it was in violation of the statutes of New York conferring upon its proper authorities the right to certify public accountants. The court said:

"There is not the slightest doubt that under the statute above quoted a foreign corporation would be restrained from transacting a business in this State contrary to and in violation of the laws of the State."

In Davis v. Sexton, 211 App. Div. 233, 207 N. Y. S. 377, it is pointed out that under the New York laws (as under our own statutes) "persons may practice as public accountants but

without a certificate of the regents they cannot assume the title of 'Certified Public Accountant.' General Business Law, Sec. 80, as amended by Chapter 443, Laws 1913."

The same distinction is observed in *State v. De Verges* (La.), 95 So. 805, 27 A. L. R. 1526. This latter case also recognizes the right of accountants from other states to become licensed in the state by the provision for their admission upon their foreign certificate if meeting with the approval of the local board, this indicating that a foreign practitioner must be admitted under the laws of the local state. So it is pointed out at length, and interestingly, in *Lehman v. State Board of Public Accountancy*, 208 Ala. 185, 94 So. 94, that while a lawyer or a doctor cannot practice at all without a certificate, yet public accountants may practice accountancy without certificates. The court said:

"They are not required to obtain a certificate or license to practice their calling but obtaining the license or certificate is purely voluntary on their part."

CONCLUSION

In view of the foregoing, it is the opinion of this department that it is unlawful for a firm or an individual operating branch offices in Missouri to hold themselves out as certified public accountants, the partners being certified public accountants of other states, but not holding Missouri degrees, but the resident partner or manager being a Missouri certified public accountant.

Hon. Davis W. Fitzgibbon

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Oct. 13, 1938

It is further the opinion of this department that a firm or partnership cannot style itself as certified public accountants under a lawfully registered fictitious name.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

FISH AND GAME: Game fish, taken from waters of another State can be sold in Missouri (Section 8275)

April 27, 1938

Honorable Elbert L. Ford
Prosecuting Attorney
Dunklin County
Kennett, Missouri



Dear Sir:

This will acknowledge your inquiry of the 22d, which reads as follows:

"I would appreciate you sending me an opinion on your construction of Section 8275, Revised Statutes Missouri 1929.

"A few days ago the Constable at Campbell, arrested a peddler of catfish. The fish were taken from the waters of the State of Arkansas, and were being offered for sale on the streets of Campbell. The Constable arrested the defendant at the request of the Game Warden, a Mr. Jones, from Charleston, Missouri, who contends that even though game fish were caught in another State, if sold in this State it is a violation of this section.

"My contention is that in order to violate Section 8275, fish must have been 'caught or taken from the waters of this State.'

"They have this party arrested under two charges, one for the sale and offering for sale of said catfish and

the other for selling without first having and obtaining a State and County license. The County has never set any license for fish peddling and the City of Campbell has no license, and my contention is that this man has violated no law and should be released and the Game Warden is desirous of obtaining an opinion from your office before dismissing this case.

The portion of Section 8275, R. S. Mo. 1929 which is pertinent to your question, reads as follows:

"It shall be unlawful for any person, firm or corporation, to offer for sale, sell, or ship for market purposes, when caught or taken from the waters of this state, any game fish. *** "

The statute is leveled against the sale of game fish "when caught or taken from the waters of this state." The language is clear. To violate this portion of the statute, a person would have to offer for sale, sell or ship for market purposes, game fish caught or taken from the waters of this state.

It is a familiar rule that criminal statutes are to be strictly construed. State vs. Owens, 268 Mo. 481. The courts cannot read into criminal statutes crimes that are not therein defined.

There is no provision in the law for obtaining a state license to sell fish, or making it a crime to sell fish without such a license. Your letter states that no license is required by your city, nor by the city of Campbell to sell fish.

Hon. Elbert L. Ford

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April 27, 1938

CONCLUSION.

It is, therefore, the opinion of this office that the man mentioned in your letter has violated no law of this state and is therefore not subject to prosecution under the facts outlined in your letter.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

PUBLIC SERVICE COMMISSION: Motor vehicles transporting cotton and cotton seed from gin to original market or warehouse which is still the property of the producer are exempt from registering with the P. S. C. as contract haulers under Section 5265.

September 9, 1938 9/10

Honorable Elbert L. Ford
Prosecuting Attorney
Dunklin County
Kennett, Missouri



Dear Sir:

This will acknowledge receipt of your letter of September 3, 1938, which is as follows:

"Some of the highway patrolman have been stopping trucks who were hauling cotton seed to the oil mill and cotton to the ware houses and advising the truck owners they must secure a truck hauling permit in order to haul such products.

"It has been the opinion of this office that this being agricultural products and truckers hauling to the oil mills and compresses, this would come under the exemptions set out in Section 5265 Laws of Missouri, 1937, page 439.

"Please give me an opinion at once as to whether or not such truck drivers would be compelled to secure contract hauler's permit."

The power and authority of the Public Service Commission on this subject are contained in Section 5270, Laws of 1937, page 436. This section reads as follows:

"The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every contract hauler

in this state except as provided in section 5265 of this act and to approve schedules containing the minimum charges of such contract haulers and to prescribe reasonable rules and regulations governing the filing and keeping open for public inspection of such schedules: To prescribe after hearing and upon complaint or its own initiative such minimum charge, or such rule, regulation or practice as in its judgment may be necessary and consistent with the public interest after giving due consideration to the cost of the service and providing that such minimum charges shall give no advantage or preference to any such contract hauler in competition with any common carrier subject to this act."

For the purpose of this opinion we are assuming that under the above statute the motor vehicles in question are subject to control by the Public Service Commission and are engaged in the transportation of cotton and cotton seed as contract haulers as this term is defined in Section 5264, Laws of 1931, page 304, and should be licensed as contract haulers unless they fall within the exemption contained in Section 5265, Laws of 1937, page 439, relative to the transportation of farm products.

This section provides that: "The provisions of this act shall not apply to any motor vehicle * * * * used exclusively in transporting farm * * * products from the farm * * to a * * * warehouse, or other original storage or market * * *."

Under the terms of this statute if the exemption is to apply, the vehicle must be used exclusively for transporting farm products from the farm to the original storage or market place. Does the manner in which cotton and cotton seed is handled between the farm and original storage or market cause it to come within this exemption?

Cotton is a farm product which, before it is ready

to be stored, must be put through a ginning process to separate the fiber or lint from the seed. This is also true with respect to what must be done before it can be sold because in most parts of the state cotton is now purchased on a grade basis and the quality and texture of the fiber is not ascertainable until said cotton has been ginned.

The motor vehicles in question, as we understand it, are transporting the lint cotton and seed from the gin to the compress warehouse or oil mill. The statute says "from the farm * * to a * * * warehouse, or other original storage or market." If we take this to mean that the cotton must be being transported direct from the land which produced it to the warehouse or market, then, of course, these motor vehicles must obtain permits.

But we do not think this to be the meaning of said statute. The purpose of the Legislature in enacting this exemption statute is plain in that said body desired the farmer to be able to get a cheaper transportation rate and they realized the impracticability of prescribing a definite rate or schedule for a vehicle engaged in moving farm products due to the seasonal activity and the irregular route and territory over which said products must be transported.

The principal crops of Missouri are corn, wheat, hay and cotton. All of these are capable of being transported direct from the land which produced them to the original market or storage place, except cotton, because it is not necessary that they be put through a preliminary processing before they can be sold or stored as is cotton. The Legislature has not named a specific crop in said statute and the presumption is that they intended this exemption to apply uniformly to all farm products. This being so we cannot conclude that the exemption statute in question means that the farm product must be being transported direct from the land which produced it to the original market or storage place because such a conclusion would exclude those vehicles transporting cotton and cotton seed.

However, the manner in which cotton and cotton seed are marketed bears on this question. Some cotton is

sold after it is ginned to the ginner or a buyer there for that purpose, and sometimes the producer transports said cotton to a warehouse to hold for a better market. Though this latter is not the usual procedure with cotton seed, it could be if the producer so desired.

Thus, where the producer does not sell his cotton at the gin it is apparent that the transportation of said cotton from the gin to the warehouse is in fact merely a continuation of the transportation which began at the farm (perhaps in another vehicle) and which was interrupted for the ginning process which is necessary to put the cotton in a condition to be sold or stored. This, in our opinion, is transportation from the farm to the original market or storage, even though it may be carried to the gin by one vehicle and away from there in another. The important thing is that the cotton still remains the property of the producer. The above is also true with reference to cotton seed if it remains the property of the producer enroute from the farm to the gin and thence to the market or storage place.

However, where the producer sells both seed and cotton or either at the gin or to a buyer there for that purpose, the gin is the original market and the motor vehicle transporting the same from the gin to another market is not exempted from obtaining a contract hauler's permit. Neither would said vehicle be exempt where the product is sold by the producer at the gin when the vehicle is transporting the same for that buyer to a warehouse or place of storage because the application of the exemption ceases once the product reaches either the original market or storage place. The statute does not require both to have been reached.

CONCLUSION

Therefore, it is our opinion that the exemption contained in Section 5265, supra, relative to the transportation of farm products is applicable to those motor vehicles which transport cotton or cotton seed from the gin to the original market or place of storage if said cotton and seed are still the property of the producer and remain so until said original market or place of

Hon. Elbert L. Ford

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September 9, 1938

storage is reached with the product.

Of course, the meaning of the statute is clear that the motor vehicle must be exclusively devoted to the transportation of those products which make the exemption apply.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:DA

MOVIE QUIZ CONTEST)
LOTTERY)

Movie quiz contest constitutes
a lottery.

September 28, 1938

16/
20



Honorable Elbert L. Ford
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

We have your request for an opinion relative to the \$250,000 Movie Quiz Contest, wherein are to be awarded 5,404 prizes, ranging from \$10.00 to \$50,000 each. We also have a booklet containing the contest rules.

You request an opinion of this office as to whether or not this Movie Quiz Contest is a violation of the lottery laws of this State. Under the rules, the contestants attend the theatre and receive, without charge, one of the booklets containing a list of prizes, instructions on how to win, a set of the contest rules, and a list of the motion pictures and the question asked with reference to each picture. The contestants are required to answer one question from thirty different motion pictures, the answers to which are simple enough to be clearly answered by anyone seeing the motion picture from which the question to be answered is taken. As an example of the questions asked, we quote the following question from the booklet:

"ANSWER THIS QUESTION: The college that
Sonja Henie attends in 'My Lucky Star'
is (Check one)

() Pennsylvania	() Payne
() Plymouth	() Page

"

Anyone who saw the above picture would readily recognize that the college involved was Plymouth.

Rule 2 provides in part as follows:

" ** The name of the motion picture and the question to be answered for that particular picture is clearly described in the booklet. The question asked belongs

only to that one specially designated motion picture. Thirty questions only must be answered to be eligible in this contest."

Rule 3 provides that the answers to the thirty questions must be accompanied by a written statement of not more than fifty words, telling the name of the picture the contestant liked best and why.

Rule 6 provides:

"Entries will be judged by the highest number of correct answers to questions regarding thirty pictures. In the event of ties, then the best fifty word statements will be selected and graded on the basis of sincerity, merit, originality and advertising value to determine the winners."

Rule 11 provides that each entry will be carefully read and considered by Radio & Publication Contests, Inc., and that the final judging and distribution of awards will be made by an honorary committee of prominent persons under the provisions of Rule 12.

Rule 13 provides that the judges' decision is final.

The question presented is whether or not the above scheme is a lottery. A lottery is any scheme or device whereby anything of value is, for a consideration, allotted by chance. State vs. Emerson, 318 Mo. 633, 1 S. W. (2d) 109, 111; State ex rel. vs. Hughes, 299 Mo. 529, 253 S. W. 329, 28 A.L.R. 1305; State vs. Becker, 248 Mo. 55, 154 S. W. 769.

The term in constitutions must be construed in the popular sense. Chancy Park Land Co. vs. Hart, 104 Ia. 592; 73 N. W. 1059; Johnson vs. State, 137 Ala. 101; 34 So. 1018. City of New Orleans vs. Collins, 27 So. 532, 538.

The word "lottery" must be construed in its popular sense with the view of remedying the mischief intended to be

prevented and to suppress all evasions for the continuance of the mischief. *People vs. McPhee*, 139 Mich. 687, 103 N. W. 174; 69 L. R. A. 505; *State vs. Mumford*, 73 Mo. 647, 650. *State vs. Wersebe*, 181 Atl. 299, 301.

The word is generic; no sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed but not quite within the letter of the definition given. *People vs. McPhee*, 139 Mich. 687; 103 N. W. 174; 69 L. R. A. 505; *State vs. Clarke*, 33 N. H. 329. This is made apparent from an examination of a large number of cases in which various methods of distributing money or goods by chance are examined and discussed.

The Missouri statutes which prohibit the operation of a lottery are Sections 4314 and 4315, R. S. Mo. 1929. While the term "consideration", as involved in lottery schemes has been given no technical meaning in Missouri, it has been considered to mean the same as used in ordinary contracts.

The Missouri definition keeps alive the spirit of Article XIV, Section 10 of the Missouri Constitution, and Section 4314 R. S. Missouri 1929, and gives to the word "lottery" its popular and non-technical meaning -- a goal which all definition-makers have sought. This definition is brief, clear, complete, comprehensive, and satisfactory in every respect. It assembles the elements of a lottery in bold relief, shows their relation to each other with no attempt to place any limited or confined meaning on one or more of the elements. It furnishes an accurate standard or yardstick for testing any lottery scheme.

A Minnesota court, in construing its lottery statute in *State vs. Moren*, 48 Minn. 555, l.c. 560, said:

"The statute is intended to reach all devices which are in the nature of lotteries, in whatever form presented, and the courts will tolerate no evasions for the continuance of the mischief."

From the *George Washington Law Review*, May 1936, page 481, we find the universal rule stated as follows:

"The rule that lottery statutes should be construed so as to prevent evasions, is fundamental, for the mind of man, inspired by cupidity and the desire for unjust enrichment over his fellow man, has invented innumerable subterfuges."

This rule is supported by the following authorities:
Horner vs. United States, 147 U. S. 449, 13 S. Ct. 409, 37
L. Ed. 237 (1893); Ballock vs. State, 73 Md. 1, 8 L. R. A.
671, (1890); Ex parte Gray, 23 Ariz. 461, 204 Pac. 1029 (1922).

Our own court, in State ex rel. vs. Hughes, 253 S. W.
229, 1.c. 231, commenting upon attempted evasions, said:

"If the fact that the winning number is determined before the tickets or chances are sold, though the number is not disclosed, renders the scheme unassailable as a lottery, then the 'Louisiana Lottery' could still operate under our law by the simple device of determining the winning numbers first, keeping them secret and then selling chances based upon correspondence of ticket numbers with the numbers already drawn, but kept secret from the ticket buyers; or publishing the winning numbers and selling secretly numbered tickets. None will contend this can be done. It overlooks the whole reason for the law against lotteries. It is the appeal to the gambling instinct which is condemned, and no mere juggling of the order of business can serve to evade the constitutional provision."

The test of a lottery is not how adroitly worded the scheme is, but how it works. State vs. Clarke, 33 N. H. 329, 1.c. 335.

The Movie Quiz Contest, in substance, works as follows: People buy admission tickets to a theatre and are given a booklet containing the rules of the contest, and the particular question from each motion picture to be answered in at least thirty motion pictures. People attend the theatre and watch the picture for the answer to the question asked. This constitutes consideration.

Williams, Flexible Participation Lotteries, Section 57, says:

"The element of consideration has been present in numerous forms and under many different conditions. It may exist as the specific price of the right to participate in the distribution; or be merged and included in admission fees; the prices of tea; bonds; caramels; turn-overs; newspapers; merchandise; and note cases; or it may be observed in the mass as the collective contribution of the purchasers even though some of them participate in the drawing without being required to buy anything."

In this case, the price or consideration paid to participate is merged and concealed in the regular admission price to the theatre. Under these circumstances, the court will look at the scheme as a whole and the price received from the customer is a consideration for both the article sold and the chance to participate. Some of the cases supporting this rule are Meyer vs. State, 112 Ga. 20;; Glover vs. Malloska, 238 Mich. 216; 213 N. W. 107; State vs. Emerson, 318 Mo. 633; State ex rel. vs. Hughes, 299 Mo. 529; State vs. Mumford, 73 Mo. 647. A list of additional authorities will be found in Williams, Flexible Participation Lotteries, Section 204.

It therefore appears that the element of consideration is present in the Movie Quiz Contest.

The second element of a lottery is that of prize -- which is admittedly present in this Movie Quiz Contest. The first prize of \$50,000., the second prize of \$25,000., the third and fourth of \$10,000 each, and five thousand additional and smaller prizes offered, are each to be paid in cash. There is therefore a prize element involved in this contest.

We come to the third and last element involved in the lottery scheme -- the element of chance.

There are two kinds of chance which are recognized in different jurisdictions as one of the elements of lottery. Some courts follow what is known as the "pure" chance doctrine, while other jurisdictions hold to that of "dominant" chance. 17 R. C. L. 1223 says:

"Chance as one of the elements of a lottery has reference to the attempt to attain certain ends not by skill or any known or fixed rules, but by the happening of a subsequent event incapable of ascertainment or accomplishment by means of human foresight or ingenuity, and it is essential *** in order to give to the scheme the character of a lottery. In the United States *** it is not necessary that this element of chance should be 'pure' chance but may be accompanied by an element of calculation or even of certainty."

We have heretofore pointed out that under Rule 6, the winner will be determined by the "best fifty word statements", to be selected on the basis of sincerity, merit, originality and advertising value.

Webster's New International Dictionary defines these terms briefly as follows:

Sincerity: "Quality or state of being sincere; honesty of mind or intention; freedom from simulation, hypocrisy, disguise or false pretense."

Merit: "Due reward or punishment; usually, reward deserved; a mark or token of excellence; quality, state or fact of deserving well or ill; to earn by service or performance; to have a right to claim as reward; to deserve."

Originality: "State or quality of being original."

In addition to the above elements which are to guide the judges in determining what is the best fifty word statement, the "advertising value" will be considered. The contest does not state in what manner, or in what proportion these elements will be considered. There is no rule or yardstick by which the best statement can be selected.

How can a judge in New York, stranger to a contestant in Missouri, know the sincerity -- the state of mind -- of the contestant when he wrote the fifty word statement? Will the judges, in determining the "merit" of the statement, be guided wholly by the technical rules of grammar, by a clearness of expression, by euphony or something else? Likewise, the question of "originality" may depend on the familiarity of the judges with literary works. A judge with limited knowledge might not recognize "borrowed" phrases or sentences, and under such circumstances the contestant may win or lose, depending on the learning or ignorance of the judge. In the last analysis, the judges are given unlimited discretion as to the selection of the winner, and whatever decision is agreed upon by the judges, the contestants, by Rule 13, are bound thereby, because the decision of the judges "will be final."

It is apparent from Rule 6 that the determination of the best statement is left in the uncontrolled discretion of the judges. Commenting upon this phase of lotteries, we find the following statement in 45 Harvard Law Review, page 1212:

"It is somewhat surprising to find a fairly large number of decisions involving the award of prizes in the uncontrolled discretion of a judge. All of them agree that the contest is a lottery."

There is no standard or rule by which the best fifty word statement is to be selected, or judged from a definite standpoint. In Brooklyn Daily Eagle vs. Voorhies, 181 Fed. 579, 1.c. 582, the court said:

"It must be held that to offer a prize for the 'best' essay might be a lottery,

if the persons are not induced to compete with some definite statement of what the word 'best' means."

In *Coles vs. Odham Press Ltd.*, 1 K. B. (1936) 416, l.c. 426, the Chief Justice said:

"There is no clue at all to the qualifications of the editor, or to the frame of mind in which he will act, or has already acted at the material time. There is no clue to the criterion, if any, by reference to which the standard has been fixed. The solution which is to be adjudged to be correct is not to be picked out of the efforts of the competitors in competition with each other. It is to be the solution that is found, on examination, to coincide most nearly with a set of words chosen beforehand by somebody not known, by a method, if any, not stated, that person being perfectly at liberty to act in an arbitrary, capricious, or even mischievous spirit. In other words, the competitors are invited to pay a certain number of pence to have the opportunity of taking blind shots at a hidden target."

Recently, the Supreme Court of the State of Missouri, in one of the best reasoned opinions to be found anywhere, in *State vs. Globe-Democrat Pub. Co.*, 110 S. W. (2d) 705, l.c. 718, in an opinion of Ellison, J., said:

"What is a matter of chance for one man may not be for another. And as Mr. Justice Holmes said in *Dillingham vs. McLaughlin*, 264 U. S. 370, 373, 44 S. Ct. 362, 363, 68 L. Ed. 742, 'what a man does not know and cannot find out is chance as to him, and is recognized as chance by the law.' Obviously, if some abstruse problem comparable to the Einstein theory

September 28, 1938

were submitted to the general public in a prize contest on the representation that no special training or education would be required to solve it, the contention could not be made, after contestants had been induced to part with their entrance money, that the element of chance was absent because there were a few persons in the world who possessed the learning necessary to understand it."

The inclusion or the exclusion of a definition of the word "best" may determine whether a contest is one dominated by skill or chance. Brooklyn Daily Eagle vs. Voorhies, supra, Boatwright vs. State, 38 S. W. (2d) 87 (Texas). The former case failed to define the word "best", while the latter case gave it a definite meaning. The former case might be a lottery, the latter a game of skill.

It therefore appears that the winners of the Movie Quiz Contest will be determined by chance.

CONCLUSION

It is, therefore, the opinion of this office that the Movie Quiz Contest is a lottery, the conducting of which is made punishable by imprisonment in the Penitentiary for not less than two nor more than five years, or by imprisonment in the county jail for not less than six nor more than twelve months.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

CHIROPRACTIC:

Right to revoke licenses by the State Board

1/24
December 29, 1938



Mr. Jerome F. Fontana
Secretary of Mo. State Board of Chiropractic Examiners
St. Louis, Missouri

Dear Sir:

We acknowledge your request for an opinion dated December 20, 1938, together with the photostatic copy of certificate:

"We would appreciate it very much if you will render this Board an opinion in regard to the following:

We have information in our office to the fact that in 1934 two certificates in Electro-Therapy, a copy of which I am enclosing, were issued to two licensed chiropractors in this State by a Chiropractic College that is chartered by the State of Missouri, recognized by this Board, without these chiropractors attending the classes in Electro-Therapy. Further, I wish to advise that the certificates were not honorary. One of these certificates that was issued is hanging in a chiropractors office at the present time.

What we wish to know is, what action can this Board take against the College as well as the chiropractor."

We are returning herewith, the photostatic copy of certificate which you submitted. Section 13549 R. S. Mo. 1929 provides in part:

" * * * * * Any person desiring to procure a license authorizing him or her to practice chiropractic in this state shall make application therefor to the board on a form prescribed thereby, giving his or her name, sex, age, which shall not be less than 21 years, name of school or college of which he or she is a graduate, and shall furnish the board satisfactory evidence of preliminary education as required in this chapter, and of good moral character, and that he or she is a graduate of a chiropractic school or college teaching chiropractic in accordance with the requirements of this chapter, which shall be determined by the board, together with such other information as the board may require, and which application shall be sworn to before some officer authorized to administer oaths. Any applicant who applies for examination to procure a license to practice chiropractic, and who has matriculated in a chiropractic school or college after the passage of this chapter, furnish satisfactory evidence of their preliminary educational qualifications, to-wit: a certificate of graduation from an accredited high school or its equivalent. Their chiropractic course shall cover a period of not less than three years of nine months each, and requiring actual attendance of not less than 2045 hours and which shall be construed as the maximum requirements for qualifications to practice chiropractic under this chapter. There shall be paid to said board, by each applicant, a fee of \$25.00, \$15.00 of which shall accompany the application, and the balance of \$10.00 shall be paid upon the issuance of a license. Any person failing to pass such examination may be re-examined within one year from the time of such failure without additional fee. The board shall subject all applicants to an examination in the following subjects: anatomy, physiology, symptomatology, hygiene and sanitation, chiropractic orthopedy

pathology, principles of chiropractic chiropractic analysis, and practical application of their knowledge and skill in chiropractic adjusting and nerve tracing. * * * * *

Provided further, that students who are matriculated in a properly recognized chiropractic school or college on October 1, 1926, and who have had two years high school or its equivalent at that time, shall be admitted to examination upon qualifying with three years of six months each actual attendance in such school or college."

* * * * *

Section 13553 R. S. Mo., 1929 provides:

"It shall be the duty of the board of chiropractic examiners to carefully investigate all charges of immoral or illegal actions of anyone to whom a license to practice chiropractic in this state has been issued. Upon complaint being made to the board it shall investigate and if it seems probable cause exists for the complaint, shall furnish a copy of the complaint to the accused by registered mail, together with a notice of the time and place for the hearing of same, which shall not be less than thirty days after depositing of said communication in the United States mail. The accused shall have an opportunity to be heard to answer such charges in person, or by attorney, and if upon such hearing it shall be proven beyond a reasonable doubt to the board, that the accused is guilty of such immoral or illegal action, or is addicted, or has been addicted, during a period of the past six months to the use of narcotics, drugs, or intoxicating liquors, or in any way guilty of deception or fraud in the practice of chiropractic, or of shielding anyone in immoral practices, criminal or illegal actions, or is guilty of any criminal or illegal actions, the board shall revoke his license.

CONCLUSION

Pursuant to Section 13549, supra, we are of the opinion that the State Chiropractic Board must recognize certain Chiropractic Schools as accredited, only so long as said schools comply with the statutory prescribed course of study and said board may refuse to recognize any chiropractic school for failure to comply with the statutory prescribed course of study.

The fact that a recognized Chiropractic School gives a certificate to students who complete "a course in Electro-Therapy under the direction of the members of the faculty", is not prohibited by Missouri Statutes. Electro-Therapy is not a statutory prescribed course of Chiropractic study, but may be made a required subject of study by rule of the board, before the board will issue its license to practice chiropractic. On the other hand, there is nothing the board can do about prohibiting any Chiropractic College from issuing the certificate complained about, since the recognized Chiropractic College does not certify that the certificate holder attended classes in Electro-Therapy, but certifies only that the holder has "completed a course in Electro-Therapy under the direction of the members of the faculty", and by such a special certificate it shows on its face that classroom attendance is not represented, and nothing on the face of the certificate shows it to be a misrepresentation of any fact.

As to the holding and displaying of such a certificate making a licensed Chiropractic liable to license revocation, it all depends upon whether such conduct be immoral. False representation by word or by conduct, which are acted upon as true by the public to the damage and detriment of the public are bound to be immoral. We are of the opinion that a licensed Chiropractic, who holds and displays such a certificate on Electro-Therapy, is not, by such ownership and display without other misrepresentations of fact, guilty of immoral conduct subjecting himself to be cited for license revocation, under the provisions of Section 13553, supra.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

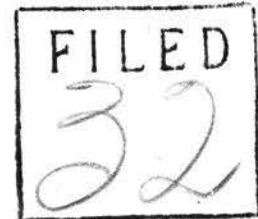
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COVELL R. HEWITT
(Acting) Attorney General

LIQUOR CONTROL: Club holding 3.2 percent. Members thereof may not store intoxicating liquor in lockers on premises.

February 21, 1938

Mr. Joseph M. Garvey, President
Department of Police
St. Joseph, Missouri



Dear Sir:

This department is in receipt of your letter of February 3, 1938, in which you request an opinion as follows:

"The Shrine organization of St. Joseph operates a golf and country club here in St. Joseph. In connection with their club house, they have a tap room in which they sell liquor. I informed them it would be necessary for them to obtain liquor licenses in order to sell liquor. They have no objection to buying the license, except that under the retail liquor license they would be compelled to close their tap-room on Sunday. Sunday is the day they entertain most of their guests.

"I then suggested to them that they might obtain a 3.2 beer license and if any of the members wanted to drink something stronger than beer, they could build lockers which the members could rent and in which they could store liquor purchased from outside dealers for their personal use. This suggestion they have followed and accordingly purchased a 3.2 beer license in the name of the steward of the club.

"Judge Sam Wilcox, of our Circuit Court, who is the potentate of the

club, informed me this morning that the affidavit on the back of the application requires the affiant to state that no liquor of any stronger alcoholic content than 3.2 will be kept or stored on the premises. The judge pointed out that the steward hesitated about signing such an affidavit because of the presence of liquor in the lockers.

"The affidavit seems to go somewhat further than the law, which provides that it shall be unlawful for any person holding a malt liquor license or permit and not holding a retail liquor dealer's license covering the premises described in said malt liquor dealer's license or permit to have or keep in or upon the premises any intoxicating liquor of any kind."

The question which you present, stated concisely, is: May the holder of the 3.2% beer permit of a club construct lockers in which members of the club may keep their own intoxicating liquors and not run contrary to the provisions of the Liquor Control Act, prohibiting the keeping of intoxicating liquor on the premises covered by a 3.2% beer permit?

Section 13139-h-1 of the Liquor Control Act (Laws of 1935, page 397) is in part as follows:

"Any person holding a permit under this article to sell non-intoxicating beer at retail, who shall have or keep or secrete in or about the premises described in and covered by his permit any intoxicating liquor of any kind or character * * * * * shall be deemed guilty of a misdemeanor."

Section 13139-z-17 of the Liquor Control Act (Laws of 1937, page 536) is as follows:

"Before any permit authorized by this article other than a manufacturer's or wholesaler's permit shall be issued and delivered to any applicant therefor, such applicant shall take and subscribe to an oath that he will not allow any intoxicating liquor of any kind or character, including beer having an alcoholic content in excess of 3.2 per cent by weight, to be kept, stored or secreted in or upon the premises described in such permit, and that such applicant will not otherwise violate any law of this state, or knowingly allow any other person to violate any law of this state while in or upon such premises."

Section 13139-z-21 of the Liquor Control Act (Laws of 1935, page 401) is in part as follows:

"Any person holding a license to sell non-intoxicating beer only who shall sell, give away or otherwise dispose of, or suffer the same to be done in, upon or about his premises any malt liquor containing alcohol in excess of three and two-tenths per cent (3.2%) by weight, or any other intoxicating liquor of any kind or character, shall be deemed guilty of a felony."

In State v. Robinson, 163 Mo. App., 1.c. 226, it is said:

"In the interpretation of statutory language the meaning must be given that is most consonant with the policy or obvious purpose of the statute."

Construing the above sections together, it is apparent that the obvious purpose is to prevent persons licensed under the non-intoxicating liquor laws of this state from handling or having about his premises, either

February 21, 1938

directly or indirectly, intoxicating liquor. The only construction consistent with this purpose and which must be adapted here is as follows: A person holding a 3.2% beer permit must not, directly or indirectly, under any circumstances, have, keep, secrete, sell or otherwise dispose of intoxicating liquor, or suffer the same to be done in, upon or about the premises covered by his permit.

The construction of lockers on these premises in which members of the club will keep their own liquor would be but an attempt to circumvent the obvious purposes and terms of the statutes. A person may not do by indirection that which is prohibited from being done directly.

CONCLUSION

Therefore, it is the opinion of this department that when a club or association, or some person as steward of said club or association, has obtained a 3.2% beer permit, the members of said organization may not keep intoxicating liquor in lockers for that purpose on the premises covered by said permit. The doing of this subjects the licensee to prosecution, as well as being grounds for the revocation of his permit.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

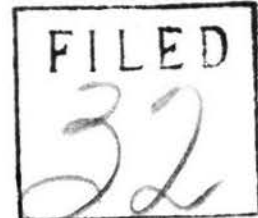
LLB:VAL

CORONER:

It is the duty of the coroner to have witnesses subscribe to transcript of testimony given in a coroner's inquest.

May 7, 1938

5-24



Dr. G. W. Gaines,
Coroner of Ray County,
Richmond, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated May 3, 1938, for an official opinion from this department which request is as follows:

"Please give me a ruling on section 11621, pertaining to witnesses in coroners' inquest, signing their testimony.

After the testimony has been taken in shorthand and later typewritten, it is quite a chore to hunt up the witnesses and have them sign the testimony, especially where the witness lives a long distance away."

Section 11612, R.S. Mo. 1929, reads as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before

such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

Under this section it is the duty of every coroner to call a jury to inquire into the cause of death by violence of casualty of any one found within his county. Section 11621, R.S. Mo. 1929, reads as follows:

"The evidence of such witnesses shall be taken down in writing and subscribed by them, and if it relate to the trial of any person concerned in the death, then the coroner shall bind such witnesses, by recognizance, in a reasonable sum for their appearance before the court having criminal jurisdiction of the county where the felony appears to have been committed, at the next term thereof, there to give evidence; and he shall return to the same court the inquisition, written evidence and recognizance by him taken."

This section is mandatory and it is compulsory for the coroner to have the evidence of witnesses testifying that a coroner's inquest taken down in writing and subscribed by them.

In the payment of duties performed in compliance with Section 11621, R.S. Mo. 1929, Section 11628, R.S. Mo. 1929, provides as follows:

"For taking down the testimony at an inquest, the coroner shall be allowed ten cents for every hundred words, and twenty-five cents for certifying the same."

"Shall" as used in Sections 11621, 11612 and 11628

May 7, 1938

is mandatory. The word "shall" in the statutes directing that public body shall do certain acts * * * was construed as mandatory and in a permissive sense. Grant v. City of Newark, 28 New Jersey Law, 491, 497.

It is the duty of the coroner to compel the testimony of the witnesses before a coroner's inquest to be taken down in writing and also require that the transcript of a testimony be subscribed by them. In your letter you suggest that it requires some effort on your part to hunt up the witnesses and have them sign the testimony and as a suggestion under the law of the state of Missouri in reference to payment of witnesses before a coroner's inquest, the coroner must pay the witnesses in cash out of money allotted to him by the county court and the witnesses need not wait until the witness fees have been paid into the court. As a suggestion to help in your work, I would suggest that you hold the cash payment of the witness until he has finally completed his testimony by subscribing to the transcript of his testimony. This action would cause many of them to return within a reasonable time and sign the transcript of their testimony.

CONCLUSION

In view of the above sections and suggestions, it is the opinion of this department that the transcript of the shorthand notes of witnesses testifying before a coroner's inquest must be subscribed by them, and it is the duty of the coroner to follow this mandatory section in detail.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

MOTOR VEHICLES:

Power of St. Louis Police to make arrests for displaying illegal tags on motor vehicles and changing number on motor block.

January 11, 1938

Mr. John H. Glassco,
Chief of Police,
St. Louis, Missouri.

Dear Sir:

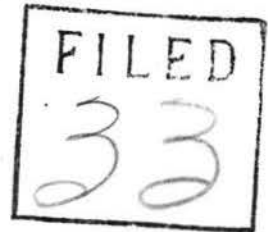
This will acknowledge receipt of your request for an official opinion dated January 5, 1938, which reads as follows:

"Would request this department obtain opinion or decision from Attorney General at Jefferson City, Mo., thru the Secretary of State's Office; having to do with the following situations:-

What jurisdiction this department has insofar as automobiles bearing improper state licenses are concerned and NOT in operation.

Also in the matter of Certificate of Title; it being the practice of used car dealers and junk dealers to retain these Certificate of Titles and NOT return same to the Commissioner of Motor Vehicles for cancellation. In many cases this bureau has found these titles are used in the handling of stolen automobiles in which the motor numbers are erased and numbers substituted to correspond with Certificate of Title in their possession; their being no compulsory measures for the return of these titles to Commissioner of Motor Vehicles when the automobiles are wrecked beyond repair or junked.

This matter of Certificate of Title has been taken up with Associate City Counsellors McCune and Barrow, who suggest decision by the Attorney General Office at Jefferson City, Mo.



January 11, 1938

The attached report was drafted by the Automobile Bureau of the St. Louis Police Department with a view to clearing up certain matters with which their officers come in contact almost daily.

Will you please give the subject matter attention and favor us with a ruling by which our officers may be governed, at your early convenience."

Section 7770 Session Laws of 1935, paragraph E, page 298, reads as follows:

"No person shall operate a motor vehicle or trailer on which there is displayed on the front or rear thereof any other plate, tag or placard bearing any number except the plate furnished by the commissioner or the placard herein authorized, and the official license tag of any municipality of this state, nor shall there be displayed on any motor vehicle or trailer a placard, sign or tag bearing the words 'license lost', 'license applied for', or words of similar import, as a substitute for such number plates or such placard."

Under this section a motor vehicle must be in operation before it is a violation of the law.

The violation under paragraph E of this section is punishable as set out in Section 7786 R.S. Mo. 1929, paragraph D, which is as follows:

"Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

The punishment as set out in paragraph D is the general penalty set out in the motor Vehicle Act where no specific penalty is

January 11, 1938

set out for any specific part of said act.

The above authority set out covers the first part of your request regarding the jurisdiction of the police department bearing improper state licenses when not in operation.

Section 7781 R.S. Mo. 1929, paragraph A provides as follows:

"No person shall destroy, remove, cover, alter, deface, or cause to be destroyed, removed, covered, altered or defaced, the manufacturer's number, the motor number or other distinguishing number on any motor vehicle, or number or other distinguishing number on any motor vehicle tire, the property of another for any reason whatsoever."

This paragraph prohibits the alteration of the distinguishing numbers on a motor vehicle and is punishable as a felony.

Section 7786 R.S. Mo. 1929, paragraph C, provides as punishment for the violation of above set out Section 7781 R. S. Mo. 1929, paragraph A, as follows:

"Any person who violates paragraph (a) of section 7781, paragraph (a) of section 7782 or paragraph (f) or (g) of section 7783 shall be deemed guilty of a felony and on conviction thereof shall be punished by imprisonment in the penitentiary for a term not exceeding five years or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars (\$100.00) or by both such fine and imprisonment."

Section 7781 R.S. Mo. 1929, paragraph B, provides as follows:

"No person shall sell, or offer for sale, or shall own or have the custody or possession of a motor vehicle, trailer or motor vehicle tire on which the original or manufacturer's number

or other distinguishing number has been destroyed, removed, covered, altered or defaced, and no person shall sell, offer for sale, own or have the custody or possession of a motor vehicle or trailer having no manufacturer's number or other original number, or distinguishing number:*****."

Section 7781 R.S. Mo. 1929 was amended by way of addition by Section 7781a at page 299 Session Laws of 1935 which reads as follows:

"Nothing in this article shall be construed to prohibit the owner of a certificate of title to a motor vehicle issued by the Secretary of State of Missouri from removing the motor or engine from such motor vehicle and replacing same by a reconditioned motor or engine of the same make or manufacture, and giving such replaced motor or engine the same number as the removed motor or engine bore on having same installed.

Such owner shall joint with the person removing said motor or engine and replacing the motor or engine in said vehicle in an affidavit, which affidavit shall show the number of the engine or motor removed from said motor vehicle covered by said certificate of title, the date of such removal and the reason for such removal, and shall give a description of the motor or engine replaced in said motor vehicle, which replaced engine or motor shall bear the same number as the motor or engine removed, but shall be preceded by the symbol 'RC'. Said affidavit, together with the original certificate of title shall then be sent to the Secretary of State at Jefferson city, Missouri, with a fee of \$1.00, for registration of such change in motors or engines. On receipt of same it shall be the duty of the Secretary of State to file the affidavit, and such certificate, in

his office, and issue a new certificate of title covering said motor vehicle in the name of the owner thereof, as shown by the certificate filed, and to deliver said new certificate to such owner.

Whenever the original or manufacturers' number or other distinguishing number on any motor vehicle, trailer or motor vehicle tire has been destroyed, removed, covered, altered or defaced, the owner of such motor vehicle, trailer, or motor vehicle tire may apply to the Secretary of State, at Jefferson City, Missouri, for, and upon receipt of such application together with a fee of \$1.00 the Commissioner shall issue to said applicant, a certificate authorizing the owner to make or stamp or cause to be made or stamped on the motor vehicle, or motor or engine thereof or motor vehicle trailer or motor vehicle tire a special number to be designated by the Commissioner and when such number has been placed upon such motor vehicle or motor or engine thereof or trailer or motor vehicle tire such new number shall become and thereafter be the lawful number of the same for the purpose of identification and registration and for all other purposes under the provisions of this article, and the owner thereof may thereafter sell and transfer such property under said special number and no person shall destroy, remove, cover, alter or deface any such special number; provided that in connection with such application for such new number the owner of such motor vehicle, trailer or motor vehicle tire shall produce satisfactory evidence that he is the owner thereof."

Section 7786 R.S. Mo. 1929, paragraph D provides for the violation of Section 7781 R.S. Mo. 1929, paragraph B

and reads as follows:

"Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

Section 7781 R.S. Mo. 1929, which provided that it was unlawful to alter, sell or have in possession any motor vehicle or tires, the serial number of which had been altered, or in which the number of the engine motor had been altered, was held to come within the police power in *Star Square Auto Supply Company v. Gerk*, 30 S.W. (2d) 447. The whole act was held constitutional under this case.

CONCLUSION

In conclusion will say that it is the opinion of this office that under Section 7770, paragraph E, Session Laws of 1935, page 298, unless the motor vehicle is being operated the owner is not committing any crime by placing any other tag than the tag issued by the commissioner of motor vehicles, upon said motor vehicle.

Further, it is the opinion of this office that the junk dealers are not required to return certificates of title for cancellation to the commissioner of motor vehicles in a transaction where they receive the assignment of the certificate of title and intend to destroy the car as junk. However, when the police of St. Louis can prove that the motor number of any motor on any motor vehicle has been altered or changed unlawfully by the owner, the police are authorized to charge the owner of said motor vehicle with a felony under Section 7781 R.S. Mo. 1929, paragraph A.

If there is no sufficient evidence to prove by whom the numbers on the motor had been altered under paragraph A of Section 7781, paragraph B of said Section 7781 forbids the

Mr. John H. Glassco

-7-

January 11, 1938

selling for possession of motor vehicles or motor vehicle tires so altered. Paragraph B of this section is punishable as a misdemeanor.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

HABEAS CORPUS) Certiorari will not lie to review the circuit
CERTIORARI) court's order granting bail in habeas corpus
matters, there being no jurisdictional question
involved.

January 21, 1938

Honorable M. Stanley Ginn
Prosecuting Attorney
Lawrence County
Aurora, Missouri



Dear Sir:

We acknowledge your request for an opinion dated January 13, 1938, which reads as follows:

"On the 5th of July, 1937, Franklin Grimes died as a result of gun-shot wounds which had been inflicted by Leo Mallonee, a few minutes previous. A preliminary hearing was held, and Leon Mallonee was bound over to the Circuit Court and ordered held without bail. An Information was filed in the Circuit Court, charging Leo Mallonee with murder in the first degree. No testimony was introduced at the preliminary hearing by the defendant, except four witnesses who testified that the defendant was of good character. The testimony introduced by the state at the preliminary hearing tended clearly and decisively to show a deliberate, intentional and unexcusable murder. Thereafter, on the 20th day of July, 1937, Defendant, by counsel, petitioned the Circuit Judge for a Writ of Habeas Corpus, and the Sheriff of Lawrence County duly filed his return thereto. When the matter came on for hearing before the Circuit Judge, the judge, without hearing any of the evidence presented at the preliminary hearing, or without permitting to be

introduced the subscribed and sworn testimony of the witnesses at the preliminary hearing which was reduced to writing and certified to by the witnesses, admitted defendant to bail for the reason that the transcript of testimony at the preliminary hearing certified to by the Justice of the Peace and subscribed to by the witnesses, failed to contain the testimony of the defense character witnesses. These defense witnesses refused and have continued to refuse to subscribe their testimony.

"Please inform if it would be possible for Certiorari before the Supreme Court to withdraw the case from the inferior court, and re-open the hearing as to whether or not the defendant should be admitted to bail.

"My reason for asking this is because it will be very difficult to bring the defendant to trial in this case as long as he is out on bond. At our last term of court, he was granted a continuance because of the absence of witnesses. Further, the testimony seemed to indicate that the defendant might have been intending to kill a different person, and of course the danger to that person's life would still be existent."

Section 1427, R. S. Mo. 1929 provides in part:

"Application for such writ shall be made by petition, signed by the party for whose relief it is intended, or by some person in his behalf, to some court of record in term, or to any judge thereof in vacation. ***"

Section 1463, R. S. Mo. 1929 provides:

"When the imprisonment is for a criminal or supposed criminal matter, the court or magistrate before whom the prisoner shall be brought, under the provisions of this article, shall not discharge him for any informality, insufficiency or irregularity of the commitment; but if, from the examination taken and certified by the committing magistrate, or other evidence, it appear that there is sufficient legal cause for commitment, he shall proceed to take bail, if the offense be bailable, and good bail be offered; if not, shall commit the prisoner to jail."

Section 1464, R. S. Mo. 1929 provides:

"When the offense is clearly and specifically set forth in the warrant of commitment, no evidence other than the examination taken and certified thereunto shall be received for or against the prisoner, unless such examination has not been taken and certified according to law, in which case the committing magistrate may be examined, if desired by the prisoner, as to the evidence on which the commitment was found, and thereupon the court or magistrate shall proceed to bail, discharge or remand the prisoner, as the circumstances of the case may require; and in the absence of all such evidence, the prisoner shall not be discharged, but may be bailed or remanded, according to the circumstances of the case."

In State vs. Hiatt, 112 Mo. App. 535, l.c. 538, 87 S. W. 35, the court said:

"The respondent is the judge of a court of record and, as such, has authority, in the vacation of his court, to issue writs of habeas corpus for persons alleged to be unlawfully restrained of their liberty, hear their applications for discharge and decide them. (R. S. 1899, sec. 3546.) Now, as the respondent was empowered to issue the writ and decide on the right of the petitioner to a discharge, he was empowered to decide erroneously as well as rightly. In other words, his jurisdiction of the subject-matter of the particular case was complete. The doctrine prevails in this State that if an inferior court grants the discharge of a prisoner in a habeas corpus proceeding when he is not entitled to be discharged, the decision is not subject to review by an appellate court, as it is favor of personal liberty. Of course, if some magistrate or court should undertake to grant the writ when he or it had no jurisdiction to do so, the proceeding might be prohibited or, perhaps, reversed on certiorari. *** The rule is that the decision of the tribunal where the case originated, if it was a tribunal enjoying jurisdiction of the cause, is allowed to stand whether right or wrong. *** "

The ruling in the Hiatt case was quoted and approved by the court in State vs. Westhues, 286 S. W. 396, l.c. 398.

In State vs. Skinker, 25 S. W. (2d) 472; 324 Mo. 955, 1.c. 959, the court said:

"Relator seeks by our writ of certiorari to quash the judgment of the Circuit Court of Webster County, Missouri, in the habeas corpus proceeding of one Joe McBride, petitioner. The scope of our review under this writ is limited to jurisdictional matters and errors appearing on the face of the record in the habeas corpus proceeding which has been certified to us in this proceeding. *** We take the record as we find it, excluding the mere evidence, which can in the nature of things relate to the merits only."

CONCLUSION.

By the Skinker case, we see that certiorari is a remedy in Missouri to bring up the record of an inferior court in a habeas corpus case where such inferior court has rendered a judgment which shows on the face of the record that judgment was rendered without jurisdiction. Testimony heard by the trial court is not before the appellate court pursuant to certiorari. Nor are matters of exceptions in refusing to hear testimony.

Construing the statute, supra, the circuit court, being a court of record, has original jurisdiction to hear and determine habeas corpus matters. Its original jurisdiction is not inferior to the Supreme Court when on the face of the record it has jurisdiction over the person and the subject matter, as in this case. If the trial court having jurisdiction determines the offense to be a bailable offense, and if good bail be offered, it is then the trial court's duty to determine in what sum bail shall be given, and proceed to take the bail.

Hon. M. Stanley Ginn

-6-

January 21, 1938

Since the ruling in the Hiatt case, supra, the decision of an inferior court with jurisdiction over the person and the subject matter, granting a discharge of a prisoner, pursuant to habeas corpus, is not subject to review by an appellate court. As the discharge of a defendant is in favor of personal liberty, so also is this court's order granting a bail, and the ruling of the Hiatt case should prevail.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

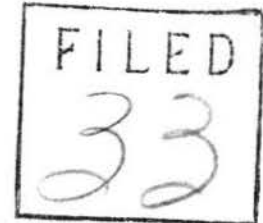
J. E. TAYLOR
(Acting) Attorney General

WOS:FE

MOTOR VEHICLES:

Finance companies have the right to hold certificate of title belonging to dealers and individuals and dealers are compeled to have certificate of title in possession.

February 18, 1938



Mr. John H. Glassco,
Chief of Police,
St. Louis, Missouri.

Dear Sir:

This will acknowledge receipt of your request of February 9, 1938, for an opinion from this office which reads as follows:

"Request this department communicate with Attorney General, Jefferson City, Mo., and ask for ruling on the following:

Have finance companies right to hold Certificate of Title of used car dealer on floor plan cars?

On individual cars finance companies hold mortgage on?

Is it required by law for a used car dealer to have Certificate of Title in his possession when he has used car for sale?

Will you please furnish this department with ruling on the questions in appended report by Lieut. Jos. G. Lesyna, in charge of the Auto Theft Bureau of this department?"

The Section 7774 R.S. Mo. 1929, a part of which reads as follows:

"* * * * * Four months after this law takes effect and thereafter, it shall be unlawful for any person to buy or sell in this state any motor vehicle

or trailer registered under the laws of this state, unless, at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void. In the case of dealers, a separate certificate of ownership, either of such dealer's immediate vendor, or of the dealer himself, shall be required in the case of each motor vehicle in his possession, and the commissioner shall determine the form in which application for such certificates of ownership and assignments shall be made, in case forms differing from those used for individuals are, in his judgment, reasonably required: * * * * *

Page 99, Extra Session, 1993-34 Laws of Missouri, reads as follows:

"(a) Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank to be furnished by the commissioner for that purpose, containing:

- (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, and amount of motive power, stated in figures of horsepower;
- (2) the name, residence and business address of the owner of such motor vehicle;
- (3) if said motor vehicle be a commercial vehicle the weight of the vehicle and its rated capacity of live load, in pounds or seating capacity;
- (4) if such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the commissioner

such additional information as he shall require.

(b) Upon the filing of such application, exhibition of certificate of ownership and the payment of the fees hereinafter provided, the commissioner shall assign a number to such motor vehicle, and without other expense to the applicant shall issue and deliver to the owner a certificate of registration in such form as the commissioner shall prescribe, and a plate, or set of plates, bearing such number."

Under the above sections of the Laws of Missouri, the purpose of the Act in requiring certificates of ownership was to prevent the illegal sale of motor vehicles. The Act or Acts does not require the possession of the certificate of ownership, but only for the purpose of obtaining license plates and transfer of ownership of the motor vehicle.

In construing the Act or Acts in reference to motor vehicles, the courts have held that they should go into the purpose of the Act.

In the case of Betz v. Columbia Telephone Company, (App.) 24 S.W. (2d) 224, the court said:

"To get at the true meaning of the language of the statute, the court must look at the whole purpose of the act, the law as it was before the enactment and the change in the law intended to be made."

As stated before, the purpose of the Act or Acts in reference to transfer of motor vehicles, was to require certificate of ownership, which certificates were to be used in obtaining license plates and transfer of the ownership of the identical motor vehicle. The Act does not require possession of the certificate of title except for the purpose set out in the Motor Vehicle Act or Acts. 59 Corpus Juris at page 961, sets out the following:

"In construing a statute to give effect to the intent or purpose of the legislature, the object of the

February 18, 1938

statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used," citing *Betz v. Columbia Telephone Co.*, (App.) 24 S.W. (2d) 224.

CONCLUSION

In view of the authorities above set out, it is the opinion of this office that finance companies have the right to hold certificate of titles of used car dealers or floor plan cars. Also, finance companies have the right to hold certificates of titles on individual cars secured by a mortgage held by the finance company.

It is also the opinion of this office that a used car dealer is not compelled to have certificate of title in his possession when he has a used car for sale, but when he sells a car, in order to transfer ownership, he must have a certificate of title of the previous vendor or a certificate furnished by the motor vehicle department as set out in Section 7774 R.S. Mo. 1929.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

INSURANCE:) Policies written by companies writing policies
WORKMEN'S COMPENSATION) known as excess aggregate policies,
COMMISSION:) catastrophe excess policies and stop loss
policies, under supervision and control of
the Insurance Department and Workmen's
Compensation Commission.

August 30, 1938



Missouri Workmen's Compensation
Commission,
Jefferson City, Missouri.

Attention: Mr. Spencer H. Givens,
Secretary

Gentlemen:

This is to acknowledge receipt of your request
for an opinion from this Department as follows:

"On behalf of the Workmen's Compensation Commission, I am herewith enclosing two forms of contracts known as the excess aggregate and catastrophe excess policies that are being issued by a number of companies, at least one of which not being authorized to transact business in this state. These contracts are generally classified as stop loss contracts.

"Under the first form, the company agrees to indemnify the employer from any loss in the following manner:

"That if at any time during the period of a contract any employee in the employer's immediate service shall sustain any personal injury by accident or disease while engaged in the service of the employer in work forming part of or process in their business liable to make compensation therefor by virtue of the state laws of Missouri which may be in existence at the time of any

accident covered by this policy, the company will indemnify the employer against all sums for which the employer would be so liable and will, in addition, be responsible for costs and expenses incurred with the company's consent in connection with any claim for such compensation, it being understood and agreed that the policy shall apply only to operations at certain locations or elsewhere within the State of Missouri. This policy is only to pay the excess of \$5,000.00 in respect of each and every disaster within a limit of liability of a certain stipulated amount in respect of each and every disaster irrespective of the amount of the policy.

"The term 'disaster' is defined in the policy to mean an accident or series of accidents arising out of one occurrence. This policy further provides that in the event of claim or any number of claims arising out of any one disaster occurring likely to exceed \$5,000.00 no cost shall be incurred without the consent of the company.

"We are desirous of having your opinion whether the two forms outlined above constitute the transaction of a workmen's compensation business in the State of Missouri. If the business written on the forms outlined above is not to be considered workmen's compensation insurance, I would appreciate your advising me under what classification such business may be placed. "

For answer to your question, we must refer to the statutes relative to the Workmen's Compensation Act to determine whether or not the form of the policies mentioned and enclosed in your letter, should be classified as Workmen's Compensation business in the State of Missouri.

Section 3323, R. S. Mo. 1929, provides in part as follows:

"Every employer electing to accept the provisions of this chapter, shall insure his entire liability thereunder except as hereafter provided, with some insurance carrier authorized to insure such liability in this state, except that an employer may himself carry the whole or any part of such liability without insurance upon satisfying the commission of his ability so to do. * * *

The above section requires every employer, who elects to come under the provisions of this Act, in order that the employer may secure the payment of compensation to the injured employe, must provide for same in one of two ways: (1) He shall insure his entire liability thereunder, with some insurance carrier authorized to insure such liability in this state, or (2) the employer may himself carry the whole or any part of such liability without insurance upon satisfying the Commission of his ability to do so. He may also proceed under Section 3331, R. S. Mo. 1929, which provides that the "employer or group of employers may enter into an agreement to provide a system of compensation benefits or insurance in lieu of the compensation and insurance provided by this chapter." However, such substitute system and insurance shall be subject to the approval of the Superintendent of the Insurance Department.

It is those cases in which the employer elects to carry the whole or any part of his liability, after satisfying the Workmen's Compensation Commission of his

ability to do so, that the employers purchase what have been denominated excess aggregate policies, catastrophe excess policies, or stop loss policies.

Section 3326, R. S. Mo. 1929, provides in part as follows:

"Every policy of insurance against liability under this chapter shall be in accordance with the provisions of this chapter and shall be in a form approved by the Superintendent of the Insurance Department. * * *" (Italics ours)

It follows, therefore, that if the forms of policies mentioned above are to be considered as insurance against liability under the Workmen's Compensation Act, the forms of same must be approved by the Superintendent of Insurance.

In the catastrophe form submitted with your letter of request the insured is referred to as the "employer" and in the excess aggregate form the insured is referred to as "self-insured" and the company is referred to as "reinsurer." A reinsurer is one who agrees to indemnify or insure by contract by which a first insurer relieves himself from the liabilities and risks which he has undertaken, and devolves them upon other insurers. It has been suggested that these insurance contracts, mentioned above, between the employers and the insurance company are contracts of reinsurance and that the employe, who is the real beneficiary, is therefore not concerned with same. It is also suggested that the state is not interested and that these contracts are the private concern of the employer and the reinsurance carrier. It seems to us that when the employer has secured the consent of the Workmen's Compensation Commission under the provisions of Section 3323, supra, to carry the whole or any part of his liabilities without insurance, the transaction between the employer and the insured is not reinsurance, for that term presupposes that there is an original insurer. There can be no reinsurance without an original insurer.

8-30-38

The contract forms which you enclose provide that when there is a loss or injury to a workmen, which would likely come under the terms of the policies in question, the employer must give notice of the accident to the insurance company or its agents and must meet all of the requirements provided in said policies relative to notice etc., the same requirements as are usually found in policies of insurance covering liabilities under the workmen's compensation law; and these policies further provide that the employer shall not make any settlement or admission of liability without the consent of the insurance company, and that the employer shall give the insurance company all necessary information and assist in regard to any claim or suit or proceeding that may be filed thereon. These policies do not cover the entire liability of employer but only in cases above certain amounts or under certain conditions, according to the terms of the policy. However, in any event, they indemnify the employer against liability arising out of the relation of employer and employee as fixed and determined under the Workmen's Compensation Law. Whenever the employer enters into contracts of insurance, as above, it is nothing more than workmen's compensation insurance.

The fact that the insurance company insures part of the risk only does not thereby keep it from being workmen's compensation insurance. It is still workmen's compensation insurance.

Both the employer and the employee by reason of these contracts of insurance are better protected if the companies writing these policies are under the supervision of the Insurance Department of the State and the forms of policies approved by the Superintendent of the Insurance Department.

Conclusion.

It is, therefore, our opinion that the insurance carriers entering into the insurance contracts described in your letter of request, are engaged in workmen's compensation insurance business and are subject to the control and supervision of the Superintendent of Insurance.

Very truly yours

APPROVED:

COVELL R. HEWITT
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General

WORKMEN'S COMPENSATION COMMISSION:

Commission has no authority
under the statute to destroy
permanent records in its
office.

October 4, 1938.

10-7



Missouri Workmen's Compensation
Commission,
Jefferson City, Missouri.

Attention: Spencer H. Givens,
Secretary

Gentlemen:

This is to acknowledge receipt of your letter
of September 20th, in which you request the opinion of
this Department. Your letter is as follows:

"The Commission is seeking your
opinion on whether or not it would
have the right under the Missouri
Workmen's Compensation Law to
destroy certain of its older
records, perhaps those in non-
compensable cases, that are more
than ten years old.

"Section 3360, R. S. Mo. 1929, is
the only part of the Compensation
Law in which we can find any refer-
ence for records to be kept, and
this merely states that the Commis-
sion's permanent records shall be
kept in Jefferson City. We are
faced with the problem of securing
enough space for the actual physical
preservation of our case records.
If the present law does not give us
authority to take care of the situa-
tion, we plan to get legislative
action on the matter, and, of course,
wanted your opinion as to what our
procedure should be."

Oct. 4, 1938.

Your question is, whether the Commission has authority to destroy certain records in the office of the Commission that are more than ten years old.

Section 3360, R. S. Mo. 1929, mentioned in your letter, provides in part as follows:

"The Commission shall be provided with offices at the state capital, in St. Louis and Kansas City, in which offices its records shall be kept, but its permanent records shall be kept in Jefferson City. * *"

It is our opinion that the Commission would have no authority to destroy any of the records of the Missouri Workmen's Compensation Commission even though, in the opinion of the Commission, these records would never be referred to. In our opinion you should receive legislative sanction to destroy any of the permanent files or records in your office before it could legally be done.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

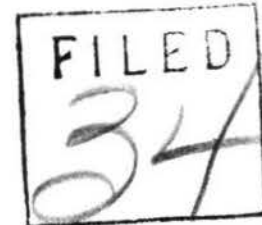
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APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

INSURANCE:: Stipulated premium company may not amend charter as burial society by resolution.

May 31, 1938



Mr. Wm. F. Goodman
Corporation Attorney
Secretary of State's Office
Jefferson City, Missouri

Dear Mr. Goodman:

We wish to acknowledge your request for an opinion under date of May 26, 1938, as follows:

"Find enclosed resolution on the part of the Atlas Life Society, the purport of which is to effect a re-organization of said company to come within the provisions and to be entitled to the rights and privileges of a burial association organized under the provisions of Article 10, Chapter 32, Revised Statutes of Missouri, 1929.

We know of no statutory provision, case decision or legal interpretation of the general corporation laws of this state that would privilege such a re-organization.

We ask the favor of an opinion from your office as to whether or not a re-organization under Article 10, Chapter 32, Revised Statutes of Missouri, 1929, may be effected through the filing of the enclosed resolutions."

The Atlas Life Society was originally incorporated under Article X, Chapter 32, R. S. Missouri 1929, relating to benevolent, religious, educational and scientific associations as a burial society under Section 5014 of said article, as follows:

"Associations may be incorporated under the provisions of article 10, chapter 32, R.S. 1929, for the purpose of furnishing funeral or burial benefits for their members: Provided, that no such benefits shall exceed the sum of three hundred dollars for the funeral or burial of any one member. Such association when formed shall be exempt from the provisions of the general insurance laws of this state, to wit: Chapter 37, R.S. 1929: Provided, that any such association now in existence may incorporate as provided in this law within ninety days after it shall take effect, and thereafter no such association shall be incorporated, as in this law authorized, until it shall have application for at least three thousand memberships, with at least one month's dues paid on each application: Provided, that no member shall be admitted into any such association who, at his or her last birthday was over age of 65 years, and that the premium or dues collected by every such association shall increase at the same as, or a greater rate than, premiums are increased from 10 years to 50 years: Provided, also, that if any such corporation shall receive any member as of any date prior to first day of of the month in which such member was actually received, or who shall receive any member at a rate for any other age than the actual age of such member shall be deemed guilty of a misdemeanor and upon conviction punished by a fine of not less than five hundred (\$500.00) dollars nor more than one thousand (\$1,000) dollars, and in addition thereto, it shall be the duty of circuit judge before whom such case is tried to enter judgment declaring a forfeiture of the charter of the defendant association."

May 31, 1938

Subsequent thereto the Society sought to reincorporate under Section 5775 R.S. Missouri 1929, as an insurance company doing business under the stipulated premium plan, as follows:

"Any domestic life or accident corporation, company or association existing or doing business in this state at the time this article takes effect, may, by the vote of a majority of its board of directors or trustees, accept the provisions of this article and amend its articles of incorporation to conform to the same, so as to cover and enjoy any and all the provisions and privileges of this article the same as if it had been originally incorporated thereunder, and it shall file such amended articles of incorporation in the office of the secretary of state, a certified copy of which shall be filed with the insurance department, and shall thereafter perpetually enjoy the same and be deemed to have been incorporated under this article. Reincorporation, however, shall in no way annul, modify or change any of the existing contracts and liabilities of such corporation, and any and all such contracts and liabilities shall continue in force and effect the same as though such corporation had not reincorporated or qualified under this article, neither shall such reincorporation in any way prejudice, impede or impair any pending action or proceeding or any rights previously acquired."

At this point we quote from the Resolution adopted by the Society, which you enclosed, reading in part as follows:

"WHEREAS, on March 15th, 1938, the Honorable Dwight H. Brown, Secretary of State, of the State of Missouri, issued an amended Certificate of Incorporation to the Atlas Life Society, declaring it to be an insurance company on the stipulated premium

plan for a period of one hundred years from that date, with a fully paid capital stock of twenty five thousand dollars (\$25,000.00), and

WHEREAS, as provided by law, proper request was made of the Insurance Department of the State of Missouri, that a license be issued to the Atlas Life Society, authorizing it to write business on the stipulated premium plan, and

WHEREAS, while no license has been issued by the Insurance Department of this State or anyone for it, and no move of any kind has been made by the Insurance Department of this state, or anyone for it, toward the end that said license might be issued, and

WHEREAS, The Atlas Life Society, by reason of the failure of said Insurance Department to issue a license to it to write its business on the stipulated premium plan, Atlas has been greatly hampered in the proper conduct of its business to the end that great damage to it and/or it's members might accrue should its inactivity longer exist, and

WHEREAS, it is the unanimous sense of the Board of Directors, of the Atlas Life Society that the best interests of the Society and of it's members would be served should the Atlas Life Society here and now amend it's Articles of Association to the end that it's amended charter as a stipulated premium life insurance company be again amended and it's Articles of Association, as thus amended, become in substance and in fact the same text as they were previous to their amendment on March 12th, 1938:"

As indicated, an amended certificate of incorporation was issued by the office of Secretary of State to the Society declaring it to be an insurance company on the stipulated premium plan, but the Society was unable to obtain a license from the Insurance Department. The Society is therefore asking that

"it's amended charter as a stipulated premium life insurance company be again amended and it's Articles of Association, as thus amended, become in substance and in fact the same text as they were previous to their amendment on March 12, 1938."

As a stipulated premium life insurance company authorized to do business under the provisions of Chapter 37, R. S. Missouri 1929, the company by resolution seeks to amend its charter and come within the provisions of Article X, Chapter 32, R. S. Missouri 1929.

A glance at Section 5019 of said Article X would negative such a possibility inasmuch as said Article declares that it is not applicable to life insurance companies authorized to do business under the provisions of Chapter 37, R. S. Missouri 1929, in part as follows:

"This article shall not be so construed so as to apply to life insurance companies, associations or societies authorized to do business under the provisions of Chapter 37, R. S. Missouri 1929 * * * *".

We have examined the statutes carefully and fail to find any authority that would privilege a reincorporation in the manner here undertaken.

Mr. Wm. F. Goodman

-6-

May 31, 1938

We are therefore of the opinion that the Atlas Life Society organized under Chapter 37, R. S. Missouri 1929, as a stipulated premium life insurance company may not re-incorporate under Article X, Chapter 32, R. S. Missouri 1929, by the filing of the enclosed resolution.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

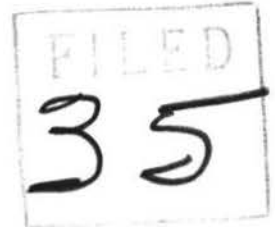
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ELECTIONS:
ABSENTEE BALLOTS:
BALLOTS:
COUNTY CLERK:
DEPUTY COUNTY CLERK:

County clerk has authority to appoint
deputy county clerk to issue absentee
ballots only at county clerk's office
at county seat.

February 8, 1938

Hon. G. Derk Green
Prosecuting Attorney
Linn County
Linneus, Missouri



Dear Sir:

This department is in receipt of your letter of
January 22, 1938, in which you request an opinion as
follows:

"The County Clerk of this county recently received a communication from one of the labor organizations requesting that deputy County Clerks be appointed in Marceline and Brookfield for the purpose of receiving applications for absentee ballots and accepting the ballots after they have been voted. The purpose of this being to permit railroad employees to vote with the deputy County Clerk and avoid the necessity of making application in person at the Linneus office or by mail, and to avoid the necessity of returning the ballots to the Linneus office in person or by registered mail. The County Clerk suggested to me that he did not know that the law regarding absentee ballots permitted him to appoint deputy County Clerks in this manner.

"He would like an opinion from your office regarding the authority to make appointments for this purpose and also a ruling concerning the furnishing of seals of office to such deputy clerks, if they can be appointed, and their authority to take applications, issue absentee ballots, and accepting the filing of them after having been voted."

Article VIII, Section 9 of the Constitution is as follows:

"Qualified electors absent from the state on military or naval service shall, and qualified electors absent from their counties but within the state may, be enabled by law to vote at general or special elections."

Pursuant to this constitutional provision, the legislature enacted Section 10181, R.S. Missouri, 1929, as amended in Laws of 1933, page 219, which is as follows:

"Any person being a duly qualified elector of the State of Missouri, who expects in the course of his business or duties to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, may vote at such election as hereinafter provided."

And also Section 10182, R.S. Missouri, 1929, Laws of 1935, page 264, which is as follows:

"Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election may, not more than thirty nor less than five days prior to the date of such election, make application in person, or by mail, to the county clerk or, where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct to be voted at such election."

February 8, 1938

We direct your attention to that part of Section 10182, supra, which we have underlined. It will be noticed it mentions "the county clerk" or "other officer charged with the duty of furnishing ballots for such election in his voting precinct".

Section 10299, R.S. Missouri, 1929, charges the county clerk with the duty of furnishing ballots and is as follows:

"Except as in this article otherwise provided, it shall be the duty of the clerk of the county court of each county to provide printed ballots for every election for public officers in which the electors or any of the electors within his county participate, and to cause to be printed in the appropriate ballot the name of every candidate whose name has been certified to or filed with him in the manner provided for in this article. Ballots other than those printed by the respective clerks of the county courts according to the provisions of this article shall not be cast or counted in any election."

The exception referred to in this section applies in counties where there is a board of election commissioners. (Sections 10302 and 10303, R.S. Missouri, 1929). Thus in Linn County, which we will assume has no board of election commissioners, the county clerk is the person to whom the application for an absentee ballot should be made. The statute mentions the clerk specifically, and he is also the officer charged with the duty of furnishing ballots for the election in the precinct in which the voter desires to cast his absentee vote.

The above statute, in referring to the official duties of the clerk in respect to absentee ballots, refers to the clerk alone. Section 11680, R.S. Missouri, 1929, provides the clerk of the county court with deputies, and is as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

In *Springer v. McSpadden*, 49 Mo., 1.c. 300, the court in commenting on the effect of what is now Section 11680, *supra*, said:

"The law, in prescribing the duties of clerks, invariably designates the clerk alone, yet the functions of his office may always be performed by deputy duly appointed.
* * * * *

"The deputy has no authority to act in his own name, but when he performs an official act in the name of the principal, it is the act of the principal himself."

Thus, it appears that a deputy county clerk may act for his principal, the clerk, in issuing the official absentee ballots. However, this does not mean that this duty of the clerk may be performed at another place other than the office of the county clerk at the county seat.

Section 11674, R.S. Missouri, 1929, provides where the county clerk shall transact his official business, and is as follows:

"Each clerk shall keep his office at such places as the court shall direct, not to be more than two hundred yards from the courthouse or permanent place of holding the court of which he is clerk, and shall there

February 8, 1938

keep the records, papers seal and
property belonging to his office
and transact his official business."

Summing up the foregoing, we see that the issuing of official absentee ballots is a part of the official duties and business of the county court clerk. This duty may be performed by the deputy clerk, but said deputy, when so acting, acts in the name of his principal, and such act is the act of the principal himself. The act must be performed at the county seat, as provided in Section 11674, supra, where all the official business of the county clerk must be transacted.

CONCLUSION

Therefore, it is the opinion of this department that the issuing of official absentee ballots is a part of the official business of the county court clerk which must be performed at his office at the county seat. That the clerk may not appoint deputies who will have offices at another place other than the county seat, and authorize those deputies to issue official absentee ballots at that place on his behalf.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

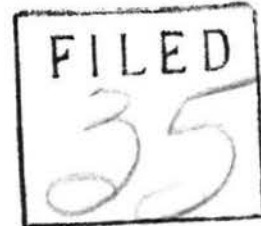
J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

ASSAULT: Mere words or solicitation not sufficient to constitute assault with intent to rape.

- February 8, 1938

Hon. Joseph L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri



Dear Sir:

We have your request of February 5, 1938, for an opinion which reads in part as follows:

"I would like to have your opinion as to whether or not the facts stated in said affidavit constitute the crime of attempted rape. The statements set out in the affidavit constitute in full everything that was said or done."

The affidavit attached to the request sets out a conversation wherein the defendant by solicitation attempted to have sexual intercourse with the prosecuting witness.

An examination of the authorities reveals the following rules of law applicable herein:

"Mere indecent advances, solicitations or importunities do not amount to an attempt."

52 C.J. p. 1030, Section 41.

In State vs. Harney, 101 Mo. 470, l. c. 472, the Supreme Court in a case similar to the present one made this statement:

"The only charge that can be evolved from the verbose reiterations of this indictment is, that the defendant, by verbal solicitations, tried to obtain the consent of a child under the age of twelve years to have sexual intercourse with him, and failed. However despicable and deserving of punishment such conduct may be, it falls short of the criminal offense attempted to be charged, to constitute which there must be an actual attempt to have intercourse with such child. So long as the evil purpose dwells in contemplation only it is beyond the grasp of these provisions of the law."

Other cases supporting the statement found in Corpus Juris supra, are State vs. Remley, 237 S.W. 489; State vs. Riseling, 186 Mo. 521; State vs. Pierce, 243 Mo. 524; 52 C.J. 1034, Note 17.

CONCLUSION

It is therefore the opinion of this office that the facts stated in the affidavit are not sufficient to constitute the crime of assault with intent to commit rape.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

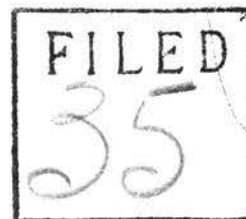
J. E. TAYLOR
(Acting) Attorney General

FER:MM

ELECTIONS: 1. Section 10313 interpreted to include persons uninstructed who request aid in marking their ballots as well as persons who cannot read and write and are physically unable to cast their ballot.
2. Persons making the oath provided for in Section 10313 can inform election judges in any manner he choses how he wants his ballot prepared.

March 15, 1938

3/15



Honorable W. W. Graves
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of March 14, 1938, wherein you request an opinion based on the interpretation of Section 10313, R. S. Mo. 1929; your question being as follows:

- "(a) Is any voter who cannot read or write,
- "(b) Or who is unable to mark his ballot by reason of physical disability,
- "(c) Or who states that he does not know how to mark his ballot,

entitled to the help of the Judge of Election in so marking his ballot?"

The first part of your question, designated as "a" and "b," is unquestionably answered by Section 10313, the statute being plain and unambiguous. That is, when an elector cannot read or write, or has a physical disability which prevents the actual physical act of voting, then the judges of the ballots should assist him in the manner as provided in the statute. Section "c" of your question states that "or does not know how to mark his ballot," presents a more serious and difficult problem. It must be conceded that the statute in its wording does not include expressly this class of electors, but at the outset we think a fair construction of the statute, and the

decisions are to the effect, that it was for the purpose of aiding electors and enabling them to exercise their franchise when, by reason of physical disability or illiteracy, or otherwise, they would be disfranchised. Our Constitution, by Article VIII, Section 2, has prescribed the qualifications of voters. In the decision of Nance vs. Kearbey, 251 Mo. 374, it was held that while the right to vote is not a vested natural right in a strict sense, yet it is a constitutional right in those citizens possessed of enumerated constitutional qualifications. Also, a constitutional right to vote may not be so regulated by statute as to be entirely abrogated or lightly denied.

In the decision of State ex rel. vs. Hough, 193 Mo. 615, it was held to the effect that election laws must be liberally construed in aid of the right of suffrage. The statute in question has been captioned "Illiterate voters -- judges to prepare ballot, when." The word "illiterate" is defined as,

"a person ignorant of letters or books;
unliterate; uninstructed; uneducated."

Under the Australian ballot system of voting, the prime purpose was to safeguard the right of the voters, and that the secrecy of the ballot be preserved as a great safeguard to the purity of elections. It has been said that "all knowledge of how a voter has voted is the voter's own secret, unless he chooses to divulge it he is fully protected, and a free and honest vote may be secured."

Having stated that the section does not expressly include the words of your question, we must consider the results which might arise if the elector does not know how to mark his ballot, and the judge or judges of election assist or give him information in marking his ballot.

In discussing such a situation, and what is now Section 10313, the court, in the case of Hope vs. Flentge, 140 Mo. 1. c. 404, said:

"Again it is urged that the court
erred in not permitting the contestee
to show that in the case of certain

electors the Democratic judges went into the booths and assisted certain electors therein named. Section 4784, a part of which has already been copied, contains this proviso: 'Provided, however, that the provisions of this section shall not be construed to allow any judge or judges of any election to enter a booth for the purpose of assisting any elector in preparing his ballot. Such judges, after reading to the elector the contents of the ballot, shall, without leaving their respective positions, prepare such ballot as the elector may dictate.' Acts 1893, p. 164.

"Here again was a positive violation of the law. The judges had no right in the booths, and yet there is no allegation that this misconduct was in furtherance of a design to unduly influence these electors, or that they were in fact imposed upon, or any advantage taken of them by the judges. The judges rendered themselves amenable for a violation of the law, but the question here is, shall this unlawful action of the judge disfranchise the illiterate voter for whose protection the statute made provision? Must he suffer because those designated by the law to instruct him violate the law? To so hold would establish a precedent which unscrupulous partisan officials might seize upon to nullify a perfectly fair and honest election. It is a sound distinction of the law which disfranchises a voter for his own failure to obey the plain and positive rules adopted to secure an honest expression of the will of the people, and that which refuses to punish him for the neglect or misconduct of an officer, over whose conduct he has no control, as to some provisions which the legislature has not deemed of sufficient importance to declare a non-compliance

therewith shall avoid the election or render a ballot illegal and void. This objection can not, for these reasons, be sustained."

Referring again to the terms of Section 10313, supra, the statute does not provide or state what shall be the result or the penalty in the event the terms of the statute are not strictly complied with. Some election statutes provide the result or the penalty for failure to comply with the terms of the statutes. The decisions of the court, and the general rule, are contained in *Horsefall vs. School District*, 143 Mo. App. 1. c. 545:

"The decisions of the Supreme Court in this State have not been altogether harmonious as to the effect of irregularities upon the result of an election, and we shall not attempt to review these cases, but we think it may now be said to be the established rule in this State, as it is generally in other jurisdictions, that when a statute expressly declares any particular act to be essential to the validity of an election, then the act must be performed in the manner provided or the election will be void. Also if the statute provides specifically that a ballot not in a prescribed form shall not be counted then the provision is mandatory and the courts will enforce it; but if the statute merely provides that certain things shall be done and does not prescribe what results shall follow if these things are not done then the provision is directory merely, and the final test as to the legality of either the election or the ballot is whether or not the voters have been given an opportunity to express, and have fairly expressed their will. If they have, the election will be upheld, or the ballot counted as the case may be. (*Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101; *Hope v. Flentge*, 140 Mo. 390, 41 S. W. 1002; *Sanders v. Lacks*, 142 Mo. 255, 43 S. W. 653; *State ex rel. v. Roberts*, 153 Mo. 112, 53 S. W. 520; *McKay v. Minner*, 154 Mo. 608, 55 S. W. 866; *Hehl v. Guion*,

155 Mo. 76, 55 S. W. 1024; State v.
Swearingen, 128 Mo. App. 605, 107 S. W.
1.)"

Therefore, we conclude that by applying the above test as contained in the decision, to Section 10313, R. S. Mo. 1929, the section is directory. But, assuming for the sake of argument, that the terms of the statute are not broad or comprehensive enough to include that class of electors who state that they do not know how to mark their ballots, and that if the judges of election assist them, that the same constitutes an irregularity, what is the result?

In the decision of State ex rel. vs. Arnold, 278 Mo. 672, it was held an election irregularity is not fatal to the validity of the whole return of the precinct unless made so by statute, or unless the irregularity is such as has probably prevented a free and full expression of popular will.

And again in the decision of O'Laughlin vs. City of Kirkwood, 107 Mo. 302:

"To annul the result of an election because of irregularities in conducting it, it must be shown that some mandatory statute was violated or that the election was conducted in such an irregular manner that the true sentiment of the voters was not expressed by it or that it was impossible to know whether the true sentiment was expressed."

Thus, it will be noted from the above decisions that the real test of an honest ballot cast by an elector, is that the true sentiment of the elector is shown by his ballot. Fraud vitiates almost every act of a human being, and likewise fraud will vitiate a ballot or an election. All the legal principles and decisions which we have offered assume that the elector is honest, and likewise the election judges. Again we say such irregularities will not void the election or the ballot of the elector who is unable to cast his ballot without aid. As was said in the case of Skelton and Brannock v. Ulen, 217 Mo. 383:

"Irregularities committed by the judges and clerks at an election which are not shown to be fraudulent, or instigated by contestee, and in which he in no wise participated or derived any benefit from, and by which his vote was not increased, will not authorize the court to declare the whole vote at the precinct to be void."

Conclusion

We are of the opinion that when an elector states, under oath, that he cannot read or write, or that he is physically unable to mark his ballot, that the judges of election shall prepare his ballot. We are of the further opinion that by the Constitution of Missouri and the statutes governing the conduct of elections, it was the intention of the Legislature that every person who meets the constitutional requirements should have the privilege of voting, that when the Legislature used the expression "read or write" it meant by those words not the naked ability to read words or to write simple sentences, but, as contained in the definition of "illiterate," to include the uninstructed; that it comprehends the ability to consider "its contents or meaning," as was said in the case of U. S. v. Tod. 294 Fed. 820, 822, as follows:

"Under Act Feb. 5, Sec. 3 (8 USCA Sec. 136), excluding aliens 'physically capable of reading,' but who cannot read any language, a deaf mute, though physically incapable of reading aloud, is not physically incapable of reading; 'reading' being the act practiced or art of perusing written or printed matter and considering its contents or meaning."

In recent years, our ballots have become larger with additional parties, constitutional changes and propositions, so that it requires more intelligence of the voters today than

of our forefathers. The layman may be able to read or copy the physician's book, the lawyer's brief or the philosopher's works, but be wholly unable to comprehend or understand anything he has read. Likewise, the elector may read names on the ballot, propositions and amendments and yet may understand none of it, and as a result he is in the same position so far as casting an intelligent vote or expressing his free choice is concerned as the person who is illiterate or cannot read or write. In reaching this conclusion, we are not unmindful of the decision of the Kentucky Supreme Court where a similar statute was under consideration in the early case of *Major v. Barker*, 99 Ky. 305. But after duly considering the same we are of the opinion that the decision has given the statute a narrow restricted interpretation which tends to throw barriers in the path of the voters rather than facilitate the act of casting a ballot. From a reading of the decisions of the Missouri Supreme Court, relating to interpretations of election statutes, we find that our Supreme Court has more liberal views than that of the Kentucky Supreme Court; hence, we decline to follow the ruling in the *Major v. Barker* decision.

We are, therefore, of the opinion that the judges may assist those electors who, by reason of illiteracy, physical disability or lack of instruction or understanding, are unable to cast their ballot. To hold otherwise may have the effect of disfranchising otherwise qualified electors.

II.

The following question has also been presented to this office:

"The second point involved is this: the law states 'The voter may declare his choice of candidates to the judges having charge of the ballots, Etc.' We believe and insist that this declaration may take any one of the following forms: the placing of a sample ballot before the judges and the statement that he wants to vote this ticket, or the placing of a card with a list of candidates

before the judges with the statement, I want to vote this ticket, or I want to vote this way, or I want to vote for these candidates, or that he may say to the judges, I want to vote for the Democratic candidates, or will you mark it for the Democratic candidates for me, or who are the Democratic candidates, I want to vote for them. In other words we believe that the statement that the voter may declare his choice of candidates, leaves it open to him to select the way in which he makes his declaration and that the judges of election are his agents for the purpose of marking it in the way he directs."

We shall include the answer to the above question in this one opinion so as to obviate the necessity of writing two opinions.

The section (10313) provides that when the voter makes the necessary declaration under oath as heretofore pointed out,

"he may declare his choice of candidates to the judges having charge of the ballots, who, in the presence of the elector, shall prepare the ballot for voting in the manner hereinbefore provided * * * *. Such judges, after reading to the elector the contents of the ballot, shall, without leaving their respective positions, prepare such ballot as the elector may dictate."

It is clear that the said statute intends to guarantee to the illiterate or physically disabled voter the same freedom of choice that the literate and physically fit voter has. The literate and physically fit voter can mark his ballot in secret, and he therefore has complete freedom in making his choice of candidates. He is the sole judge of whom he is to vote for. To guarantee to a voter who, because of illiteracy or physical disabilities, has to call upon the judges of election for assistance in making out his

Mar. 15, 1938

ballot, the same freedom of choice, it is necessary that such unfortunate voter be allowed to dictate whom he shall vote for. When the literate and physically fit voter enters his booth to make out his ballot in secret, no one can prevent him from taking out of his pocket a sample ballot already marked, or from using a typewritten list of the persons he desires to vote for, or from using any other data he has in his possession from which to make out his ballot. Therefore, it would seem clear that the illiterate or physically unfit voter should have the same right to use whatever data he has in his possession to enable him to have his ballot prepared as he wants it. To say otherwise would be to deprive the illiterate and physically unfit voter of equal privileges with his literate and physically fit brothers.

The statute says the judges "shall prepare such ballot as the elector may dictate." It does not say how or in what manner such dictation shall be made. A dumb man might dictate his choices one way, a blind man another, a deaf man still another. The statute gives him the right to dictate his ballot, and it does not limit him in his method of conveying to the judges how he wants to vote. Any way he has of making known to the judges how he wants to vote is not unlawful. The judges are his agents for the purpose of making his ballot.

Conclusion

It is, therefore, the opinion of this office that a voter who makes the declaration under oath provided for in Section 10313, R. S. Mo. 1929, can inform the judges of election in any manner he chooses, how he wants his ballot prepared.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

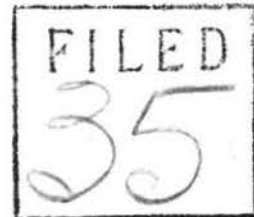
OWN:EG

ELECTIONS: Section 10313, R.S. 1929, construed. The words "declare under oath" do not require the elector to sign an oath. He may take it orally

March 19, 1938

3-19

Honorable Waller W. Graves, Jr.
Prosecuting Attorney
Kansas City, Missouri



Dear Mr. Graves:

This Department acknowledges your telegram delivered today, in which you request an opinion. As your telegram states the question tersely and succinctly we herewith quote the same:

"The Board of Election Commissioners have adopted a rule following the suggestions in your opinion of recent date interpreting section ten thousand three hundred thirteen allowing judges of election to assist voters in marking their ballots. They have gone further and require in their regulation a signed oath. I would like to have your opinion as to whether or not under Section Ten thousand three hundred and thirteen the voter must sign an oath or whether the oath may be taken orally before any of the judges of election."

Bearing in mind our original interpretation of Section 10313, Revised Statutes Missouri 1929, in our opinion of March 15, 1938, we are now concerned with the expression, "any elector who declares under oath to the judges of election having charge of the ballot;" the rest of the section being to the effect that if said person cannot read or write, or by reason of physical disability is unable to mark his ballot

and may "declare" his choice of candidates to the judges having charge of the ballots. It appears that the electors, under the circumstances mentioned, "declare under oath" and "declares" his choice of candidates. Does the elector in "declaring under oath" do the same orally or in writing?

Webster's New International Dictionary defines "declare" as follows:

"To make clear; to free from obscurity; -- To make known by language; to communicate or manifest to others explicitly and plainly, whether by acts, words, writing, or signs; to publish; proclaim; announce; - -
- To make declaration of; to assert; to affirm; to set forth; to avow."

Words and Phrases, Volume 2, page 1904, defines the word "declare" as follows:

"The word declare signifies to make known, to assert to others; to show forth; and this in any manner by words or by acts, in writing, or by signs."

We think the general rule is to the effect that when a statute merely states, declares or says that an individual shall take an oath, the kind or purpose of the oath being immaterial, that the person taking the oath receives the same orally, the usual custom being by raising his open right hand, the rule being further to the effect that an "oral oath is sufficient unless a written oath is prescribed." 46 Corpus Juris, 843; Davis v. Berger, 54 Mich. 652, 1. c. 654.

In order to compel the person making the oath to make the same in writing it would have been necessary for the statute to have contained statements, "declare under oath in writing" or "subscribe to an oath" or "make affidavit" or "make affidavit in writing."

The word "subscribe" is defined as, "to write at the bottom or end of a writing or instrument. " "A strict definition of the term involves the idea of a written signature or a writing." Loughren v. Bonniwell, 101 N. W. 287.

In order to make the point we call your attention to the fact that there are other election statutes which state when the oath shall be in writing and when certain election officials shall subscribe to an oath, as, for instance, Section 10236, Revised Statutes Missouri 1929. A situation analogous to the point which is now involved may be illustrated and deemed on a parity with Section 10271, Revised Statutes Missouri 1929, wherein it is provided that in a primary election any voter attempting to vote other than the ticket of the party with which he is known to be affiliated "when challenged, obligates himself by oath or affirmation administered by one of the judges to support the nominees of the ticket he is voting in the following general election." No court has ever construed this section to demand of the elector an oath in writing, and, we think, clearly, for the reason that the statute does not require that the oath be taken in writing.

Lastly, what is an oath and is it not synonymous with the word affirmation? It has been variously defined; a good definition being,

"An outward pledge given by the person taking it that the attestation or promises are made under an immediate sense of responsibility to God."

March 19, 1938

An oath is an

"appeal by a person to God
to witness the truth of what
he declares"

and

"an imprecation of divine
punishment or vengeance
upon him if what he says
is false."

CONCLUSION

We are of the opinion that the expression "declares under oath," as used in Section 10313, contemplates and means an oral oath; that had the legislature contemplated a written oath it would have used terms clearly stating that the oath should be taken in writing or that the elector should sign his name to an oath.

Referring to your inquiry wherein you state that the election commissioners, in view of our opinion of March 15, have adopted a rule that those electors who require assistance at the polls should make a signed oath, we do not believe that this class of voters should be subjected to any different rule or regulation than a person physically disabled or unable to read and write.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED

J. E. TAYLOR

(Acting) Attorney General

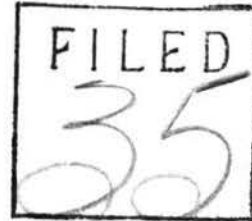
OWN LC

LOTTERIES: Money Quest Nite.

April 13, 1938

4-14

Mr. G. Derk Green
Prosecuting Attorney
Linn County
Linneus, Missouri



Dear Sir:

We have your request of April 9, 1938, for an opinion which is in part as follows:

"The manager of the theatre selected ten persons from the audience and asked them to come upon the stage. There he suggested that he had ten questions that he wished to ask them and proceeded to ask each person one question. If the person gave a correct answer then the manager of the theatre paid to that person \$1.00. If the answer was not correct then that person did not receive anything but the \$1.00 was placed in a fund or pot for the purpose as I will mention later. Several of the persons gave correct answers and received the \$1.00, others could not answer correctly and the \$1.00 was placed in the larger fund. Then the manager proceeded to ask each of the ten persons what he designated as a "master question." The person able to answer the "master question" received all of the money placed in the fund from the failure of others to answer the other question."

April 13, 1938

At the very outset it appears that the manager of the theater selects ten persons from those in the audience. All the people in the show have paid an admission price. This furnishes the element of consideration. All of the patrons who pay admission to the show, which includes a paid consideration for the right of participating in "Money Quest Nite" are excluded from participation unless they happen to be one of the ten selected by the manager.

Commenting upon this phase of lotteries, we find the following statement in 45 Harvard Law Review, page 1212:

"It is somewhat surprising to find a fairly large number of decisions involving the award of prizes in the uncontrolled discretion of a judge. All of them agree that the contest is a lottery."

Under date of March 15, 1938, this office rendered an opinion to the Honorable Claude T. Wood, Prosecuting Attorney, Waynesville, Missouri, holding that "Doctor Quizzer" is a lottery, a scheme in most details similar to this one.

CONCLUSION

It is therefore the opinion of this office that the scheme "Money Quest Nite" is a lottery within the meaning of Section 4313 R. S. Missouri 1929.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER: MM

NARCOTICS:
STATE BOARD OF HEALTH:

A physician administering and dispensing narcotic drugs shall keep a record as is required by the the Federal Narcotic Law, otherwise such physician violates state law.

April 20, 1938.



Mr. J. B. Greeson,
District Supervisor,
Bureau of Narcotics,
611 Mutual Building,
Kansas City, Missouri.

Dear Sir:

This is to acknowledge receipt of your request for an opinion reading in part as follows:

"* * *advise whether it is permissible for a practitioner licensed under the state laws, who is not registered under the Federal narcotic laws but who is employed by an institution such as a hospital, to dispense or administer narcotic drugs from the institution's supply of narcotics to patients of such institution, provided the institution by which he is employed is duly registered under the Federal Narcotic Laws."

At the outset may we inform you that the Missouri Narcotic Law makes no reference to the licensing of anyone other than a manufacturer or wholesaler of narcotic drugs. (Secs. 3 and 4, Laws of Missouri, 1937, p. 347.)

Therefore, a physician or practitioner, as you have suggested, cannot be licensed under this Act, as the Act only licenses a manufacturer or wholesaler of narcotic drugs. This is equally true as respects the registration or licensing of a hospital.

A detailed examination of the Act as a whole clearly indicates, with respect to records, that if the records required to be kept regarding dispensing and administering of narcotics comply with the Federal Narcotic Laws, such compliance will be deemed a sufficient compliance with the Act. (Secs. 9 and 5, Laws of Missouri, 1937, supra).

It is provided in part by Sec. 9, supra, that

"Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this subsection if any such person using small quantities of solutions or other preparations of such drugs for local application, shall keep a record of the quantity, character, and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients. Provided, that no record need be kept of narcotic drugs administered, dispensed, or professionally used in the treatment of any one patient, when the amount administered, dispensed, or professionally used for that purpose does not exceed in any forty-eight consecutive hours, (a) four grains of opium, or (b) one-half of a grain of morphine or of any of its salts, or (c) two grains of codeine or of any of its salts, or (d) one-fourth of a grain of heroin or of any of its salts, or (e) a quantity of any other narcotic drug or any combination of narcotic drugs that does not exceed in pharmacologic potency any one of the drugs named above in the quantity stated.

THE KEEPING OF A RECORD REQUIRED by or under the Federal Narcotic Laws, containing substantially the same information as is specified above, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed, or stolen, if any, the kind and quantity of such drugs, and the date of the discovery of such loss, destruction, or theft."

It is clear from the above statute that, if the record required contains substantially the same information as is required under the Federal Narcotic Laws, this section of the statute would be complied with. Where the statute is plain and unambiguous as here, . no room for interpretation exists. *Cummins v. Kansas City Public Service Company*, 66 S.W. (2d) 920.

CONCLUSION.

In view of the above, it is our opinion that if a physician is employed by an institution, such as a hospital, which is duly registered under the Federal Narcotic Laws, and such physician administers or dispenses narcotic drugs and keeps a record of such drugs in the method and in the manner as required by the Federal Narcotic Laws, such physician complies with the provisions of Sec. 9, Laws of Missouri, 1937, p. 334. 344

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

RCS/LD

LOTTERIES:--Money Quest Nite.

April 29, 1938

Mr. G. Derk Green
Prosecuting Attorney
Linn County
Linneus, Missouri



Dear Sir:

This acknowledges receipt of your request of April 27, 1938, for an opinion with reference to "Money Quest". From your letter it appears that persons are arbitrarily selected by a drawing and after being selected are given some sort of a prize, the size and amount of which depends upon the correctness of his answer to some question.

We are advised that hand bills are distributed in your town with reference to Money Quest Nite, in which patrons of the theater are urged to get a pot of gold, and that these circulars contain a double stub with a number on each, one of which stubs is deposited in a box in the lobby of the theater and the other is retained by the patron.

Your letter states that prizes are given varying from fifty cents to One dollar in size. We are also informed that prizes amounting to as much as Forty dollars are being given away by the Uptown Theater.

We have carefully considered this question and are unable to find any distinction between it and Bank Night recently held to be a lottery by the Supreme Court of this State.

A lottery in this State to be in violation of Section 4314 R. S. Missouri 1929, must contain three essential elements, namely, prize, chance and consideration. State vs. Emerson, 1 S.W. (2) 109; State ex rel. vs. Hughes, 299 Mo. 529; 253 S.W. 229; 28 A.L.R. 1305; State vs. Becker, 248 Mo. 555, 154 S.W. 769.

April 29, 1938

We need give no consideration to the prize element because that is admitted in this case. The money given away to the patrons is the prize.

The arbitrary selection of a few persons from the audience constitutes the element of chance. Those selected either by pulling a number out of the box or by any other method are given a preference, and the selection of these few constitutes the element of chance. The recent case of the Supreme Court of this State, State ex rel. McKittrick vs. Globe Democrat Publishing Company, 110 S.W. (2) 705, clearly establishes the rule in this state that when the element of chance enters into a determination of the winners the contest is a lottery.

The third and last element of a lottery is consideration. From the facts in this case it appears that the winners are selected solely from theater patrons who have paid an admission to the theater. The payment of admission which is coupled with a chance or opportunity to win a prize, in the eyes of the lottery law, is also payment for the opportunity to compete in the game of chance. State vs. Danz, 250 Pac. 37; Featherstone vs. Independent Service Station Association, 10 S.W. (2) 124; Society et al. vs. Seattle, 203 Pac. 21.

CONCLUSION

It is therefore the opinion of this office that the scheme known as Money Quest Nite is a lottery in violation of Section 4314 R.S. Missouri 1929, which makes it a felony punishable by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or work house for not less than six, nor more than twelve months.

Respectfully submitted,

APPROVED:

FRANKLIN E. REAGAN,
Assistant Attorney General

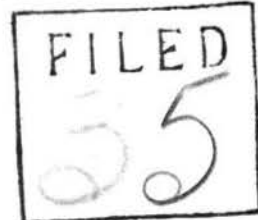
J. E. TAYLOR
(Acting) Attorney General

FER:MM

-) Proper officer of City of St. Louis may not reinstate a delinquent tax bill which has been voluntarily paid, where such payment was shown to have been made by the record.
- (2) Such officer should not accept payment of delinquent taxes on lot on which such taxes have been duly paid. But when another payment for taxes on the same lot was voluntarily made said officer cannot make a refund therefor.

April 30, 1938

Mr. Donald Gunn
Attorney at Law
1010 Pine Street
St. Louis, Missouri



Dear Mr. Gunn:

We wish to acknowledge receipt of your request for an opinion on April 18, 1938, on behalf of the collector of the revenue of the City of St. Louis which is as follows:

"On behalf of the Collector of the Revenue of the City of St. Louis, I am requesting the following information and your opinion with reference to the legal aspects of this situation.

"There are located within the City of St. Louis two pieces of adjoining property, having approximately the same dimensions. Parcel #1 is owned, let us say, by A. Parcel #2 is owned by B. About six months ago, through some error, A. called at the Collector's office and paid the general real estate taxes for the year 1934 which had been assessed against Parcel #2. Several months thereafter, he discovered his mistake, and being anxious to finance Parcel #1, he called at the Collector's office and likewise paid the general real estate taxes for 1934 on Parcel #1. Up to date, therefore, A has paid these taxes on both pieces of property.

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"Now, subsequent to the time that A paid the taxes on Parcel #2, B became in arrears and in default on a deed of trust against Parcel #2. The holders of the deed of trust, being anxious to determine whether or not they should buy in the property at foreclosure, called at the Collector's office and determined that the general real estate taxes for 1934 had been paid on Parcel #2. They did not, in this connection, have the title actually run by a title company. Subsequently, they foreclosed on Parcel #2 and acquired the same at the foreclosure sale. They state that one of the reasons for acquiring same was the fact that these particular taxes had been paid. Demand has now been made upon these purchasers to pay the taxes on Parcel #2 so that a refund may be made to A of the amount he paid erroneously.

"The questions, therefore, presented by this situation are:

1. Has the Collector of the City of St. Louis, or the Comptroller of the City of St. Louis, or any other officers within this city, the right to reinstate a tax bill which has been paid through error, and the records pertaining to which have been erroneously marked paid?
2. Upon payment to the Collector by any party of the taxes previously collected by him from some other party, has he the right to refund to the party who paid in error the amount so paid by him?
3. Would the person who paid the wrong piece of property (A) have the right to maintain a suit against the person holding the legal title to the property which he

paid erroneously and recover back the amount so paid, either at law or in equity?

"In connection with the last question, I understand the cases to hold that the person who pays in error cannot be subrogated to the rights of the state, and cannot claim the state's lien as having been transferred to him. However, I am not clear on whether or not a suit could be successfully maintained on the theory of unjust enrichment, or some similar theory.

"The foregoing request is made of you in view of the fact that the taxes involved consist partially of state funds and, further, for the reason that the office of the Comptroller of the City of St. Louis is in a large measure involved, and I do not feel that I should advise that office, as I do not represent it, but that, on the other hand, the advice given them should come from the Attorney General."

The third question in your letter relates to a purely private controversy and therefore under and by virtue of the provision of Section 11274 of the 1929 Statutes of Missouri, we are not at liberty to render an opinion on that point. Therefore we shall render an opinion including only your first and second inquiries.

In your letter dated April 18, 1938 you stated that the general taxes in question were due for the year 1934, and that some six months prior to the date of said letter a hypothetical person paid the taxes due for said year upon a lot, owned at the time by another person. The taxes on the lot

were therefore delinquent and the collection of such taxes by the proper officer must be made under and by virtue of the procedure of Senate Bill 94 of the 1933 Session Acts of Missouri.

I

Section 9949 of Senate Bill 94 of the 1933 Session Acts at page 427 is as follows:

"The collectors of the respective counties and the collectors of such cities, respectively, shall proceed to collect the taxes contained in such 'back tax book' or recorded list of the delinquent land and lots in the collector's office as herein required, and any person interested in or the owner of any tract of land or lot contained in said 'back tax book' or in the recorded list of delinquent lands and lots in the collector's office may redeem such tract of land or town lot, or any part thereof, from the state's or such city's lien thereon, by paying to the proper collector the amount of the original taxes, as charged against such tract of land or town lot described in said 'back tax book' or recorded list of delinquent lands and lots in the collector's office, together with interest on the same from the day upon which said tax first became delinquent at the rate specified in Section 9952."

Section 9952a of said Act at page 430 is as follows:

"All lands and lots on which taxes are

delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale; provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor. The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

Senate Bill 93 of the 1933 Session Acts of Missouri at page 424 is as follows:

"Sec. 9946. In all cases where any assessor or assessors, the county court, or assessment board, or any city council or assessment board, shall have assessed and levied taxes, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interests and penalties thereon, the city council of any city and the county court of any county shall have the full power to correct any errors which may appear in connection therewith, whether of valuation, subject

to the provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law * * * *."

An opinion in answer to an inquiry similar to the within inquiry was rendered by this department to Mr. Will H. Hargus, Prosecuting Attorney of Harrisonville, Missouri, on March 3, 1934, holding that "Tax payer through his mistake, paying taxes on land which he does not own, may not recover back such taxes paid voluntarily." The above opinion was based upon a payment made to extinguish the tax lien of a drainage district but the same law is applicable as to the collection of general taxes. The decision quoted in that opinion is *Matthews v. City of Kansas* 80 Mo. 236 which laid down the rule as to the voluntary payment of taxes and is in part as follows:

"Under the statute then in force the assessment of taxes on real property was not a personal tax against the owner. The assessment was made on the land itself by its members, regardless of who was its owner. It was not the duty of the collector to look up the owner or apply to him for the taxes. The tax by law became due and payable at certain prescribed periods, and it was the duty of the owner to go to the collector, or send some one, and pay this tax assessed on the land as such. So the collector in his testimony but stated a legal truth in saying that he had no concern as to who was the owner of a given lot or tract of land. He was receiving the tax imposed on the given lot as such. It may be conceded that if Hariman had gone to the collector and stated

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that he had come to pay the tax assessed on plaintiff's land, trusting to the collector to look up the numbers, and this the collector undertook to do, and furnished the wrong numbers, and the agent had thereupon made payment on the belief of the correctness of the lots, this would have been a case of mutual mistake, or at least one in which the plaintiff would have a clear equity of restitution. But the proof here is that without any word or act of the collector inviting thereto, the agent of plaintiff, not depending on the collector for the land assessed, against his principal, presented his own prepared list to the collector 'and told him to make out a receipt for the taxes due upon said list.' In such a case the collector had to look simply to the numbers of the lots thus furnished to ascertain the amount of taxes assessed thereon. This he did as invited by the plaintiff, and received the money without question, as it was due the city. Where is the evidence in all this to give color even to any mistake or misrepresentation as to any material fact on the part of the collector? He was pursuing the statute receiving the tax due on the lots as such, regardless of who the owner was. The money received was justly owing to the city, was a charge on the lots, and, therefore, it cannot be affirmed that it is unconscionable for the city to hold it."

Nothing appears in your letter which indicates that the collector in any way contributed to the mistake. Therefore said decision is the law of your case.

Under Section 9949 supra "any person interested in or the owner of" a lot may pay the taxes and redeem the property from the tax lien.

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Under Section 9952a supra an interested party may pay the taxes and redeem the property from the tax lien "at any time before the property is sold therefor."

Under Section 9946 supra the proper officers were given the power to correct errors of taxes on real estate "whether the same be delinquent or otherwise and until the same are paid and collected."

The above statute is the only one we are able to find giving to any officer or group of officers the right of correcting errors in tax matters, and such right is given only until the taxes are paid and collected and not after such time.

Conclusion

Therefore, it is the conclusion of this department that when the proper officer of the City of St. Louis receives the amount due for delinquent taxes, penalty, interest and costs, from any interested person, voluntarily paying the same on a given lot in said city, to extinguish the tax lien thereon and gives receipt therefor and marks the same paid, he has no legal right thereafter to reinstate the tax bill.

II

When delinquent taxes are once collected, receipt given therefor and the record shows it to have been paid, the collector or proper officer should not accept further payment.

In passing on the right of the collector to enforce payment of delinquent taxes after he has collected the same and has given receipt therefor, the court in Huber v. Pickler 94 Mo. l.c. 386, says:

"If, in the suit brought by Snyder against plaintiff to enforce the payment

of the tax for 1876, he had appeared and produced the said Snyder's receipt for the taxes of that year, no judgment could or would have been rendered against him. And it is equally clear, under the authority of the cases above cited, that if, after the rendition of the judgment and before any sale took place under it, the said Snyder's receipt was shown to him for the taxes of the year on which the judgment was rendered, and the said collector accepted the same as payment and satisfaction, and entered the payment on the back-tax book, a public record, and as such imparting notice, agreeing in effect at the same time to satisfy the judgment by directing the attorney who brought the suit to proceed no further with it, that a purchaser at an execution sale thereafter made under the judgment took no title in virtue thereof.

The taxpayer in this case did all that he was required to do, so far as the payment of the taxes for the year 1876, was concerned. These he paid; there was no delinquency on his part. The delinquency was on the part of the collector in not complying with section 6758, Revised Statutes, 1879, and in not entering on the tax book opposite and against the tract of land the tax paid when he collected it, and in falsely or mistakenly returning the land delinquent, when in truth and fact it was not delinquent, and in then instituting a suit to recover a tax which had been paid him more than two years before the suit was brought."

In regard to the collector making collection for taxes which he had already collected and given receipt therefor the

court quoted a Legislative Act which it said seemed to contemplate just such a contingency as the case in hand presents and provided to meet it. Said Section being Section 6791 of the Revised Statutes of 1879 which is Section 9939 of the 1929 Revised Statutes and which is quoted in said decision as follows:

"Any collector of the public revenue for the state, * * * who shall fail to make return of all lands, tenements, or other real estate to the proper officer, according to law, on which the taxes have been duly paid, so that the same shall, by the cause of his negligence, delinquency, or misconduct, be advertised and sold as delinquent lands, shall forfeit to the innocent purchaser in good faith of such lands, at the time and place appointed for the public sale of the same, one hundred per cent damages on the sum so paid by the innocent purchaser to such collector, and ten per cent per annum interest thereon until the same is paid to such purchaser, recoverable in any court having competent jurisdiction."

But, while a party, sued for taxes, which had been paid, would have a valid defense of payment to the suit, it is not a foundation for a suit to recover the money voluntarily paid for such taxes.

In passing on this question in State ex rel v. Chicago & Alton Railway Company 165 Mo. 597, 1. c. 611 the court said:

"In its petition to the county court in 1893 to refund the tax so paid, the defendant based its claim solely on the ground that the tax had not been levied

in accordance with the requirements of section 7654, above referred to. There was no claim made that the tax was not levied to pay a just obligation of the townships, for which all the taxable property in the township was liable, but only that the procedure prescribed by law had not been followed.

"Whilst that would have been a perfectly valid defense to a suit to collect the tax, it is not a foundation for a suit to recover the money voluntarily paid in conformity to the assessment. Taxes paid voluntarily, under those circumstances, can not be recovered. (Walker v. City of St. Louis, 15 Mo. 563; State ex rel v. Powell, 44 Mo. 436; Couch v. Kansas City, 127 Mo. 436; Robins v. Latham, 134 Mo. 469.) * * * *"

Said decision further held that general taxes collected would be placed in the county treasury under the control of the court subject to legal restrictions, in the following language:

"If this had been money collected for general county purposes, its place would be in the county treasury, and it would be under the control of the county court, subject of course to the restrictions that the law imposes on that control."

We are unable to find any statute or decision where the county court, collector or other proper officer is given the right to refund taxes voluntarily paid.

On the other hand the rule which has been uniformly followed in Missouri is stated in *Brewing Co. v. St. Louis* 187 Mo. 367, 1. c. 376 in the following language:

April 30, 1938

"The rule stated has been uniformly followed in this State in reference to all kinds of payments, including taxes, licenses, and claims, and the doctrine is firmly established that payments made with a full knowledge of all the facts constitute voluntary payments and can not be recovered, and that mistake or ignorance of law gives no right to recover. (Walker v. St. Louis, 15 Mo. l. c. 575; Christy's Admr. v. St. Louis, 20 Mo. 143; Claflin v. McDonough, 33 Mo. 412; Couch v. Kansas City, 127 Mo. 436; Teasdale v. Stoller, 133 Mo. 645; Douglas v. Kansas City, 147 Mo. l.c. 437; see, also, 22 Am. and Eng. Ency. Law (2 Ed.) pp. 609 and 613.)"

Conclusion

Therefore, it is the opinion of this department that an officer of the City of St. Louis who has the legal duty of collecting delinquent taxes should not accept payment of taxes, delinquent or otherwise, on a lot on which the taxes have been duly paid. But when another payment for taxes on the same lot was voluntarily made said officer cannot make a refund therefor.

Respectfully submitted

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SVM/w

TAXATION:

Persons living within a city are subject to a city tax on the personal property on his farm which is outside of the city limits. Persons living outside of the city limits are not subject to a city tax on the personal property portion of his business such as ice boxes, etc.

May 20, 1938

Mr. J. A. Gregory,
City Attorney,
Aurora, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated May 17, 1938 for an official opinion from this department which request is as follows:

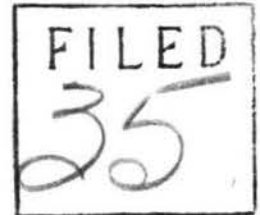
"We would like to know if a person living outside the city limits and conducting a business within the city limits is subject to a city tax on the personal property portion of his business, ice boxes, scales, cash register, etc., also if a person living within the city limits and owning a farm outside is subject to a city tax on the personal property on his farm, cattle, hogs, sheep, horses, implements, etc.

Aurora is a city of the third class.

We are unable to find any information on the above proposition and will greatly appreciate an opinion from you at your early convenience."

I.

Answering the first part of your request for an official opinion, wherein you ask if an individual lives outside of the city limits in the county and owns personal



property used in his business, such as ice boxes, scales, cash registers, etc., will say that Section 9745, R.S. Mo. 1929 reads as follows:

"All personal property of whatever nature and character, situate in a county other than the one in which the owner resides, shall be assessed in the county where the owner resides, except as otherwise provided by section 9763; and all notes, bonds and other evidences of debt made taxable by the laws of this state, held in any state or territory other than that in which the owner resides, shall be assessed in the county where the owner resides; and the owner, in listing, shall specifically state in what county, state or territory it is situate or held."

The exception noted in Section 9745 is Section 9763, R.S. Mo. 1929, applies only in the case of personal property held by an administrator, executor, guardian or other person legally in charge and control of an estate in the probate court.

Section 9745, supra, does not mention cities but does mention different counties and states the owner shall be assessed in the county wherein he lives even if the property is located in another county. In the case of State ex rel. Kelly, Collector, v. George A. Shepherd, 218 Mo. 656, the court held:

"Defendant was an unmarried man and owned a farm in the country, on which was a farm house in which he kept a room, and intended and considered the farm house his home, where he occasionally took a meal with his tenant. His aged parents lived in town, and at the time of the assessment of the taxes sued for and for a number of years prior thereto he

lodged at night in their home, going every morning to his farm to look after it and to care for his stock, and his sole reason for lodging with his parents at night was that they were old, sickly and helpless and needed his care and assistance. Held, that his personal property was not taxable in the school district of which the town was a part, but in the school district in which his farm was situate, and that holding is in consonance with the Revenue Statute, and that being a clear statute it is not necessary to resort to the 'Construction' Statute providing that 'the place where any person having no family shall generally lodge shall be deemed the place of residence of such person.' This last statute should not be allowed to determine the place of the defendant's residence or domicile."

Also the court further said:

"It is conceded by counsel for both appellant and respondent that personal property is taxable at the domicile of the owner and in the school district in which he resides."

In Section 9261, R.S. Mo. 1929, this section applies to the assessment of personal property for school for school purposes. It states among other things the law as follows:

"* * * * * and it shall be the duty of the county assessor in listing property to take the number of the school district in which said taxpayer resides at the time of making his list, to be by him marked on said list, and also on the personal assessment book, in columns provided for that purpose."

Under this Section 9261, supra, it is the duty of the county

assessor to list the property in the district where the owner resides. The personal property described in your request should be assessed at the residence or domicile of the owner.

Section 9745, supra, should not be confused with Section 10077, R.S. Mo. 1929, which is the state ad valorem tax and which tax is also considered a personal property tax. This section 9745, supra, also should not be confused with city occupation taxes.

Section 9756, Session Laws of 1937, page 570, provides:

"The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to-wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property, * * * * * and every other species of property not exempt by law from taxation. The word 'list' as used in Section 9806 of this Chapter shall include

all the lists required under this section to be taken."

Under this Section 9756, Session Laws of Missouri, 1937, page 570, merchandise has been excepted where the city or state may be required to assess a license tax. This section in no way repeals Section 9745, supra, and the personal property should be assessed and listed in the district where the owner resides.

II.

Answering the second part of your request wherein you ask if a person living within the city limits and owning a farm outside is subject to a city tax on the personal property on his farm, cattle, hogs, sheep, horses, implements, etc., will say that Section 6994, R.S. Mo. 1929 which applies to cities of the fourth class reads as follows:

"In assessing property, both real and personal, in cities of the fourth class, the city assessor shall jointly, with the county assessor, assess all property in such cities, and such assessment, as made by the city assessor and county assessor jointly and after the same has been passed upon by the board of equalization, shall be taken as a basis from which the board of aldermen shall make the levy for city purposes. The assessment of the city property, as made by the city and county assessor, shall conform to each other, and after such board of equalization has passed upon such assessment and equalized the same, the city assessor's books shall be corrected in red ink in accordance with the changes made by the board of equalization, and so certified by said board, and then returned to the board of aldermen: Provided, that in cities which do not elect an assessor the mayor shall procure from the county

clerk of the county in which such city is located, and it shall be the duty of such county clerk to deliver to the mayor on or before the first day of July of each year a certified abstract from his assessment books of all property within such city made taxable by law for state purposes, and the assessed value thereof as agreed upon by the board of equalization, which abstract shall be immediately transmitted to the council, and it shall be the duty of said council to establish by ordinance the rate of taxes for the year. A lien is hereby created in favor of such city against any lot or lots or tract of land for any such tract assessed by such city against the same, which said lien shall be superior to all other liens or encumbrances except the lien of the state for state, county or school taxes."

Section 6994, R.S. Mo. 1929, was Section 8445, in the Revised Statutes of 1919. In the case of State ex rel. Divine, Revenue Collector, v. Collier, 256 S.W. 455, 301 Mo. 72, was a case where the city collector of Greenfield, which was a city of the fourth class located in Dade County, Missouri, filed an action against the appellant, Collier, under a statement of facts by which reads as follows:

"For the purpose of the trial of this cause, both in the justice's court and upon appeal to the circuit court, the following statement of facts is stipulated to be true:

"That the city of Greenfield is a city of fourth class, duly organized under and by virtue of the laws of the state of Missouri, and is located in Dade county, Mo., and that R.C. Divine, the relator herein, is the

duly elected, qualified, and acting collector of the revenue of said city. That the defendant herein is an actual resident of said city, residing within the corporate limits thereof, in which place he has resided continuously for more than 10 years. That the tax bill filed herein as the basis of this suit is regular in every way, and the amount stated therein is the amount the plaintiff ought to recover, providing it is entitled to recover at all, under the statement of facts as herein agreed to, there being no contention as to the legality of said tax bill, nor of the manner of making the assessment, levy, or other procedure leading up to the issuing of said tax bill, nor of the amount of said levy, there being but one, and only one, question of law at issue between the parties hereto, as follows, to wit:

'The property forming the basis of the assessment upon which the levy for these taxes was made consisted of horses, cattle, mules, sheep, hogs, implements, and machinery owned by the defendant, and kept and used upon a farm owned by him located outside the corporate limits of the city of Greenfield, but within the boundaries of Dade county, Mo., and not used in any way in connection with his home in Greenfield. Plaintiff contends: That under the laws of the state of Missouri the city has a right to assess, levy and collect city taxes against every resident of the city, upon all personal property which he owns or has under his control, irrespective of where said property is actually kept--whether within or without the corporate limits of the city. If this is true, the finding shall be for the plaintiff. Defendant con-

tends: That the city has the right only to assess, levy, and collect city taxes against residents of the city, and where it consists of live stock, implements, farm machinery, and crops kept and used exclusively on a farm owned by the resident, but outside the corporate limits of the city, the assessment of such property for city taxes is unlawful, even though the owner resides within the corporate limits of the city. If this is true, the finding shall be for the defendant."

A jury was waived and the court gave judgment against the defendant in the amount of forty four dollars and ninety four cents (\$44.94). In the appellate court it was affirmed by the following opinion:

"The stipulation heretofore set out contains the following:

'The property forming the basis of the assessment upon which the levy for these taxes was made consisted of horses, cattle, mules, sheep, hogs, implements and machinery owned by the defendant, and kept and used upon a farm owned by him located outside the corporate limits of the city of Greenfield, but within the boundaries of Dade county, Missouri, and not used in any way in connection with his home in Greenfield.'

We are of the opinion that the trial court reached a correct conclusion in its disposition of this case, and that its ruling is sustained by the following authorities: 26 R.C.L. Section 241, pp. 273, 274; State ex rel. v. Pearson, 273 Mo. loc. cit. 78, 199 S.W. loc. cit. 943, 944; State ex rel. v. Shepherd, 218 Mo. 656, 657, 117 S.W. 1169, 131

Am. St. Rep. 568. It is conceded in the foregoing stipulation that:

'Defendant herein is an actual resident of said city (Greenfield), residing within the corporate limits thereof, in which place he has resided for more than ten years.'

The judgment below is accordingly affirmed."

As stated in your request, Aurora is a city of the third class and Section 6779, R.S. Mo. 1929 which applies to cities of the third class is almost identical with the mood of assessment as described in Section 6994, R.S. Mo. 1929 which was upheld in the case of State ex rel. Divine, Revenue Collector, v. Collier, supra, which section applies to cities of the fourth class. Section 6779, R.S. Mo. 1929 reads as follows:

"In assessing property, both real and personal, in cities of the third class, the city assessor shall, jointly with the county assessor, assess all property in such city, and such assessment, as made by the city assessor and county assessor jointly, and after the same has been passed upon by the board of equalization, as hereinafter provided for, shall be taken as the basis from which the city council shall make the levy for city purposes; and for the purpose of giving cities of the third class representation on the county board of equalization, when said board is sitting for the purpose of equalizing the assessment on such city property, the mayor and city assessor shall sit with the county board of equalization when the said board is passing upon the assessment of such city property, and shall each have a vote in said board, and

May 20, 1938

they shall be paid for such service the same amount per day and out of the same fund as other members of such board of equalization. The assessment of city property as made by the city and county assessor shall conform to each other, and after such board of equalization has passed upon such assessment and equalized the same, the city assessor's book shall be corrected in red ink in accordance with the changes made by the board of equalization, and so certified by said board, and then returned to the city council."

CONCLUSION

In conclusion, will state that it is the opinion of this department that a person living outside of the city limits and conducting a business within the city limits is not subject to a city tax on the personal property portion of his business, such as ice boxes, scales, cash registers, etc.

It is further the opinion of this department that if a person lives within the city limits of a city of the third class, such as Aurora, and owns a farm outside of the city limits, he is subject to a city tax on the personal property on his farm, cattle, hogs, sheep, hogs, implements, etc.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

SCHOOL BOARDS: Right of board of directors to control use of school building.

June 15, 1938

b-16

Mr. G. Derk Green,
Prosecuting Attorney,
Linneus, Missouri.



Dear Sir:

We have your letter of June 11th requesting an opinion from this department on the following situation as contained in your letter, which is as follows:

"Members of the school board of school district number six in Linn County have asked that I obtain your opinion upon a question arising in their district. The facts are as follows:

"At the annual meeting held in the school district last spring directors were elected and minutes of the meeting were kept by a secretary. Among other things the secretary made the following entry in the minutes written by her. 'School house to be used for religious, literary or other purposes farm or labor organizations secret or otherwise. If carried decision to be left to directors. Yes--36, no--7.' After this meeting various types of meetings were held in the school house but after a short time some dissatisfaction arose within the district about using the school house for outside purposes. Then, as it is reported to me, the members of the school board met and it was voted to prohibit the use of the building for any purpose or for any meeting other than for school activities or meetings of the school board. Since then the board

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refuses to grant permission to any outside organization to use the building. The facts reported immediately preceeding this decision indicated that the building was being used for club meetings after which the members held dances. When this question was voted upon by the directors two of them voted against having or permitting any meetings except for school purposes and one voted in favor of permitting such meetings. After this decision the president of the board caused a padlock to be placed upon the school house door in order to prevent outsiders or others from gaining entrance to the building and using it without the consent of the board. Thereafter the clerk of the district, being the one member of the board voting to use the building for use of outsiders, broke the lock from the door, entered the building and permitted its use for meetings of clubs as it had previously been used.

"Section 9205 provides for care of the school property and that the board of directors may allow the free use of such building for certain purposes unless prohibited by a majority vote of the qualified voters. Two of the directors contend that this gives them authority to pass upon the use to which the school house shall be put, and the clerk contends that the school board has no authority in this but must permit the building to be used for club purposes and that he and others have the right to remove the lock and enter for the purpose of conducting such meetings.

"As I see it the question submitted to you for decision is with reference to the authority of the school board to prohibit the use of the building for outside meetings under these circumstances. This is a very troublesome matter here and we would like a decision as quickly as possible. I have asked them to delay any further meeting until June 20 as I hope to have

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a ruling from your office before that time. I will appreciate it very much if you will advise me immediately concerning this question so I may have the information for the school meeting to be held shortly after June 20."

That part of the statute, Section 9205, R. S. Mo. 1929, applicable here reads as follows:

"The board of directors, or board of education, having charge of the school-houses, buildings and grounds appurtenant thereto, may allow the free use of such houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens and for such other civic, social and educational purposes as will not interfere with the prime purpose to which such houses, buildings and grounds are devoted: Provided, that at any annual or special meeting the use of the schoolhouse for any of the above purposes may by a majority vote of the qualified voters voting on the proposition be prohibited. Such prohibition shall remain in effect until the next annual school meeting."

It can be readily seen that by reason of the above statute providing that the board of directors may allow the use of the schoolhouse for the purposes named, the board of directors, in whose keeping and care the schoolhouse is lodged, had the sole and exclusive right to say when and by whom such schoolhouse can be used for any of the purposes mentioned as will not interfere with the prime purpose to which such schoolhouse is devoted. The only limitation upon the exercise of such discretion by the board is when a majority of the qualified voters of the district, acting in a lawful meeting, vote to prohibit the board from extending such privilege or use for any one or all of the purposes mentioned in the statute.

In your letter you state that the patrons of the district at the last annual meeting undertook to act on the question of the use of the schoolhouse in the following particular, as shown by the records of the board, to-wit:

"School house to be used for religious, literary or other purposes farm or labor organizations secret or otherwise. If carried decision to be left to directors. Yes--36, no--7."

Such action on the part of the patrons performs no function because it was totally unnecessary to delegate to the board the right or discretion to say when or for what purpose the use of the school building should be granted. The board was already invested by law with such right by reason of the provisions of the statute.

That it was the intention of the Legislature in the enactment of Section 9205 to lodge full and complete discretion in the school board as to whether the schoolhouse should be used for purposes other than the prime purpose to which it is devoted, is emphasized by reason of the fact that prior to 1915 the statute law of the state, Section 10784, R. S. Mo. 1909, provided as follows:

"The board of directors shall not allow the use of the schoolhouse or school premises for religious, literary or other public purposes, or for the meeting of any farmer or labor organization, secret or otherwise, except when such use shall be demanded by a majority of the voters of the district at any annual or special meeting."

The Legislature by amendment in the session of 1915 changed Section 10784 to its present form, thus completely reversing the situation by lodging full and complete discretion in the board and taking such right away from the patrons, subject only to the veto power of the patrons if exercised in the proper way.

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CONCLUSION

Hence, it is our conclusion that the school board in question has full and complete discretion to say when and for what purpose the schoolhouse can be used, other than the prime purpose to which said schoolhouse is devoted, and if such right or discretion is not prohibited by the voters of the district in the manner prescribed by law, the action of the board by a majority vote in exercising its discretion, if done in good faith, in granting, or withholding, the use of the schoolhouse is binding on the dissenting director and as well on all others. Furthermore, the action on the part of the dissenting director, or any other person, in breaking the lock and entering the schoolhouse, if persisted in, under the circumstances, could lead to serious consequences.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR

DEPARTMENT OF AGRICULTURE -- No authority to borrow money
from the R.F.C.

August 16, 1938

Mr. Charles W. Green, Sec.
Missouri State Fair
Sedalia, Missouri



Dear Mr. Green:

We have your request of August 12, 1938 for an opinion,
which is as follows:

"We have a plan under consideration for re-habilitating some of the buildings on the Missouri State Fair Grounds. The contemplated plan is a PWA project.

"I wish you would give me a written opinion if it would be legal to set up this project whereby the Government would make the grant to us, and whereby the State Fair could borrow from the R.F.C. the amount of money we would have to put up and pay this amount of money back over a period of years.

"If this would be legal, it would be a great help to us in our plans, for the reason that we would not have to ask the Legislature for money for this work.

"I would like your opinion, so that, when I present the proposed plan to the Governor, he would have information in full concerning the proposed plan."

The power of the State Fair Board, as set out in Section 12470, R. S. Mo. 1929, vests in the Board, on behalf of the State of Missouri, to acquire title to property for the purpose of the State Fair. These powers were, by the State Legislature, in 1933, (Laws Mo. 1933, page 167) transferred to the State Department of Agriculture. Nowhere do we find any authority for

Mr. Charles W. Green

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the State Department of Agriculture to borrow money or pledge the credit of the State or the fees of the Department of Agriculture as security for a loan.

It is to be noted that the State Fair receives fees from its activities. All of these fees are required to be placed in the State Treasury, to the credit of a particular purpose or fund for which they are collected. Laws Mo. 1933, page 415.

Article X, Section 19, Constitution of Missouri, provides that no money shall ever be paid out of the Treasury of the State or any of the funds under its management except in pursuance of an appropriation by law.

Answering your request, it is therefore clear that the Department of Agriculture has no authority to borrow money from the R.F.C.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE

BENEVOLENT CORPORATIONS: A vigilant society or association
is not a benevolent organization.

August 24, 1938



Honorable W. W. Graves
Prosecuting Attorney
Kansas City, Missouri

Dear Sir:

This will acknowledge your communication of August 4th in which you request an opinion of this office relative to the subject matter stated therein, as follows:

"My attention has been called to the proposed incorporation of the National Vigilance Alliance under Article X, Chapter 32, Revised Statutes of the State of Missouri, 1929. Incorporators are to be G. M. Babst, G. A. R. Slocum and R. T. Brewster, reputable citizens of Kansas City, Missouri.

"The purpose is to form a non-profit benevolent corporation to combat crime and to create a trust fund through the payment of dues by members to carry on the work of the organization. Rewards are to be paid members for information concerning burglary and robbery of members and to peace officers for the arrest and conviction of the offenders. All money received from members is to be used to pay the expenses of the organization and to meet obligations contained in 'membership reward certificates'.

"I attach hereto a copy of the petition for a pro-forma decree, the articles of agreement, the membership reward certifi-

Aug. 24, 1938

cate and the by-laws. I would appreciate your opinion on the following questions of law:

"1 Is the National Vigilance Alliance entitled to incorporation under Article X, Chapter 32, Revised Statutes of the State of Missouri, 1929?

"2. Would the National Vigilance Alliance be engaged in the insurance business so as to come under the jurisdiction of the Superintendent of Insurance?"

In dealing with your questions, we must necessarily take, and accordingly do take, into consideration the memoranda attached to your letter, namely, the petition for a pro forma decree, the Articles of Agreement, the Membership Reward Certificate, and the By-laws, as constituting the facts of the case, so far as presented to us, upon which our conclusions of law are to be predicated.

I.

The "Alliance", as we will hereinafter refer to it, seeks to justify its contemplated incorporation, according to its memorandum brief, solely on the ground that it is a benevolent association, and with this position we agree--if it is entitled to incorporate at all--because manifestly it is not a religious, scientific or educational association, within the meaning of the provisions of Section 21, Article X, of the Missouri Constitution, or within the meaning of such terms, including the additional named fraternal-beneficial association, as found in Sections 4996 and 4999, R.S. Missouri, 1929.

Hence, the first question is, do the facts as presented by the memoranda aforesaid entitle it under the law to incorporate as a benevolent corporation?

(a) Section 21, Article X, of the Missouri Constitution reads in part as follows:

"No corporation, company or association, other than those formed for benevolent, religious, scientific or educational purposes, shall be created or organized under the laws of this State, unless the persons named as incorporators shall, at or before the filing of the articles of association or incorporation, pay into the State treasury fifty dollars for the first fifty thousand dollars or less of capital stock, and a further sum of five dollars for every additional ten thousand dollars of its capital stock."

Section 4999 of the 1929 statutes undertakes to define or specify what associations are benevolent, religious, scientific and educational, respectively. Such statute, so far as pertinent here, reads as follows:

"Any association formed for benevolent purposes, including any purely charitable society, hospital, asylum, house of refuge, reformatory and eleemosynary institution, fraternal-beneficial associations, or any association whose object is to promote temperance or other virtue conducive to the well-being of the community, and, generally, any association formed to provide for some good in the order of benevolence, that is useful to the public, may become a body corporate and politic under this article."

Manifestly, the declared purpose of the Alliance is not embraced in any of the above terms used in the statute, namely, a purely charitable society, hospital, asylum, house of refuge, reformatory, eleemosynary institution, or association to promote temperance. Hence, unless the meaning of the concluding language of the statute, to-wit, "or other virtue conducive to the well-being of the community, and, generally, any association formed to provide for some good in the order of benevolence, that is useful to the public," can justify the Alliance, under the facts displayed, as being a benevolent association, then its effort to incorporate as such must fail.

It is to be noted, however, that statutory provisions as to what is or is not a benevolent association are not conclusive. In the case of *State v. McGrath*, 95 Mo. 1. c. 197, the court said:

"If, in point of fact, the incorporation authorized by the act is not a corporation for benevolent purposes, the declaration of the legislature that it is a benevolent corporation does not make it so, any more than a legislative declaration that a horse is a cow would alter the fact and convert the horse into a cow. Such legislative legerdemain is to be condemned, not approved.

"The nature or character of corporations authorized to be created by the act of 1887 is to be determined from the purpose to be accomplished and the business they are authorized to engage in."

Returning to the above language taken from the statute, namely, "or any association whose object is to promote temperance or other virtue conducive to the well-being of the community, and, generally, any association formed to provide for some good in the order of benevolence, that is useful to the public," as a possible justification under which the Alliance might claim to be a benevolent association, it may be profitable to first determine, so far as can be, what the Legislature intended by such language when read in conjunction with the preceding language found in such statute. We have been unable to find any decision from any of the appellate courts of our state construing this particular language, so we are left to general principles of law and our own conclusions based thereon for a solution of the question.

The Legislature at the beginning of the statute in question, used the following language: "Any association formed for benevolent purposes." We believe it fair to presume that if an association is formed for a benevolent purpose, then such purpose is necessarily useful to the public. Hence, the other phrase of the statute--and one which is in question here--namely, "and, generally, any

association formed for some good in the order of benevolence, that is useful to the public," appears to us to be merely an inadvertent repetition, expressed in a slightly different form, of the above language used at the beginning of the statute.

It is to be further noted that the Legislature in providing for the incorporation of "any association formed for benevolent purposes" apparently took pains to express what character of associations could be classed as benevolent for the purpose of incorporation. If the Legislature did not apprehend that the class as specified would cover all associations or groups that could, legally speaking, operate for benevolent purposes, useful to the public, then it did a useless and unnecessary thing in so specifying, because if such statute contained only the above phrases as stated in general terms, such general terms would have served any contrary intention on the part of the Legislature to limit benevolent associations to those named.

In the view just expressed that the two phrases, namely, at the beginning and end of the quoted part of the above statute, both expressed in general terms (which we believe to mean one and the same in effect), as contained in the statute, are limited by or to the objects so specified as benevolent, and whatever is incident to such objects, we have in mind well recognized rules of statutory construction which are illustrated by the case of *City of St. Louis v. Laughlin*, 49 Mo. l. c. 564, which is about as near apposite in principle as we could find, wherein the court said:

"In the present case the charter specifically enumerates the classes of persons intended to be taxed, and the sweeping words 'all other business, trades, avocations or professions,' we do not think can be made to include persons not of the same generic character or class. In specifying and enumerating the trades and professions to be taxed, it was intended to limit the taxation to them or to persons engaged in similar trades or occupations."

More recently, the Supreme Court in *Kansas City v. Threshing Machine Co.*, 337 Mo. 1. c. 930, said:

"It is a general principle of (statutory) interpretation that the mention of one thing implies the exclusion of another thing; expressio unius est exclusio alterius." 25 R. C. L. 981, sec. 229; 25 C. J. 220, 59 C. J. 980-86, secs. 580-83.) 'Where there are, in an act, specific provisions relating to a particular subject, they must govern, in respect of that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate."

Passing on to the further discussion of the afore-said generalities expressed in the statute in question, we are left to deal with the other mooted phrase or clause, namely, "or other virtue conducive to the well-being of the community." It is to be seen that the words "other virtue" are used as an alternative to the word "temperance" contained in the preceding clause, namely, "any association whose object is to promote temperance." It is evident that the Legislature in writing this statute assumed on its own initiative that an association formed, and whose object is, to promote temperance was a benevolent association and could be incorporated under the Constitution as a benevolent corporation. However, neither at the time the statute was enacted, nor since, was there, or has there been, any decision in existence from our appellate courts holding that a temperance association comes within the meaning of the word "benevolent" as used in the Constitution. Accordingly, the fact that the Legislature has denominated a temperance society a benevolent association and entitled to incorporate as such does not necessarily validate such incorporation. In this respect the Supreme Court in the case of *Rockhill Tennis Club v. Volker*, 331 Mo. 1. c. 958-959, said as follows:

"By the plain and positive terms of this section of the Constitution, no corporation can be formed in this State in the manner provided by the statutes mentioned,

that is, without paying into the State treasury at least fifty dollars on its capital stock, except 'those formed for benevolent, religious, scientific or educational purposes.' There is no pretense that plaintiff complied with this constitutional provision, and when a corporation is formed by a pro forma decree of the circuit court under the statutes mentioned, it is not contemplated that it shall do so. But it is equally imperative that the corporation so formed shall be of the kind permitted by this constitutional provision, that is, formed for either benevolent, religious, scientific or educational purposes. This constitutional provision curbs the power of the Legislature, and it was held in an early day that the Legislature had no power to declare a corporation to be of the class exempted from paying the corporation tax required for its formation unless it actually is of that class. Whether it is or not is a judicial question."

In any event, if the Legislature in denominating temperance as a virtue of mankind which, if promoted by an organization, would acquire the attributes of benevolence such as to entitle such organization to incorporate, then we believe that such Legislature further intended by the phrase "or other virtue," following the word "temperance," that the other virtue or virtues meant were of like or similar kind to that of temperance. We would hesitate to say that the Legislature intended to run the entire gamut of virtues human born or acquired by mankind, which would include, among others, affability, generosity, kindness, integrity, and industry, and by reason of which, if practiced by any substantial number in a community, would be conducive to its well-being, and hence attribute to the Legislature that it meant that if any one or more of such virtues would be promoted by an organization, it would or could become a benevolent corporation.

In view of the foregoing, the query is pertinent here, can crime prevention or crime punishment be said to come within the meaning of the word "virtue", and if so, is

crime prevention or crime punishment, or both in the conjunctive, a virtue of like or similar kind as temperance? Generally speaking, temperance is understood to mean a moral attribute of human character, whereas crime prevention or crime punishment is more or less the operation of the mechanics of criminal law enforcement provided for under our criminal code. Furthermore, the fact, if it be a fact, that the practice of temperance and crime prevention and punishment might both achieve a like result, namely, "conducive to the well-being of the community, * * * and useful to the public," yet merely reaching the same result is not the test. For instance, the Ford Motor Company employs many thousands of laborers in the community in which it is located, thus providing gainful occupation and the fruits thereof for these many thousands, together with their families. Hence, the promotion or operation of this corporation, whether or not a virtue, is at least conducive to the well-being of the community and reaches the same result as presupposed for temperance and crime prevention and punishment. Notwithstanding, no one would say that the Ford Motor Company could lay claim to being an organization or corporation of a benevolent character.

In the case of *State v. McGrath*, supra, by reason of the association therein concerned having no paid up capital and operating on membership dues or assessments for the purpose of furnishing homes to its members, such association claimed it was one of a benevolent character and in fact had legislative declaration that it was such. It is conceivable that its purposes as shown were "conducive to the well-being of the community, and useful to the public." Yet the court failed to find any benevolent characteristic about this association, the court saying, 1. c. 198:

"It is clear, we think, from the sections above quoted as well as from the articles of association, that the leading purpose of this corporation is not to promote benevolence or charity, but to better the pecuniary condition of its members or shareholders alone, and we are unable to see how the fact that such an association may tend to promote frugality and economy, and open up a way 'whereby the shareholders, out of their savings, may

be enabled to secure houses, or loan their savings to others at high rates of interest, to be fixed by the directors,' can be said to impress or characterize the association as one formed for benevolent purposes, when the chief incentive to each stockholder is that he may benefit himself."

We are not unmindful of the fact that considerable argument could be made that the Alliance is entitled to incorporate as a benevolent association under the general clause of the statute as hereinabove set forth, and hence a close question might be involved, if the right to so incorporate turns solely upon this point. However, we believe a further question taken in connection with the above will dispose of the matter of character of the Alliance, and consequently it may be unnecessary to decide this first point.

(b) The Articles of Agreement of the Alliance, under Article III therein, setting forth the purpose of the organization, state such purpose in general terms, but qualify or circumscribe such general terms by specifying in some seven or eight enumerated paragraphs following (six of which are material here and likewise qualified or circumscribed by the Membership Certificate) in what way it proposes to carry out its purpose so expressed generally at the outset. The gist of enumerated paragraphs 1 and 2 provides for the inspection of premises of members of the Alliance, and advising them, and adopting methods of protection against robbery, burglary, and like crimes.

The salient feature of the enumerated paragraphs 3 to 6 inclusive, taken as a whole, which we believe can be fairly stated as to effect, is to use the proceeds of a trust fund to be created by requiring members to pay stipulated dues wherewith to pay members for loss of property, who have been victimized by robbery, burglary, and counterfeiting, for a report of the case, which could be used, if needed, by law enforcement officers toward effecting the arrest and conviction of the perpetrators of such crimes and the recovery of the stolen money or property.

The Membership Certificate undertakes to reimburse members for money or property loss, or, put differently, to insure them against such loss by reason of burglary, robbery or counterfeiting by the indirect method of paying the member victimized, who suffers the loss, what is denominated in the Articles of Agreement and Membership Certificate, a reward for exposing the crime and reporting the facts connected therewith.

The By-laws as proposed provide, among other things, that the officers of the Alliance are three, namely, the president, secretary and treasurer; that the president shall have full authority over the funds, the personnel, members, and the management of the Alliance; that the officers mentioned above shall constitute the managing board, and the managing board shall determine the general policies of the Alliance. Further provisions of the By-laws provide for trustees, not less than three nor more than seven in number, by election or selection, in which the members have no say or voice. In fact, there is no provision as to how the trustees are to be selected or elected. Hence, the aforesaid provisions giving the broad powers to the president, or the president together with the other two officers, as the managing board, might with reason be construed to give the president or the board the authority to name or select themselves as the minimum three trustees. A further provision, coupled with the sole authority of the president over the funds of the Alliance, permits him, after twenty per cent thereof is set aside wherewith to pay rewards, to control the other eighty per cent and the investment thereof.

While a provision of the By-laws does not permit any of the three officers to make pecuniary profit out of the Alliance, save their salaries as such officers, yet the By-laws can be amended, without voice of the members, by a two-thirds vote of the said trustees. It is to be noted by the petition to be filed for incorporation that the three incorporators necessary under the statute, to-wit, the president, secretary and treasurer, will accordingly fill such offices indefinitely so far as by-law provisions are concerned. Hence, if the three officers named as incorporators become the three officers, respectively, and the three minimum trustees provided for, it is within the power of any

two of such officers and trustees to amend the By-laws to the end that such officers could profit substantially thereby.

We are mindful of the rule that by-laws can neither increase nor diminish the powers granted in the articles of agreement or charter of the corporation, but nevertheless such by-laws--and as well the Membership Reward Certificate in this case--can be used for the purpose of aiding construction so as to arrive at the true intent of the purposes set forth in the articles of agreement. In point of fact, statutory provisions provide for extrinsic aid in determining the true character or purposes of the association seeking to incorporate as a benevolent corporation.

Section 4997, R. S. Mo. 1929, provides in part as follows:

" * * * it shall be his (the court's) duty to appoint some competent attorney, as a friend of the court, whose duty it shall be to examine said petition and show cause, if any there be, on some day to be fixed by the court, why the prayer of said petition should not be granted, and said attorney shall not be confined in his examination to said petition and articles of association, but may introduce such testimony as may be available and proper in order to fully disclose the true purposes of the association; * * *."

If the By-laws are interpreted to the end that the officers of the proposed corporation could or would become the first three trustees provided for, then the By-laws are subject at any time to a change by the trustees that could result in unlimited personal advantage to said three officers.

In the case of *In re St. Louis Inst. of Christian Science*, 27 Mo. App. 1. c. 640-641, wherein the control and use of the unexpended income of the association therein concerned was in question, there is presented a more or less analogous situation to the instant case concerning the control and use of the eighty per cent of the trust fund of the Alliance. The court in the above case said:

"By section 978, of the Revised Statutes, it is directed that 'No association, society, or company, formed * * * for pecuniary profit in any form * * * shall be incorporated under this article.' The constitution of the institute provides that, after the payment of certain expenses out of the tuition fees charged to pupils and the amounts paid by patients, the remainder of such receipts 'shall be devoted to the furtherance of the principles taught in the said school, in such way as to the board of directors shall seem best.' This opens as wide a field for unrestricted appropriation and expenditure by the petitioners (who constitute the board of directors) as may be found in any corporation established purely for the pecuniary profit of its founders. The residual expenditure is to be, not for the support or advancement of the institute itself, but for the furtherance of its 'principles,' in whatever way the directors--i.e., the petitioners, who are to be sole judges thereof--may choose to adopt. The directors may be of opinion that the principles of the institute will be best furthered by their own personal comfort and exemption from the crying wants of life. There is hardly any limit to the number of ways in which the personal advantage of the directors may be considered by themselves, as in furtherance of the 'principles' taught by the institute. The residual fund is, practically, as much under their entire personal control, as if the constitution had plainly declared that such was the special object in view. To this extent, the corporation would be created for the pecuniary profit of its founders, and, therefore, contrary to the letter of the law."

As pertinent to the instant case, we quote from Section 5003, R. S. Mo. 1929, as follows:

"No association, society or company formed for manufacturing, agricultural or business purposes of any kind, or for pecuniary profit in any form, * * * shall be incorporated under this article."

We take it that the three incorporators you mention in your letter contemplate signing the petition and becoming the first officers of the Alliance if incorporated, and consequently we do not wish to be understood as saying that such incorporators as officers will operate the Alliance to the members' disadvantage and to such officers' own personal advantage. In view of the statement made that the persons mentioned in your letter are reputable citizens, we presume fidelity, on their part, to the best interests of the members. However, in construing corporate powers, the law looks to what can be done by those presently in charge and their successors in office, and not what will be done.

However, in passing, it may not be amiss to allude to the salaries provided for the three officers in question, namely, \$12,000 for the president, \$3,600 for the secretary, and \$2,400 for the treasurer, making a total of \$18,000 in all for the three chief officers. In view of the full authority given the president over the funds of the association and the full powers given the managing board (the president, secretary and treasurer) to determine the general policies of the association, it would be well within the authority of the three officers to determine that the salaries of the officers should be the first item to be paid out of the income. While it is not our province to pass upon the amount of salaries to be paid, or any other expense of the association, and we do not do so, yet critics might observe that in the forming of the proposed corporation, it would be accomplished not without substantial pecuniary profit to the three officers, whether justified or unjustified.

We believe it fair to say that the most prominent purpose, if not the sole or outstanding one, of the Alliance is to enable members of the proposed corporation to receive pay, or money reimbursement for property loss through certain criminal acts, by reporting the circumstances of the crime to the Alliance. The purposes of the Alliance go even further and permit any and all members to receive pay,

without any property loss connected therewith, for what is termed outstanding contributions toward crime prevention. In other words, a member, by paying the stipulated monthly dues, may in turn receive a substantial profit for such contribution. We doubt if any stockholder in a business corporation would have any greater opportunity of receiving dividends or profit, if the business of the corporation is successful, than would a member of the Alliance have of receiving pay or reimbursement, if victimized by burglary, or if he contributes to crime prevention. Hence, it appears to us that the chief incentive to each member of the Alliance would be that he may benefit himself. We recur to the quoted language in *State v. McGrath*, supra, wherein the court said in substance and effect, that an association could not characterize itself as one formed for benevolent purposes, where the chief incentive to each member is that he may benefit himself. The setup of the Alliance appears to us to fall within the provisions of Section 5003, aforesaid, relative to corporations formed for business purposes or for pecuniary profit rather than for benevolent purposes.

Consequently, it is our conclusion, by reason of what we have said in the foregoing, that the Alliance is not a benevolent association within the meaning of the law, and hence is not entitled to incorporate as such.

II.

Passing to the question of whether the Alliance would be engaged in the insurance business so as to come under the supervision of the State Insurance Department if it pursues the purposes as set forth in the memoranda, to-wit, of paying members for loss of property due to burglary, etc., by the route of a so-called "reward" for reporting the facts of the case so that the possibility of the arrest and conviction of the perpetrator of the crime might follow, can best be answered by first ascertaining what is the law's definition of insurance. 32 C. J., Sec. 1, page 975, states the definition or rule as follows:

"Broadly defined, insurance is a contract by which one party, for a compensation

called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency. As regards property and liability insurance, it is a contract by which one party promises on a consideration to compensate or reimburse the other if he shall suffer loss from a specified cause, or to guarantee or indemnify or secure him against loss from that cause."

Second, do the facts in this case, as displayed by the memoranda aforesaid, bring the purposes of the Alliance, if carried out, within the purview of the aforesaid definition of insurance so that the Alliance would be engaged in the insurance business?

The Alliance proposes to issue in connection with, and as part and parcel of, its declared purposes in its Articles of Agreement, what is denominated by the Alliance a "Membership Reward Certificate," having a face value of \$500, which is to be issued to a member upon payment by the member to the Alliance of a stipulated amount in money, termed "dues", whereby the Alliance assumes the risk of the member suffering money or property loss, or loss of life, through burglary, robbery, or counterfeiting, and the Alliance promises to pay such member, or his family in case of death, a certain amount of money if the contingency provided for in the certificate, namely, loss of property or death, occurs, as the case may be. Manifestly, applying the aforesaid legal definition of insurance to the Membership Reward Certificate, there could hardly be any reasonable doubt that if the Alliance proposes to issue the certificate in question and carry out its provisions, that it would be engaged in the insurance business.

It is true that the Certificate denominates the payment of the money called for to the member or his family for the occurrence of the contingency specified as a "reward" for information given by the member of the occurrence of the contingency provided for. Nevertheless, it is to be seen that the payment of the so-called award or reward is not limited to payment only in the event that the "information" supplied must cause the arrest and conviction of the

perpetrator of the crime, but that merely the giving of the information is sufficient, whether it results in arrest and conviction or whether it doesn't. In point of fact, nothing is said anywhere or in any part of the Articles of Agreement, Reward Certificate, or By-laws as to what is to be done, if anything, by the Alliance with this information when reported to it. It might be inferentially concluded that the Alliance will, in turn, report the information given it by the member to the proper peace officers, but the certificate, itself, requires the member, in the first instance, to collaborate with the peace officers, who have investigated the crime, before the member makes his report to the Alliance. If the member is required, as the terms of the certificate so provide, to obtain first of all a signed statement of the peace officer, who has investigated the crime, which statement is to accompany the member's report to the Alliance, then manifestly the peace officer's investigation would be based in whole or in part upon all the information the victimized member could give such peace officer. Clearly, the report thereafter of the member to the Alliance under such circumstances, if done for the purpose of enabling the Alliance, in turn, to report the information to the peace officers, would be superfluous. The peace officers already have the information; furthermore, such report to the peace officers would be the moral duty of each and every member of the Alliance, and of the Alliance, as the composite entity of all the members, whether incorporated or not, to inform the peace officer of the community of the perpetration of a crime, and which report or information given would in no wise constitute benevolence on the part of the members of the Alliance, or the Alliance itself.

A further circumstance, and it may be a singular one, is that the amount of the "reward paid for information" in the case of property loss by the member is measured by the amount of money or value of property lost. The death payment calls for a flat \$150 as a "reward" to the family for reporting the death of a member by violence and the surrounding circumstances, so far as known, to the proper peace officer, which, it appears to us, would seem to be a natural course for such family to take, whether paid indirectly or directly therefor or not paid at all.

Aug. 24, 1938

Consequently, it is, or ought to be, obvious to anyone of average intelligence that the denomination or calling by the Alliance of the payments to be made members, under the Articles of Agreement and Membership Certificate, as "rewards for information," is but a thin veil to cover the true purposes and picture of the contemplated operation of the Alliance.

Accordingly, it is our opinion and conclusion that the Membership Certificate in question is nothing more or less than an insurance policy or contract, and that if the Alliance should issue such certificate to its members, it would be engaged in the business of life and property insurance, and should incorporate under the appropriate provisions of the statute for insurance companies, and accordingly it would be subject to the supervision of the Insurance Department of the State of Missouri.

Respectfully submitted

J. W. BUFFINGTON
Assistant Attorney General

APPROVED:

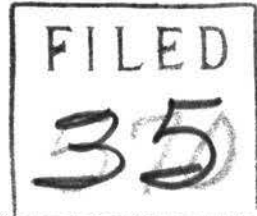
J. E. TAYLOR
(Acting) Attorney General

JWB:HR

**MUNICIPAL CORPORATIONS:
FOURTH CLASS CITIES:**

Ordinances may be passed without being read three times. Does not require unanimous vote to suspend the rules.

September 8, 1938



Hon. Chas. H. Green, Attorney
Osceola
Missouri

Dear Sir:

*Note attached Court
of appeals opinion
(534 Sw2 486)*

This acknowledges receipt of your inquiry, which is as follows:

"The City of Osceola is contemplating building a municipal light plant, for which bonds are to be issued in the sum of \$42000 plus a grant from the Government through the PWA.

"At the meeting held Friday, September 2, an Ordinance was passed providing for the election and the issuance of bonds. At this meeting, one member of the Council voted against the Ordinance and voted against suspending the rules so that the Ordinance could be put up for second and third meetings in one night, and we are wondering if this procedure is correct or whether it takes a unanimous vote of the members present in order that the rules may be suspended. We will appreciate it if you will give us your opinion on this matter."

Replying thereto, we refer you to the statute relative to the passage of ordinances by cities of the fourth class, of which the City of Osceola is one.

Section 7016, R. S. 1929, granting power to

such cities to enact ordinances, in part, provides:

"No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the board of aldermen shall vote for it, and the ayes and nays be entered on the journal; and all bills shall be read three times before their final passage."

The above section of the statutes has been construed by the courts in this state and it is held that the latter portion thereof, to-wit; "and all bills shall be read three times before their final passage," is not mandatory, but is merely directory, and that failure to literally comply with the same will not invalidate the ordinance.

In the case of *Water Co. v. City of Aurora*, 129 Mo. 540, the Supreme Court of this state had before it this same question of whether a city ordinance was valid where it was not read three times. In passing on it the Court said, page 577:

"Nor does it invalidate that ordinance because, as it is claimed, it was not read three times before its final passage. Section 1597, Revised Statutes, 1889, provides: 'No ordinance shall be passed except by bill, and no bill shall become an ordinance, unless on its final passage a majority of the members elect shall vote therefor, and the yeas and nays entered on the journal; and all bills shall be read three times

before their final passage.' It is to be observed that the above section does not declare a sentence of nullity against a bill which is not read three times before its final passage; such declaration is altogether confined to the preceding clauses of the section, and does not apply to the last clause. Similar views were held in *State ex rel. v. Mead*, 71 Mo. 266, and *Barber Asphalt Pav. Co. v. Hunt*, 100 Mo. 22. There are authorities to the contrary, but we shall adhere to our own decisions."

The *Aurora* case, *supra*, was approvingly cited in the case of *City Trust Company v. Crockett*, 309 Mo. 683, and the court there said, page 712:

"Under the ruling in *Water Co. v. Aurora*, 129 Mo. 540, and the authorities there cited, and in consideration of there being no provision in the charter of a city of the third class forbidding or regulating special meetings of the council, or, otherwise than as in section 8284, prescribing the conditions to be complied with in passing ordinances, it must be held that there was no authority forbidding the council passing the ordinances at the special meeting. It is not contended that the record fails to show the bill was read the first, second and third time, nor, that a majority of the members of the council did not vote therefor, nor that the ayes and nays were not entered

upon the journal. The record showed compliance with those requirements. There being no statute forbidding the passage of the ordinance at a special meeting, the right to do so existed."

The Aurora case, supra, was also approvingly cited by the Federal Court in the case of Monett Electric, Power and Ice Co. v. Incorporated City of Monett, 186 F. 360.

In the Aurora case the question was squarely before the court as to the validity of the ordinance and it was there held that the fact that it was not read three times did not invalidate it.

If the provision as to reading it three times was directory, as the Supreme Court there held, it would appear that the fact that a unanimous vote was not cast for suspending the rules and reading it three times would not invalidate the ordinance.

Conclusion

It is our opinion that the fact that the record of a city of the fourth class does not show that all of the aldermen voted for suspension of the rules and reading the first, second and third time, all at the same meeting, does not invalidate the ordinance so passed. This opinion presupposes that all other requirements have been complied with and

Hon. Chas. H. Green

-5-

September 8, 1938

the sole question under discussion here is whether unanimous consent is required to suspend the rules of the Council and pass at the same session the ordinance by reading it the first, second and third times on the same night.

Very truly yours

Drake Watson
Assistant Attorney General

APPROVED

J. E. Taylor
(Acting) Attorney General

LOTTERY: Distribution of chances by merchants.

September 13, 1938

Honorable Willard H. Guest
Asst. Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

We have your request for an opinion, dated September 12, 1938, which is in part as follows:

"The various merchants listed in the newspaper give the purchasers of groceries, or whatever other merchandise the dealer sells, one of the enclosed pink cards when the purchaser buys not less than Fifty Cents (\$.50) worth of commodities. These cards are then filled in at the space on the left by the purchaser as to whether he has a radio or cooker or washer, etc., and are later deposited in a box in the lobby of the Osage Theater. Thereafter each week, a drawing is to be held inside the theater at which each purchaser must be present who desires to participate in the drawing, and of necessity, I suppose, pays the regular admission to the theater. The drawing is then conducted, not by the serial number on the ticket, but the prize is given to the person present who has the most tickets in his possession, but of course, if he is not there, the one drawing is all for that week."

A lottery is any scheme or device whereby anything of value is, for a consideration, allotted by chance.

State vs. Emerson, 318 Mo. 633, 1 S.W. (2d) 109, 111;

State ex rel. vs. Hughes, 299 Mo. 529, 253 S. W. 329, 28 A. L. R. 1305;

State vs. Becker, 248 Mo. 55, 154 S. W. 769.

In State vs. Danz, 250 Pac. 37, 140 Wash. 546, the court had before it the "country store night", wherein prizes in the form of groceries and other kinds of property were awarded in the theatre. These prizes were furnished by the merchants. It was held in that case that it was a lottery.

The scheme presented by you contains all the elements of lottery. The element of chance is exemplified in the drawing, although no drawing is necessary in order to make the scheme a lottery. People vs. Hecht, 3 Pac. (2d) 399. The prize given is the merchandise awarded to the winner. The consideration is the amount paid for merchandise, wherein pink cards are given to the purchaser, and the question of purchasing a ticket to be inside the theatre also furnishes the element of consideration.

Where an enterprise distributes without charge tickets, coupons or chances of any kind, entitling the holders to participate in a distribution of prizes by lot or chance, and this is done for the purpose of inducing or stimulating pay patronage, the pay patronage thus induced constitutes a consideration and the enterprise is a lottery containing the essential elements of prize, chance and consideration, and this is true whether all or only a part of the holders become pay patrons, and even though it is possible for the recipient of such ticket, coupon or chance to meet all the conditions of participation and obtain a prize without the payment of any money therefor. This is the law in England. Willis vs. Young et al, 1 K. B. 448 (1907), 3 B. R. Cases, 976, the rule in the federal courts, Central States Theatre Corp. vs. Patz, 11 Fed. Supp. 566 (1936), General Theatres vs. Metro-Goldwyn-Mayer Dist. Corp., 9 Fed. Supp. 546 (1935), and post office department, George Washington Law Review, May 1936, pp. 482-492; the holding in several state courts, Glover et al vs. Malloska, 238 Mich. 216. State vs. Danz, 140 Wash. 546, 250 Pac. 37. Featherstone vs. Ind. Service Assn. (Tex.) 10 S. W. (2d) 124. City of Wink vs. Amusement Co. (Tex.)

Hon. Willard H. Guest

-3-

September 13, 1938

78 S. W. (2d) 1065. Com. vs. Wall (Mass.) (1936) 3 N. E. (2d) 28, and the opinion of the law writers, Thomas, Lotteries, Frauds and Obscenity in the Mails, ss. 15, 16, pp. 22-35. Thomas, Non-Mailable Matter, s. 16, p. 35. 45 Harvard Law Review, 1196, 1210. George Washington Law Review, May 1936, pp. 488, 491.

It is, therefore, the opinion of this office that the scheme as outlined in your request is a lottery, in violation of Section 4314, R. S. Mo. 1929.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE

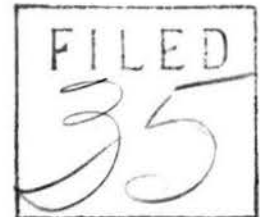
MOTOR VEHICLES:

Lessee for more than ten days required to obtain certificate of registration and license plates even though car had been leased before.

October 4, 1938

10-7

Honorable W. W. Graves
Prosecuting Attorney
Jackson County
Kansas City, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion which is as follows:

"I would appreciate an opinion from your office on the following question:

"If the owner of a motor vehicle leases the same to another for a period greater than ten days successively is the lessee required to file a new application for registration, pay new fees and obtain new license plates. As a matter of fact, some trucks are leased to dozens of different people during the year for periods greater than ten days, and, if each lessee is required to buy a new set of license plates, the State would collect dozens of times, although the actual ownership was never changed?"

Article 1, Chapter 41, R. S. Mo. 1929, deals with regulations and license fees for motor vehicles.

Section 7759 thereof defines the term owner as including "any person, firm, corporation or association owning or renting a motor vehicle or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively."

Section 7761, as amended, Laws, 1933, Extra Session, provides in substance, that every owner of a motor vehicle or trailer which shall be operated upon the highways shall file an application for registration and shall pay certain fees therein enumerated, for which he receives a certificate of ownership and a set of license plates.

Section 7774 provides that upon the transfer of ownership of any motor vehicle, its certificate of registration and the right to use the number plates shall expire.

The purpose of the registration and numbering of motor vehicles is to reduce the danger of injury to pedestrians and other travellers from the careless management of automobiles and to furnish a means of ascertaining the identity of persons violating the laws and ordinances regulating the speed and the operation of machines upon the highways. Blashfield on Automobiles, page 241; 2 R. C. L., 1176.

In *Unwen v. State*, 73 N. J. L 529, it is said:

"For the purpose of aiding in the identification of each machine and of those who are responsible for its movements and conduct, the provisions of the license and registration statutes are designed."

The courts are in accord to the effect that a license to operate a motor vehicle is a personal privilege granted to the licensee. 42 Corpus Juris, 728.

The fee imposed by the statute is a privilege or excise tax, and not a property tax upon the vehicle. This view is set forth in *State ex rel. McClung v. Becker*, 288 Mo. 607, 233 S. W. 54, as follows:

"* * * The State maintains roads and bridges at great expense and exacts a license fee for the privilege of driving or operating these high-powered vehicles thereon. It is clear therefore that the registration fee is not a tax on the vehicle, but upon the

October 4, 1938

privilege of operating it on the highways of the State."

In view of the statements quoted above the reason why each successive lessee of a motor vehicle is required to obtain a new certificate of registration and new license plates becomes apparent. In case there is an accident or a violation of the laws regulating the operation of machines upon the highways there must be some way of ascertaining the person responsible. Since the lessee is to have exclusive use of the motor vehicle, then it should be registered in his name so that such information would be readily available.

CONCLUSION

It is, therefore, the opinion of this department that any lessee of a motor vehicle, having exclusive use thereof for more than ten days is required to obtain a new certificate of registration and license plates and pay the required fee even though the motor vehicle has been registered several times in that year by other lessees.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO:DA

PAROLES: Paroled persons who have received ~~final~~ discharge
are eligible for public office.

October 31, 1938

Mr. Louis Jean Gualdoni, Committeeman
Twelfth Congressional District
St. Louis, Missouri



Dear Sir:

This will acknowledge receipt of your request
for an opinion, which request reads as follows:

"I am writing to you asking if you
will be kind enough to give me an
opinion on a case of this kind.

"On October 25th, 1929, a Mr. Al-
bert Grellner pleaded guilty of
Larceny of a Motor Vehicle, and
upon his plea he received a sen-
tence of one year in the Workhouse
and a fine of \$100.00, but was pa-
roled for two years upon his pay-
ment of the \$100.00 fine.

"Would this man be eligible to run
for a Public Office, such as Con-
stable, Justice of the Peace, etc?

"I am enclosing a copy of the com-
mitment, and after you have looked
it over, would you be kind enough
to mail it back to me, together
with your opinion on the above case.

"Trusting to hear from you on this
case, I remain"

October 31, 1938

Attached to said request appears a letter which reads as follows:

"TO WHOM IT MAY CONCERN:

This is to certify that the records of the Parole Office disclose that Albert Grellner was charged with the larceny of an automobile and on the 25th day of October 1929, he was sentenced to a term of one year in the city workhouse and a fine on one hundred dollars and costs imposed by Judge Calhoun then presiding in Division #11 Circuit Court for Criminal Causes; that sentence on the above date was duly pronounced and thereafter to-wit, on the same date, October 25, 1929, the defendant was granted a bench parole and placed on probation to report to the parole officer for a period of two years from said date. The records of the parole office further show that the defendant complied with all of the requirements of his parole and reported for a period of two years, his record in this office was then marked on October 14, 1931 'Settled, that is to say, the defendant was relieved from the discharge of any further obligations growing out of his parole.

Respectfully submitted,

Thomas E. Mulvihill,
Parole Officer "

Section 4172, R. S. Mo. 1929 reads as follows:

"Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified,

or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state: * * * *

It will be seen that by the terms of the foregoing statute the person inquired about in your request for an opinion would be disqualified from holding any public office, unless the parole which he received removed such disqualification.

Section 3810, R. S. Mo. 1929 reads as follows:

"The courts named in section 3809 of this article, or the judge thereof in vacation, subject to the restrictions hereinafter provided, may in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed by said court, or any person actually confined in jail under judgment of a justice of the peace, or sentenced to the state industrial home for girls, or to the Missouri training school for boys, will, if permitted to go at large, not again violate the law, parole such person and permit him or her to go at large upon such conditions and under such restrictions as the court or judge granting the parole shall see fit to impose; * * * *

Section 3816, R. S. Mo. 1929 reads as follows:

"When any person who has been paroled under the provisions of sections 3809

to 3821, inclusive, shall have been at large under such parole for the minimum term prescribed by section 3817 of this article, and the court granting the parole shall be satisfied that the reformation of such person is complete and that he will not again violate the law, such court may, in its discretion, by order of record, grant his absolute discharge. Such order of discharge shall recite the fact that such person has earned his discharge by good behavior, and such order shall operate as a complete satisfaction of the original judgment by which the fine or jail sentence or imprisonment in the penitentiary was imposed."

The information furnished in your request and accompanying your request does not reflect that the court which granted the parole ever entered an order of record granting the paroled person an absolute discharge. However, section 3817 R. S. Mo. 1929 provides as follows:

"No person paroled under the provisions of section 3810 of this article shall be granted an absolute discharge at an earlier period than six months after the date of his parole, nor shall such parole be continued for a longer period than two years from date of parole; but if he shall have been the second time paroled the time shall be counted from date of second parole. No person paroled under the provisions of section 3813 of this article shall be granted an absolute discharge at an earlier period than two years from date of his parole, nor shall such parole continue for a longer period than ten years: Provided, that if no absolute discharge shall be granted, nor the parole terminated

within the time in this section limited, it shall be the duty of the court at the first regular term after the expiration of such time to either grant an absolute discharge or terminate the parole and order the judgment or sentence to be complied with, but if the court shall fail to take any action at such time, such failure to act shall operate as a discharge of the person paroled. (R. S. 1919, section 4163)."

The information furnished with your request shows that the convicted person complied with all the terms and conditions of his parole and reported faithfully to the court during a two-year period. The information also shows that his record has been marked "settled." While we do not think that the marking of the record "settled" without information as to who made such record entry amounts to an order of record by the court granting an absolute discharge, yet it does indicate that the paroled person had reported to the court in accordance with the terms of his parole. Furthermore, the record does not show that the parole was ever terminated by the court, and therefore in accordance with the provisions of section 3817, supra, the paroled person would automatically stand discharged after the first term following the two-year period of his parole.

In the case of *In re Mounce*, 307 Mo. 40, the court was discussing the effect of section 3817 as regards a person paroled under the provisions of section 3813, which latter section referred to paroles granted under section 3811. The court held that the circuit court could keep a parole in force under those latter sections for as long as ten years and that the provisions in section 3817 for an automatic discharge of the paroled person would not come into play until the expiration of the ten year period. The court said, l. c. 47:

"If words could possibly make more clear and understandable the legislative intent, expressed in the proviso of Section 4163,

we have not the slightest hesitancy in holding that such proviso simply means that, if a ten-year period has elapsed after a given parole has been granted and neither the parole has been terminated nor the paroled person has been discharged from his sentence within such ten-year period, the court must either grant an absolute discharge of such person or terminate his parole at the first term of court thereafter, or the law will conclusively presume thereafter that such person has been discharged. No other conclusion can reasonably be reached."

Since the parole we are considering cannot under the terms of section 3817 run for a longer period than two years, then we think it follows from the foregoing decision in the case of *In re Mounce* that at the first term after the expiration of said two-year period the paroled person would be automatically discharged if the court did not at such term terminate the parole. Since the parole could not be kept in force for a longer period than two years, it would stand to reason that the paroled person would be free from said parole at the expiration of said term, unless, however, the court at that term exercised its right to terminate the parole and cause the paroled person to serve the sentence imposed upon him. The record in the case we are considering does not show that the circuit court terminated the parole at the first regular term after the expiration of said two-year period, and therefore we must conclude that the paroled person was automatically discharged from said parole at that time.

Section 3820 R. S. Mo. 1929 reads as follows:

"Any person who shall receive his final discharge under the provisions of sections 3809 to 3821, inclusive, shall be restored to all the rights and privileges of citizenship. (R.S. 1919, section 4166.)"

Mr. Louis Jean Gualdoni

-7- October 31, 1938

It will be noted that section 3820 says that the person who shall receive his final discharge under the provisions of sections 3809 to 3821 shall be restored to the rights of citizenship. He may either receive that final discharge by an order of record from the court which paroled him or by operation of law as set forth in section 3817. In the instant case, the paroled person received his final discharge by operation of law and therefore, we think he was automatically restored to the rights and privileges of citizenship at the first term of the circuit court following the expiration of his two-year parole.

Conclusion

It is, therefore, the opinion of this office that Mr. Albert Grellner, insofar as the conviction for larceny set forth in your request for an opinion is concerned, is eligible to hold public office in this state.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK/w

**TAXATION:
FIXING THE LEVY BY THE COUNTY
COURT:**

The levy for taxes made by the county court should only be in an amount sufficient to raise the desired funds. Any levy in excess of that amount is void to the extent in which it is excessive.

December 29, 1938



Mr. Jos. L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

This is in reply to yours of the 23rd wherein you request an opinion from this department based upon the following letter:

"Enclosed you will find a statement from The Atchison, Topeka & Santa Fe Railway Company relative to an excess illegal tax of \$0.03 on the Hundred dollars valuation state and county taxes and also illegal taxes of the Town of Revere on lighting purposes as a current expense. Our County Court concedes that the latter is illegal, but as to the former, we are in doubt.

"The Santa Fe claims the county levied an excessive tax in that it would collect far more tax than is necessary to pay off the final installment of bonded indebtedness; that it is in excess and illegal by 3¢ on the \$100.00 valuation and therefore they do not have to pay this excess of 3¢ for it was illegal for the Court to assess 8¢ when 3¢ would more than pay it off and allow for 20% for costs of collection and deficiencies.

"We would like your opinion was to whether the levy of 8¢ was illegal to the extent of 3¢ or not and if therefore the railroad can refuse to pay the 3¢ and only pay 5¢. The telephone company is now also refusing to pay more than 5¢. Many tax payers have paid all the tax in full.

"Please give us an opinion as soon as possible."

The various subdivisions of the state are authorized by Article X to levy taxes to pay bonded indebtedness. By Section 12 of this article it is provided in part as follows:

"* * * * * and provided further,
That any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same:
* * * * *

It was by the provisions of the foregoing clause of the Constitution that your county court was authorized to make a levy to pay the interest on the bonds and whatever bonds which fall due in the year of the levy. The levy should be of a sufficient amount only to pay the outstanding bonds and interest. Section 9871, R. S. Missouri, 1929, provides as follows:

"As soon as may be after the assessor's book of each county shall be corrected and adjusted according to law, the county

court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book."

Section 9872, R. S. Missouri, 1929, provides as follows:

"Whenever the county court ascertains the amount to be raised for county purposes, and fixes the rate of county taxes, it shall cause the same to be entered of record, so as to show the whole amount to be raised, and the proportion which the rates of the county tax bear to the rates of the state tax on the same subject of taxation; and the collector shall make settlement with the county court for county revenue at the same time that he is required to settle for state taxes."

From your letter it appears that the only objection made to the levy made by the county court to pay the interest and premiums on the outstanding bonds is that the court has levied more than is needed for that purpose.

We find the rule stated in Volume 61 Corpus Juris, page 569, par. 696, in the following language:

"Subject to the restriction that the constitutional or statutory requirements be complied with in regard to the manner or mode of determining and fixing the amount or rate, and as to the limitation of such amount or rate, the amount levied should be commensurate with public needs, and such a rate of taxation should be fixed as will produce

the amounts required to be raised; and is illegal as to any excess over the amount necessary to produce the funds required to be raised. Within these limitations the levying board, provided it uses sound business judgment, may exercise a reasonable discretion in determining what amount or rate of taxes shall be raised for any general or particular purposes; and in determining such amount it should consider and deduct funds on hand which are available and applicable to the purpose or purposes for which the tax is being levied. But the mere fact that there is a considerable balance in its treasury does not, of itself, invalidate, to the extent of that sum, a levy for particular purposes where it cannot be presumed that such balance is available for such purposes, and the mere fact that in estimating, in advance, the amount that may be necessary for any purpose a larger amount is levied than is actually required does not invalidate the whole levy, unless the amount levied is so grossly excessive as to show a fraudulent purpose in making the levy; and whether the levy is so grossly excessive as to constitute a fraud in law on the taxpayers is to be determined not from the fact that it subsequently develops that a larger amount was levied than was actually required, but from the facts existing at the time the levy was made.

"For the purpose of insuring that the amount actually needed for the purpose to which it is to be applied will be raised and in the treasury, the levying authorities, in fixing the rate of taxation, may allow a reasonable rate for loss and cost of collection, that is, for uncollected taxes and commissions

of the taxing collector, for delinquencies to the state, or to meet unforeseen contingencies. In making such allowance, sound business judgment should be exercised in estimating the amount necessary to be raised for such loss and costs of collection, and this amount must be small in proportion to the entire tax, and cannot be added to so as to extend the rate beyond the limit fixed by statute, or in excess of that necessary to produce the several amounts authorized to be raised and expended; and where it is clearly shown that the board has abused its discretion and levied a greater rate than necessary for such loss and cost, the rate will be held invalid to the extent shown to be unnecessary. The loss and cost item is to be included in the minimum rate and is subject to reduction."

In the case of State ex rel. and to Use of Johnson, County Treasurer, v. St. Louis & S. F. R. Company, 10 S. W. (2d) 918, the court had under consideration the question of whether or not the county court, in fixing a levy, had abused its discretionary powers in not taking into consideration a sum of money which was in a closed bank and belonged to the fund for which the levy was made, and in that case the court, at l.c. 920, quoted Judge Ragland in the same case which was cited in 315 Mo. 430, in the following language:

"Exactions from the people, as taxes or otherwise, in advance of any needs of the government are not only condemned by sound public policy but are violative as well of fundamental rights guaranteed by our organic law. The County Court of Cass County was therefore without power to levy a tax clearly in excess of what could at the time have been reasonably anticipated as necessary to pay the interest and principal of the funding bonds. However, the authority to determine what amount would be necessary for that purpose was vested in it,

and unless there was a clear abuse of this discretionary power, its action in the premises cannot be interfered with. In other words the amount levied must have been so grossly excessive as to constitute, constructively at least, a fraud upon the taxpayers. * * * Whether, however, the levy was so excessive as to be constructively fraudulent must be judged not from the fact that it subsequently developed that a larger amount was levied than was actually required, but from the entire situation which confronted the county court at the time the levy was made. The amount required for the redemption of the bonds, principal and interest, as well as the amount that would be realized from the levy, had to some extent to be estimated in advance. In doing so it would be necessary to consider, among other things, the amount and availability of funds, already on hand, and the probable loss and the cost of collection of the tax to be levied. When a court is called upon to determine whether a given levy was so excessive as to be fraudulent, or the result of a gross abuse of discretion, not only should proof of such matters as these be received, but every existing fact and condition which the county court might have properly taken into consideration in fixing the amount is relevant and admissible in evidence."

This same case holds that the county court has a broad discretion in fixing the levy, but if it abuses that discretion, the appellate courts will interfere.

It seems from the authorities cited in *Corpus Juris*, supra, that if the taxing authorities fix the amount of levy and it is in excess of what is needed, then that part of the levy which is excessive is void. That being the case, if your county authorities have made a levy for more money than will be needed to retire the outstanding bond

Mr. Jos. L. Gutting

- 7 -

December 29, 1938

and pay the interest, then the levy is void to the amount that it is excessive.

If the figures and calculations are correct which the railroad officials submitted to you and which you have enclosed with your request, then it seems clear that the court has made a levy in excess of the amount needed to pay the interest and premiums on the bonds and from the foregoing authorities it would seem that the levy would be void in the amount that it is excessive.

CONCLUSION.

From the foregoing, we are of the opinion that the levy by the county court for taxes to pay bonds or any other purpose should be only in an amount sufficient to raise the desired funds, and if the levy exceeds that amount it is void to the extent in which it is excessive.

We are further of the opinion that the county court in fixing the amount of the levy should take into consideration the balance in the bond and interest fund, if this amount is available and applicable for the purpose, and it should also take into consideration the loss on account of uncollected taxes and costs of collection of the tax, and any other item which would add to or take away from the fund for which the levy is made.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

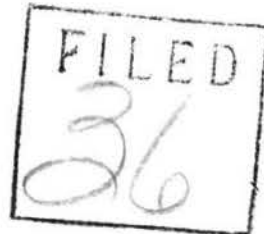
J. E. TAYLOR
(Acting) Attorney General

TWB:DA

COUNTY COLLECTOR: Cannot accept payment of general taxes and exclude district water tax

1-14
January 11, 1938

Mr. Clifford T. Halferty
Collector of Revenue
Clay County
Liberty, Missouri



Dear Sir:

This will acknowledge receipt of a request of January 3, 1938, for an official opinion, which reads as follows:

"There has been organized and is in operation in Clay County a 'Public Water Supply District'; formed under the statute passed by the 1935 Legislature.

"A certain taxpayer who owns property both within the District and out of the district as follows:

"Personal property -outside district-	
Total Tax	\$2.06
112 acres, property outside district	
Total Tax	65.52
103 acres, in district-water tax-	
\$24.91 - Total tax	86.92
Total of Tax Bill -----	\$154.50

"The above taxpayer tendered me a Bank Draft for \$129.59 being the amount of his taxes less the Water District tax. I refused to accept same, basing my action on 'Sec. 12, page 334 of the 1935 Session Acts.' However, I suggested to the taxpayer that he pay on the first two items, that is, his personal tax

Mr. Clifford T. Halferty -2- January 11, 1938

and the 112 acres, both being
outside the water district.

"I trust I have made the facts
clear in this case and request
your opinion on the question
'Should I accept payment on a
tax bill with a specific tax
cut out'."

According to Section 12, page 334 of the 1935
Session Acts, as set out in your request you are com-
pelled to collect the taxes assessed under this act.
The part of the section which is mandatory upon you
to make the collection reads as follows:

" **** The collector of the
county court or respective clerks
or the county courts shall enter
such levies on the tax books of the
county in the same manner as school
district taxes are entered, for the
use of the county collector. The
taxes thus levied and extended
upon the tax books shall be col-
lected and the payment thereof
enforced at the same time and in
the same manner as is provided
for the collection and payment
of taxes levied for state and
county purposes and such taxes,
when collected, shall be remit-
ted by the collector or collectors
of the revenue to the treasurer
of the district."

This part of Section 12 of the Act alone is
sufficient to give you authority to collect all of
the taxes at the same time. This Act, in its en-
tirety, was upheld as to validity and constitution-
ality in the case of Grossman v. Public Water Supply
District, Number 1, of Clay County, et al., 96 S.W. (2d)
701, 339 Mo. 348. I believe that the defendant in this case

Mr. Clifford T. Halferty

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January 11, 1938

is the same public supply district that you are inquiring about.

The county collector is an office that is not created by the Constitution, but is an office created by the Legislature under Section 14, Article IX, of the State Constitution. This was so held in *State v. Hering*, 208 Mo. 708. The collector is merely an agent of the State and must follow the statute in every respect. In *State ex rel. Waddell, Revenue Collector, v. Johnson, et al.*, 296 S. W. 806, the court held that;

"In suit to enforce lien for taxes for de facto school district, under Rev. St. 1919, Section 12928, collector is agent of state, de facto district not being party to suit, and hence liability for taxes cannot be defeated on ground that collector, as agent of district, cannot collect taxes after district has been disorganized; there being no principal to represent."

The tax collector's duties being purely statutory, he is confined to the law as set out by the statute alone.

In *State v. Young*, 38 S. W. (2d) 1021, 327 Mo. 909, the Court held that,

"The power to collect taxes is purely statutory and collection of taxes can only be made in accordance with tax books as actually made and furnished to the collector."

In *State ex rel. Johnson, Collector of Revenue v. St. Louis, San Francisco Railway Company*, 286 S. W. 360, the Court held;

Mr. Clifford T. Halferty

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January 11, 1938

"Public officials connected with taxes are presumed to have properly discharged their proper duties as to levying them, and this presumption can be overcome only by clear testimony."

In the case of State ex rel. Johnson v. St. Louis, San Francisco Railway Company, as above set out, the county collector is bound by the amounts set out in the tax book furnished him by the county assessor and county clerk. The same finding was held in State ex rel. v. Dungan, 177 S. W. 604, 265 Mo. 353.

In the above case, State ex rel. v. Dungan, the court held that,

"Where the assessor has made a valid assessment of lands and has prepared his books containing such assessment, jurisdiction to collect the taxes attaches, and the provisions for the subsequent proceedings are only directory."

Under Section 9880, Revised Statutes Missouri 1929, the collector is charged with the taxes that appear on the tax books and which are furnished him under Section 9877 of the Session Laws of 1933.

Under Section 9886, Revised Statutes Missouri 1929, a bond requires the county collector to faithfully collect all taxes certified to him.

In State ex rel. Stone, Internal Revenue Collector v. Kansas City, Ft. Scott and Memphis Railway Company et al., 178 S. W. 444, a suit was brought by the Internal Revenue Collector against the railroad and its receivers for taxes. The suit was for

taxes against the defendant's property in Bates County for the year 1912 and was for \$2,349.01, and for the year 1913 they were \$2,257.44. The railroad company paid all the taxes for the year 1912 except \$23.56, and in December, 1913, tendered to the collector \$2,228.48 in full payment of the taxes for 1913. The tender was refused. The issue at the trial was in regard to the unpaid balance for the year 1912 and the difference of \$28.96 between the total tax for the year 1913 and the amount tendered. Those two disputed amounts represented that portion of the school taxes which defendants contended were illegal, in this; that various school districts in the county, which were formed of cities and adjoining territory, had increased their rate of levy beyond sixty-five cents on the hundred dollars assessed valuation, and that such excess had resulted in the increase of defendants' taxes by the amounts so in dispute. The court, in affirming the judgment of the lower court which allowed payments of penalty for the non-payment of the taxes when due, said:

"They say that section 11459, Rev. Stat. 1909, requires the collector to receive and receipt for the taxes which may be tendered on any part of a tract of land. That section does not apply to any taxes, except taxes on land. It contemplates the payment of all taxes on a specified part or on an undivided part of the whole tract; but it does not contemplate the payment of a part of the taxes on the whole property. That section has no application to the facts in this case. We know of no law requiring the collector to accept a part of the taxes under the circumstances of this case. The collector's refusal to accept the amount tendered did not result in relieving defendant of the payment of the penalty on the amount tendered.

"We have no power to relieve the defendants of the penalty, nor to diminish it. Appellants cite Cottle v. Railroad, 201 Fed. 39, 119 C.C.A. 371. In that case the railroad company paid the taxes admitted to be due and sued to enjoin the collection of the balance. It was decided on that appeal that a portion of the unpaid balance was valid, and the other part void, and the collection of the latter part was enjoined. The Circuit Court of Appeals refused to enforce the penalty of 18 per cent. provided for by the statute of the state of Wyoming, but gave judgment for interest at 8 per cent. It should suffice to say that there is a broad difference between that case and this. There a portion of the tax was held void; here it was all adjudged valid. That was a proceeding in equity; this is a suit at law. This court, in this case, must follow the statute.

"The judgment is affirmed."

In the above case, State ex rel. Stone v. Kansas City, Ft. Scott and Memphis Railway Company, et al., the Court, in the syllabus of its opinion, passed on Section 11459, Revised Statutes Missouri 1909. This section of 1909 is identical with Section 12905, Revised Statutes 1919, and Section 9913, Revised Statutes 1929. The county collector, although his office was created by the Legislature and not the Constitution, is bound by Article X, Section 3, of the Constitution of the State of Missouri, which is as follows:

"Taxes may be levied and collected for public purposes only. They

shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

In the case of *Walden v. Dudley*, 49 Mo. 419, the Court held:

"A county collector is not personally liable for levying on land embraced within town limits and regularly assessed for town taxes, although the lands were used exclusively for agricultural purposes. It is his duty to collect all taxes contained in the assessor's list; and he has no discretion in the matter, except where property is expressly exempt by law, and the assessment is simply void."

Section 9913, Revised Statutes Missouri 1929, should not be construed to mean that the taxpayer can pay a part of the taxes on one piece of property, but can pay on certain tracts or lots or upon different items at different places and refuse to pay on either of the other lots or tracts providing they are specifically described.

This section has been construed in *State v. Harnsberger*, 14 S. W. (2d) 554, and by construing *State v. Harnsberger* with *State ex rel. Stone v. Kansas City, Ft. Scott and Memphis Railway Company*, 178 S. W. 444, the distinction can readily be seen.

Under the above authorities cited and rulings set out, they refer mostly to school district taxes. Under Section 12, page 334, of the 1935 session acts, the legislature provided, "the clerk of the county court or respective clerks of the county courts shall

Mr. Clifford T. Halferty

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January 11, 1938

enter such levies on the tax books of the county in the same manner as school district taxes are entered, for the use of the county collector."

CONCLUSION.

Under all of the authorities set out above, and especially under the decision of State v. Kansas City, Ft. Scott and Memphis Railway Company, it is the opinion of this office that the county collector is not required to or cannot be compelled to accept payment of other items in the tax bill when the district water tax payment is refused, and he can insist that all of the items embraced in the 1937 taxes be paid at one time.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

Approved

J. E. TAYLOR
(Acting) Attorney General

WJB LC

- ELECTIONS: (1) Candidate for office of county clerk need not be a taxpayer.
(2) Candidate eligible for township office even though kept partially at county expense in private home.
(3) Inmates of Tubercular Hospital at Mount Vernon, Missouri entitled to vote absentee ballot.

July 25, 1938

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Hon. J. Raymond Hall
Clerk of the County Court
Lancaster, Missouri



Dear Mr. Hall:

We have received your letter of July 21 in which you requested an opinion on three separate matters. Your first question reads as follows:

"Can a candidate who has never been a tax payer qualify for a county office?"

In another communication you have advised us that the particular office you have in mind is that of Clerk of the County Court. The only qualifications which a candidate for this office must have are contained in Section 11650, R. S. Mo. 1929. This section reads as follows:

"No person shall be appointed or elected clerk of any court, unless he be a citizen of the United States, above the age of twenty-one years, and shall have resided within the state one whole year, and within the county for which he is elected three months before the election; and every clerk shall, after his election, reside in the county for which he is clerk. (R.S. 1919, Section 2096.)"

Neither this section nor any other law of this state requires that a candidate in order to be eligible for such office should be a taxpayer or that he should own any property whatsoever upon which taxes might be assessed.

CONCLUSION

We conclude, therefore, that it is not necessary for a candidate for the office of Clerk of the County Court to be a taxpayer.

II

Your next question reads as follows:

"Can a candidate who is being kept at county expense but not in the county poor farm qualify for a township office?"

Section 12276, R. S. Mo. 1929 gives the qualifications necessary for a township office. This section reads as follows:

"No person shall be eligible to any township office unless he shall be a qualified voter and a resident of such township."

Therefore, since a person, in order to be eligible to run for a township office, must be a qualified voter and resident of such township, it is necessary to determine whether or not a candidate who is being kept at county expense but not in the county poor farm is eligible to vote.

In another communication from you we learn that the exact situation which you have in mind is where the county is paying a

July 25, 1938

part of the expenses of a resident in a private home. This office has previously ruled on this same question. We are enclosing herewith a copy of an opinion of this office dated October 20, 1936, and addressed to the Honorable Owen G. Jackson, Chairman of the Board of Election Commissioners, Clayton, Missouri. This opinion holds that occupants of private homes who are being partially supported by the county are not inmates of a poor house within the meaning of Article 8, Section 2 of the Constitution of the State of Missouri, or Section 10178 R. S. Mo. 1929. This particular constitutional provision and Section 10178 provide in effect that no person shall be entitled to vote while kept in any poor house or other asylum at public expense.

CONCLUSION

We conclude, therefore, that a candidate who is being kept at county expense, but not in a poor farm, is not disenfranchised for such reason. That if such a person can qualify as a voter in all other respects, he is qualified to be elected to a township office.

III

Your next and last question reads as follows:

"Can inmates of the State Sanitorium be permitted to vote an absentee ballot?"

Through another communication from you we learn that you have in mind persons who are temporarily confined in the State Tubercular Hospital at Mount Vernon, Missouri.

Section 2, Article 8 of the Missouri Constitution reads as follows:

"All citizens of the United States, in-

cluding occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Section 10178 R. S. Mo. 1929 provides as follows:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: Provided, however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this state; and provided further, that no person while kept at any poorhouse or other asylum at public expense, except the soldiers'

home at St. James and the confederate home at Higginsville, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting. (R.S. 1919, Section 4748.)"

We are assuming of course that the persons who are at the present time confined at the Mount Vernon Hospital are of sound mind. Therefore, the question resolves itself into the meaning of the term "poor-house at public expense" as used in the Constitution and the term "poorhouse or other asylum at public expense" as used in said Section 10178. For our present purposes we will disregard the question as to whether or not the statute can be broader on the same subject matter than the constitutional section, particularly with respect to limitations on the right to vote.

In the case of *Hale v. Stimson*, 198 Mo. 134, the court had before it the question as to whether or not the old soldiers kept in the St. James Home at St. James, Missouri, were disfranchised by the above constitutional provision and statute. In holding that the term "poorhouse and other asylum" could not possibly include these old soldiers and that they had the right to vote the court said:

"In short, and plainly put, appellant's counsel rely upon the proposition that the 'other asylum' referred to in the Constitution should be in and of the same class as a poorhouse, and we sympathize with that view. These contentions they sustain by a wealth of cited authority.

The argument proceeds upon the lofty plane that it is inconceivable that a home for old soldiers should be construed as struck at by a provision referring to poorhouses and other asylums. But as this insistence is nearly related to the question of public policy, the one may as well be treated as merged in the other, and the same consideration cover both.

"It is argued for respondent in effect that the provisos of section 6994, supra, are so framed as to show, by force of the doctrine of noscitur a sociis, that the legislative mind considered soldiers' homes as poorhouses, or other asylums--the language being, 'kept at any poorhouse or other asylum at public expense, except the Soldier's Home at St. James and the Confederate Home at Higginsville.' Such argument is ingenious and might be allowed force in the absence of a manifest purpose writ large in the statute. A minor consideration in the legislative mind might have been the enumeration and classification of places of abode, such as prisons, poorhouses, asylums and homes. Indeed, the section in review enumerates the inmates of public prisons along with those of homes, poorhouses and asylums, but it would be an ungracious and unnecessary construction to say that the Legislature had in mind the classification of a soldiers' home with jails, prisons and poorhouses. The salient matter in the legislative mind was: who should vote and who should not vote? and if the gloss of the section is approached from that standpoint it will be seen that the Legislature intended the old soldiers should vote, i.e., it is said so.

"Proceeding a step further, it will appear that section 6994 was plainly passed to carry out the Constitution. Therefore, the Constitution was in the legislative mind, and, being in the legislative mind, it would follow that in permitting

the inmates of the soldiers' homes to vote, the Legislature must be held to have considered the Constitution to preclude the construction that a soldiers' home was a poorhouse, or other asylum kept at public expense, or a jail or prison. Any other view would convict the law-makers of having the Constitution before their very eyes and of passing a law in obedience thereto, while at the same time purposely, perversely, and wilfully violating its terms."

Furthermore, in considering the meaning of the term "other asylum" we must take into the consideration the principle of *ejusdem generis*. The term "other asylum" is a general term following particular words and according to said doctrine the meaning of the general term must be confined in its application to the particular word. That is to say, the term "other asylum" must be confined in its application to an asylum of the same class as a "poorhouse." As stated in the case of *State v. Krueger*, 134 Mo. 262, the rule of *ejusdem generis* is as follows:

"In construing Statutes, where general words follow particular ones * * * * * the rule is * * * * * as follows: 'Where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class.'"

CONCLUSION

It is, therefore, our conclusion that the Tubercular Hospital at Mount Vernon cannot be classified as a "poorhouse or other asylum"

Hon. J. Raymond Hall

-8-

July 25, 1938

and that the inmates thereof are entitled to vote at their places of residence by absentee ballot.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

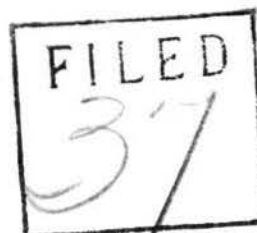
APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

JFA/w

COUNTY COURT:) County Court has authority to transfer surplus
ROADS AND BRIDGES:) funds remaining at the end of the year to
road and bridge fund, and the same may be used
for the erection of bridges in special road
districts.

3/10
January 21, 1938



Honorable Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of January 15th, requesting an opinion on the following question:

"1. Does the County Court of Pettis County have the authority to contribute money for the purpose of building a bridge in the County in a Special Road District after all of the budget requirements have been met and there is a surplus of \$33,000.00 of unexpended funds in the treasury?"

We refer to the Budget Act, especially Class 3, Laws of Missouri, 1933, page 341, as follows:

"The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair and replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

We also refer to Class 6, page 342, which is as follows:

"After having provided for the five classes of expenses heretofore

specified, the county court may expend any balance for any lawful purpose. Provided however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

By the provisions of Class 3 it will be noted that, so far as the annual budget is concerned, the county court is prohibited from expending any money from the ordinary or general revenue on any bridge in any special road district. By the terms of Class 6 the county court is empowered to expend any balance for any lawful purpose. We assume that the \$33,000.00 mentioned in your letter is an actual surplus and that the county has now no outstanding warrants or obligations of previous years. Hence, the question resolves itself into, the authority or right of the county court to donate, grant or give aid to the special road district in building a bridge?

We further assume that the \$33,000.00 mentioned is a surplus from the ordinary or general revenue of the county and not derived from the levies of the road and bridge and special road and bridge as authorized by the Constitution and the statutes. If it is surplus funds derived by the road and bridge levies, then it is more than possible that Section 8039, R. S. Mo. 1929, would govern the situation. Said section is as follows:

"Said board may, by contract or otherwise, under such regulations as the board shall prescribe, build, repair and maintain, or cause to be built, repaired, or maintained all bridges and culverts needed within said district: Provided, however, that the county court of the county in which said special road district is located may, in its

discretion, out of the funds available to it for that purpose, construct, maintain, or repair, any bridge, or bridges, or culbert or culverts in such road district, or districts, or it may, in its discretion, appropriate out of the funds available for that purpose money to aid and assist the commissioners of said special road district, or districts, which shall be expended by the commissioners of said special road district, or districts, as above provided."

You will note that the statute uses the phrase "out of the funds available to it for that purpose"; the surplus which you mentioned is not designated as being in the general revenue fund, road fund, or any other fund of the county. Hence we approach it from the angle that it is merely a surplus of funds belonging to the county when all just demands and obligations have been met.

Under Section 12167, R. S. Mo. 1929, the court has power to transfer funds. Said section reads as follows:

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

The authority of the county court to transfer a surplus and what constitutes a "surplus" is contained in Decker

v. Diemer, 229 Mo. 296, 1. c. 336, as follows:

"The bald question then is: May a county court transfer a surplus and divert it from a fund, having a designated and given purpose, to another legitimate county purpose, by force and reason of the satisfaction of the original use or purpose? We answer that question in the affirmative. We are of the opinion that the force of the Cottey Act is spent in another direction, as the history of the times of its enactment well shows, and that it ought not to be construed as prohibiting such transfer of funds. We are further of the opinion that the various statutes providing for the transfer of funds, when practically construed, lend substance and countenance to the view we have expressed. We are further of the opinion that sections 6723 to 6729 inclusive, supra, now a part of article 2 of chapter 97, entitled 'Counties,' is a live law though old. The chapter and article have been revised and amended from time to time and brought down for every day use. The Cottey act was not intended to repeal it and the provisions of the two are not antagonistic or inconsistent. Repeals by implication are not favored. It is our duty to harmonize and preserve the whole body of the law, when we can. We are further of the opinion that when all warrants and debts properly chargeable to a fund in any one year are paid and provided for, the residue of such fund is a 'surplus' within the

purview of the transfer sections. Is not the building of a courthouse as legitimate as any other county purpose? Are bonds so desirable that the people of a Missouri county must bond themselves when bonds are not necessary, or go without a courthouse? Must they levy special taxes when they have the means in the treasury to avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of the people, and the other idea that the county's business must be done for cash. All these ideas are conserved by the holding made."

From your letter there does not appear to be any deficiency in any fund.

The right to transfer funds is also discussed in the case of *State ex rel. v. Appleby*, 136 Mo. 408, 1. c. 412, as follows:

"We do not think section 7663 can be given such a construction. We must assume that the legislature intended that all just and proper liabilities of the county, created in one year, should be paid out of the revenue and income of that year. The provisions for dividing and apportioning the revenues to be collected for the year into the various funds does not contemplate that a just demand against the county should go unpaid because the revenue appropriated to the particular fund, out of which it is primarily payable, may have been exhausted, if there be money in the treasury unappropriated, or not needed for the purposes for which

it was appropriated, from which it can be paid. When it is found that there is a surplus in one fund, and a deficiency in another, there is nothing in the law, or other reason, why the court may not transfer the surplus in order to make up the deficiency. Indeed sections 3189 and 3190 expressly provide for such transfer."

Conclusion.

It is fortunate that your county is in such a splendid financial condition. Ordinarily the logical disposition of the surplus would be to consider it in computing the estimates of the present fiscal year and thereby give the taxpayers the benefit of the surplus by reducing the levy. But we are of the opinion that under Section 12167, supra, the county court could legally transfer to the proper fund whatever amount it deems sufficient to erect or build bridges in the special road districts.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

INSURANCE: 3 questions relating to Burial Society incorporating as a stipulated premium company.

March 22, 1938

3-24
FILED
31

Hon. Charles M. Hansen
Actuary
Insurance Department
Jefferson City, Missouri

Dear Mr. Hansen:

This Department wishes to acknowledge your letter of March 14, 1938, wherein you state as follows:

"This Department would like to have your opinion on several questions arising out of an application by a Burial Society operating under Article X, Chapter 32, Revised Statutes of Missouri, 1929, to re-incorporate under Article IV, Chapter 37, Revised Statutes of Missouri, 1929, as a stock stipulated premium life insurance company. The questions are as follows:

(1) Is the capital stock and all surplus of the new company always subject to any liability arising out of the Burial Society business assumed by the new company?

(2) Do all of the provisions of the Burial certificates, as well as the By-Laws governing policy benefits remain in effect after the date of reincorporation as a stipulated premium insurance company?

(3) Are these Burial certificate holders to be charged with only their actual expenses after re-incorporation as an Article IV company of the Insurance Code?"

I.

Fletcher's Cyclopedia of the law of Private Corporations, Vol. 15, Section 7328, page 445, in discussing the question whether a reorganized company assumes the debts and obligations of the old company declares that

"upon reorganization, the reorganized company, irrespective of whether it is a voluntary or an involuntary reorganization, may become liable for the debts and obligations of the old company where it expressly assumes them, or where the facts and circumstances give rise to an implication of assumption."

32 Corpus Juris, Section 67, page 1021, in discussing reorganization and reincorporation of insurance companies states that:

"Reincorporation does not annul or modify existing contracts of the company and the new company is liable thereon."

In the case of Maxwell vs. Eureka Mutual Ben. Corp., 262 Ill. App. 342, the Court in holding that upon ~~reincorporation~~ [→] the new organization became liable upon all outstanding certificates of insurance, ~~→~~ sets out the following facts:

"The Eureka Mutual Benefit Corporation issued a certificate of insurance to James Maxwell on September 11, 1925, in which appellee, a son of the insured, was named as beneficiary. The insurer was incorporated on May 25, 1925, under section 29 of the Corporation Act of 1872, Cahill's St. 1925, ch. 32, Sec. 159. In 1927 that statute was so amended that the insurer could only retain its corporate existence for six months after July 1, 1927, for the sole purpose of winding up its business or reincorporating under some Act, the enforcement of which would come

within the jurisdiction of the department of trade and commerce. In 1927, the legislature passed another Act for the incorporation of Mutual Benefit Associations, Cahill's St. ch. 73, Sec. 435 (1) et seq., under which the insurer was authorized to reincorporate. It did reincorporate, under the same name, on August 29, 1927.

* * * * *

The reincorporated association became liable upon all outstanding certificates of insurance."

From the foregoing we are of the opinion that when a Burial Society operating under Article X, Chapter 32, R. S. Missouri 1929, reincorporates under Article IV, Chapter 37, R.S. Missouri 1929, as a stock stipulated premium life insurance company the capital stock and surplus of the new company becomes subject to any liability arising out of the Burial Society business.

II.

Your second question is answered by Section 5775, Article IV, Chapter 37, R. S. Missouri 1929, as follows:

"Any domestic life or accident corporation, company or association existing or doing business in this state at the time this article takes effect, may, by the vote of a majority of its board of directors or trustees, accept the provisions of this article and amend its articles of incorporation to conform to the same, so as to cover and enjoy any and all the provisions and privileges of this article the same as if it had been originally incorporated thereunder, and it shall file such amended articles of incorporation in the office of the secretary of state, a certified copy of which shall be filed with the insurance

department, and shall thereafter perpetually enjoy the same and be deemed to have been incorporated under this article. Reincorporation, however, shall in no way annul, modify or change any of the existing contracts and liabilities of such corporation, and any and all such contracts and liabilities shall continue in force and effect the same as though such corporation had not reincorporated or qualified under this article, neither shall such reincorporation in any way prejudice, impede or impair any pending action or proceeding or any rights previously acquired."

In the case of Richards vs. Security Mutual Life Insurance Company, 259 F. 727, the New York statutes authorized the reincorporation thereunder of domestic life insurance companies doing business on the stipulated premium plan, but provided that each reincorporation

"shall in no way annul, modify or change any existing contract, contracts or liabilities of such existing corporation."

The Court in holding that such a provision was not unconstitutional as impairing the obligation of contracts said:

"I am not able to see how the reincorporation of this company in any way injured the plaintiff here or any other person similarly situated, inasmuch as by way of impairing the obligations of the contracts of insurance the section quoted expressly provides that the reincorporation and qualifying under the statute 'shall in no way annul, modify or change any existing contract, contracts or liabilities of such existing corporation, association or society and any and all such contracts and liabilities shall continue in full force and effect the same as though said corporation, association or society had not reincorporated or qualified under this article.'

It is plain that the plaintiff's contract is not impaired or changed. The new corporation is bound by it the same as was the old one."

From the foregoing we are of the opinion that the provisions of the burial certificates, as well as the by-laws governing policy benefits remain in effect after the date of reincorporation as a stipulated premium insurance company.

III.

Section 5775 supra, states that reincorporation shall in no way annul, modify or change any of the existing liability of such corporation. To charge the Burial Society with expenses of the new company would be to change the liabilities of the Society. We are therefore of the opinion that the Burial Society should be charged only with their own and actual expenses after reincorporation as a stipulated premium company.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

PROBATION: Information received by probation and parole officers
PAROLE: privileged.

April 27, 1938

H-30

Honorable Frank G. Harris
Chairman
Board of Probation and Parole
Jefferson City, Missouri



Dear Sir:

This acknowledges your request for an opinion under date of April 22, 1938, as follows:

"Please, at your convenience, render us an opinion on the following question:

Section 9, Laws 1937, page 403 relating to probation and parole would indicate that the information received by any probation officer and set forth in his report to the Board of Probation and Parole is privileged.

We would like to have you set forth in your opinion the extent of this privilege."

The section you refer to provides as follows:

"Information and data obtained by a probation or parole officer appointed under the provisions of this Act in the discharge of his official duty, shall be privileged information, shall not be receivable in any court, and shall not be disclosed directly or indirectly to any one other than the members of the

Board of Probation and Parole and judges entitled under this Act to receive reports, unless and until otherwise ordered by said Board or judge. All public officers are hereby required to assist said Board and its parole and probation officers in effectuating paroles and probations, and shall permit said Board or its parole and probation officers to have free access at reasonable times to all public records."

Section 1 of the Laws of Missouri 1937, page 400, names the courts that may place a defendant on probation, as follows:

"The circuit and criminal courts of this State, the court of criminal correction of the City of St. Louis, and boards of parole created to serve any such court or courts, may place on probation any defendant eligible for judicial parole under Sections 3809 to 3821, inclusive, of Article 18, Chapter 29, Revised Statutes of Missouri, 1929. After a conviction, or a plea of guilty, the courts and boards of parole named in this Section may suspend the imposition or execution of sentence of any person legally eligible for judicial parole under said Sections 3809 to 3821, inclusive, and may also place the defendant on probation."

Section 5 of the Laws of Missouri 1937, page 402, provides among other things for the supervision of persons released on parole or conditional pardon as follows:

"The Board of Probation and Parole shall have authority and it shall be its duty to study prisoners committed to State correctional and penal institutions to select prisoners to be recommended to the Governor for parole, commutation of sentence, or pardon; to provide for applications for paroles, commutations of sentence, and pardons; to investigate the merits of such application; to make recommendations to the Governor relative to paroles, commutations of sentence, and pardons; to recommend conditions deemed by them advisable in the case of prisoners whose release on parole, commutation of sentence, or conditional pardon is recommended; to provide for the supervision of persons released on parole or conditional pardon; and to recommend to the Governor the revocation of paroles or conditional pardons when their conditions have been violated. Said Board shall keep and preserve complete files, and records of all prisoners held in or released from state penal and correctional institutions and the recommendations made by them relative to such prisoners. The Board may adopt rules and regulations relative to the eligibility of prisoners for parole. The Board of Probation and Parole may, at the written request of the judge or judges of a court named in Section 1 of this Act, or a board of parole authorized to serve such court, authorize parole officers appointed by said Board to act as probation officers for such court or board of parole."

Prior to the creation of the present Board of Probation and Parole (Laws of Missouri 1937, pages 400, 403), after an inmate was discharged or paroled he was left to shift for himself, and unless he had relatives or friends who were able and prepared to help him to make normal contacts with society he found himself following the same path that lead to his incarceration. Under the present scheme a discharged or paroled prisoner has a counselor to whom he may look for assistance and advice in aiding him to get reestablished. It is necessary that the parolee have the confidence of parole and probation officers if he is to adjust himself and the latter to aid him to the fullest extent. Under this modern system of paroles and pardons there is not only an economic saving to the State, but more important a greater likelihood that the parolee will be able to take his place in society as a useful citizen.

The Legislature in realizing the necessity of fostering a spirit of confidence between parolee and the parole and probation officers has decreed that the information and data received by the officers should be privileged.

The extent of the privilege in our opinion is clearly stated in Section 9 supra, and needs no statutory interpretation thereof. (Cummins vs. Kansas City Public Service Company, 66 S.W. (2) 920, 334 Mo. 672. However, to show the extent that our courts have gone in protecting information obtained by public officers it is well to point out the case of State ex rel. Douglas vs. Tune, et al. 203 S.W. 465, 1. c. 467, 199 Mo. App. 404. In that case the complaint board of the City of St. Louis was under its charter (Article XIV, Section 2), authorized to hear and examine complaints against any officer or employees of the City. By a writ of mandamus it was sought to compel the Board to produce a letter complaining against an employee which was to be used as a basis of an action for libel against the sender. The Court in holding that the Board could not be compelled to produce such a letter, said:

"In the very highest sense, they are the confidential servants of the city and of its officers, for the purpose of advising those officers as to the character, fitness, ability and suitability of the various employes of the city, as well as of the acts of public utility corporations. We can conceive of no higher, more important, and useful branch of public administration than the duties thrown upon this Complaint Board. It is almost a necessary implication, when we consider the creation and objects and scope of this board, that communications from citizens, complaints from citizens, are the main source for putting the powers of inquiry of the board into play.* * * * In our opinion these communications by citizens to the Complaint Board, covering the conduct of public officers and employes, are to be considered as highly confidential, and as records to which public policy would forbid the confidence to be violated. Such is said to be the law where the question has been very fully considered in a recent work on evidence, namely, Jones' Commentaries on the Law of evidence in Civil Cases, vol. 4, sec. 762, p. 576, to which, without repeating or reproducing, we refer, There the case of Boske vs. Comingore, 177 U.S. 459, 20 Sup. Ct. 701, 44 L.Ed. 846, is referred to and quoted at length as sustaining the confidential character of such communications."

When we consider the creation and objects and scope of the Board of Probation and Paroles, to permit the information and data to be other than privileged would defeat the very purpose of the Board.

Hon. Frank G. Harris

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April 27, 1938

From the foregoing we are of the opinion that the information and data obtained by a probation and parole officer appointed under the Laws of Missouri 1937, pages 400, 403, is privileged to the extent that it is not receivable in any court and cannot be disclosed directly or indirectly to any one other than the members of the Board of Probation and Parole and Judges of the Circuit and Criminal Courts of this State including the Court of Criminal Correction of the City of St. Louis, unless and until otherwise ordered by said board or judges.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

- NOTARY PUBLIC: (1) Must state date commission expires on certificate
(2) Must have person before him in taking acknowledgment.

April 28, 1938

Surgeon General
U.S. Public Health Service
Washington, D. C.

Attention R.L. Harlow
Chief, Accounts Section



Sir:

This Department acknowledges your request for an opinion under date of April 15, 1938, as follows:

"It is requested that this office be advised as to the laws obtaining in the State of Missouri relative to the following questions.

1. Is it necessary that a Notary Public state the date his commission expires on a jurat when said jurat is being executed to a travel expense voucher, which voucher will be audited and paid by a department of the Federal Government?
2. What laws govern where a paper is notarized and the person signing does not appear before the Notary Public?"

I.

Your first question is answered by Section 11741 R. S. Missouri 1929, which provides as follows:

"Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words 'notary public,' the name of the county or city, if appointed for such city, in which he resides and has his office, and the name of the state; shall designate in writing, in any certificate signed by him, the date of the expiration of his commission. No notary public shall change his seal during the term for which he is appointed, and he shall authenticate therewith all his official acts, and the record and copies, certified by the proper custodian thereof, shall be received in evidence."

From the foregoing we are of the opinion that it is necessary that a notary public state the date his commission expires in writing, in any certificate signed by him, including a traveling expense voucher which is to be audited and paid by a department of the Federal Government.

II.

46 Corpus Juris, Section 24, page 512, makes the following statement with reference to notaries taking acknowledgments on affidavits without the presence of the parties whose acknowledgments are taken:

"When a notary takes an affidavit, the party should in every case be personally before him, and it is serious misconduct to dispense with personal presence."

In the case of *In Re: Napolis*, 169 App. Div. 469, 155 N.Y.S. 416, 1. c. 418, we find the following statement by the Court:

April 28, 1938

"The court again wishes to express its condemnation of the acts of notaries taking acknowledgments or affidavits without the presence of the party whose acknowledgment is taken or the affiant, and that it will treat as serious professional misconduct the act of any notary thus violating his official duty."

Our courts have not passed on the precise point in question. However, we are of the opinion that they would condemn the practice of notaries taking acknowledgment on affidavits without the presence of the party whose acknowledgment is taken, or the affiant, and if any damage is suffered by the party in interest it would probably hold the notary liable on his bond.

Respectfully submitted

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

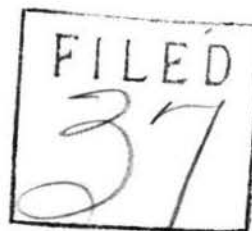
J. E. TAYLOR
(Acting) Attorney General

MW:MM

CONVICT: No loss of civil rights of citizenship prior to judgment and sentence.

May 5, 1938.

Honorable Frank G. Harris, Chairman
Board of Probation and Parole
Jefferson City, Missouri



Dear Sir:

We acknowledge your request for an opinion dated April 22, 1938, which reads as follows:

"Please, at your convenience, render us an opinion on the following question:

In the event a person having committed his first felony and being eligible for parole is put on probation by the trial judge without sentence being passed, under such circumstances is the defendant deprived of his citizenship?"

Article 8, Section 2 of the Missouri Constitution provides:

"** no person *** while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Pursuant to the above constitutional provision, the Missouri Legislature has passed Section 10178, R. S. Mo. 1929, which provides:

"** no person *** while confined in any public prison, shall be entitled

to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

The phrase "convicted of" is not only used in the Constitution and statute above quoted as a basis for loss of citizenship and civil rights, by reason of conviction of a crime, but the same phrase, intended for the same purpose, appears in numerous other penal statutes (see Sections 3928, 4035, 4172, 4212, 8787, 3947, 4404 and 4462, R. S. Mo. 1929).

If one charged with a crime is to be punished by imposition of civil disabilities after verdict of a jury or a plea of guilty before judgment is rendered and sentence is passed, it is pursuant to construction of the phrase "convicted of" appearing in Missouri penal statutes. At just what stage of criminal procedure did the Legislature intend the penalties of civil disability to take inception so that a person may be said to be legally "convicted of" crime? When is a person reasonably to be considered a convict?

Article I, Chapter 91, R. S. Mo. 1929 deals with civil rights of persons convicted of a crime. Section 12968 of said Article provides:

"A sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the persons so sentenced during the term thereof, and forfeits all public offices and trust, authority and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead."

Section 12970, R. S. Mo. 1929, provides:

"When any person shall be sentenced upon a conviction for any offense, and is thereby, according to the provisions of this article, disqualified to be sworn as a witness or juror in any cause, or to vote at any election, or to hold any office of honor, profit or trust within this State, such disabilities may be removed by a pardon by the governor, and not otherwise, except in the case in the next section mentioned. "

Section 12971, R. S. Mo. 1929, provides:

"If such convict shall have committed the offense while within the age of eighteen years, and such conviction shall be for a first offense, all civil disabilities incurred shall be removed and his competency restored at the expiration of the term of imprisonment to which he shall have been sentenced."

The legislative power to provide punishment effecting the civil rights of those convicted of a crime cannot be disputed. The common law affecting loss of civil rights to a felon has no place in Missouri jurisprudence where same be repugnant to existing Missouri statutes, and Section 645, R. S. Mo. 1929 provides:

"The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this

state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that the same may be in derogation of, or in conflict with, such common law, or with such statutes or acts of parliament; but all such acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof."

Even in those instances where a person may be charged and "convicted of" a common law crime, punishment incurring loss of civil rights cannot be imposed, and Section 646, R. S. Mo. 1929, provides:

"Punishment by virtue of the common law shall in nowise be other than by fine or imprisonment, or both, and such fine shall not exceed one hundred dollars, and the term of such imprisonment shall not exceed two months; nor shall any of the British statutes for the punishment of crimes and misdemeanors be in force in this state."

In the case of State vs. Townley, 147 Mo. 205, l.c. 208; 48 S. W. 833, the Supreme Court of Missouri construed the word "convicted", appearing in a Missouri statute, to mean that stage of criminal proceedings after judgment and sentence were rendered, and in that case the court approvingly said:

"In note 2, page 139, volume 4, American and English Encyclopedia of Law, it is said: 'It has generally been held that

the word "convicted" includes the final judgment, and that one who has been found guilty by the jury, but has not yet been sentenced, is not a "convicted" person.'

"In *Gallagher v. State*, 10 Tex. App. loc. cit. 472, it was said that the word 'convicted ... has a definite signification in law. It means that a judgment of final condemnation has been pronounced against the accused. Bouvier's Law Dictionary, under the word conviction. To say that a party had been "convicted" and then add, that he stood his trial, and that judgment final was rendered against him, would be tautology.'

"So in *Faunce v. The People*, 511 Ill. 311, it was held that a person can not be said to be convicted of a crime so as to render him incapable of giving testimony until judgment is rendered on a verdict of guilty, for not until then is he 'convicted' by law. The same rule was announced in *King v. Turner*, 15 East. 570.

"Under the statutes of New York, disqualifying any person as a witness who 'shall upon conviction be adjudged guilty of perjury,' it was held that a person is not rendered incompetent until by judgment, sentence has been pronounced upon him; that a verdict of guilty alone is not sufficient. The court said: 'We have lately, in civil cases, been called upon to construe statutes of similar import. We have held in them that there was no conviction merely upon the finding of the question in fact, and that there must also be a judgment of the court. Those cases arose under the acts

relating to dower, and the forfeiture of it by adultery. (Pitts v. Pitts, 52 N. Y. 593; Schiffer v. Pruden, 64 N. Y. 47.) We do not think that it is different under the criminal statutes involved in this case. In ordinary phrase the meaning of the word "conviction" is, the finding by the jury, of a verdict that the accused is guilty. But in legal parlance, it often denotes the final judgment of the court.' (Blaufus vs. People, 69 N. Y., loc. cit. 109.)

"So in Massachusetts a statute which provides that the conviction of any person of crime may be shown to affect the credibility of such person as a witness in any proceeding, civil or criminal, in a court, or before a person having authority to receive evidence, 'conviction' was held to imply a judgment of court."

CONCLUSION

Construing Sections 12968, 12970 and 12971, supra, with the Missouri Constitution and statutes containing the phrase "convicted of", it is self-evident that the Legislature intended the judgment and sentence of a court as a precedent to loss of civil rights of citizenship as punishment for crime in Missouri.

We are of the opinion that under the statutes of Missouri, a person charged with a crime, and before judgment and sentence, does not suffer a suspension of his civil rights of citizenship. We are of the opinion that

Hon. Frank G. Harris

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May 5, 1938

suspension of civil rights of citizenship finds its inception as a punishment for crime upon judgment and sentence of the court. Where a person is placed on probation by the trial court without passing judgment and sentence, he has not been deprived of any civil rights of citizenship.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

PARDON -- Time when pardon is available in preventing
punishment for crime.

May 6, 1938.

Honorable Frank G. Harris, Chairman
Board of Probation and Parole
Jefferson City, Missouri



Dear Sir:

We acknowledge your request for an opinion
dated April 22, 1938, which reads as follows:

"Please, at your convenience, render
us an opinion on the following ques-
tion:

Assuming that an applicant for
citizenship is not deprived of
a right to citizenship by reason
of any constitutional or statu-
tory inhibition, we would like
to know at what instant of time
a person whom the Board, after
investigation, deems a proper
subject for citizenship restora-
tion is entitled to have his
citizenship restored?"

Article V, Section 8 of the Missouri Constitution
provides:

"The Governor shall have power to grant
reprieves, commutations and pardons,
after conviction, for all offenses,
except treason and cases of impeach-
ment, upon such condition and with
such restrictions and limitations as
he may think proper, subject to such
regulations as may be provided by law

relative to the manner of applying for pardons. He shall, at each session of the General Assembly, communicate to that body each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the commutation, pardon or reprieve, and the reason for granting the same."

Section 12968, R. S. Mo. 1929, provides:

"A sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the persons so sentenced during the term thereof, and forfeits all public offices and trust, authority and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead."

Section 12970, R. S. Mo. 1929, provides:

"When any person shall be sentenced upon a conviction for any offense, and is thereby, according to the provisions of this article, disqualified to be sworn as a witness or juror in any cause, or to vote at any election, or to hold any office of honor, profit or trust within this state, such disabilities may be removed by a pardon by the Governor, and not otherwise, except in the case in the next section mentioned."

Section 12971, R. S. Mo. 1929 provides:

"If such convict shall have committed the offense while within the age of eighteen years, and such conviction shall be for a first offense, all civil disabilities incurred shall be removed and his competency restored at the expiration of the term of imprisonment to which he shall have been sentenced."

Section 3798, R. S. Mo. 1929, provides:

"In all cases in which the governor is authorized by the Constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper."

In State vs. Sloss, 25 Mo. 291, l.c. 294, the Supreme Court said:

"Although questions have sometimes arisen whether a power properly belonged to one department of government or another, yet there is no contrariety of opinion as to the department of the government to which the power of pardoning offences properly appertains. All unite in pronouncing it an executive function. So the framers of our constitution thought, and accordingly vested the power of pardoning in the chief executive officer of the state."

In the case of Ex Parte Collins, 94 Mo. 22, l. c. 24, 6 S. W. 345, the Supreme Court construed certain commutation statutes against the above constitutional provision, and the court said:

"The constitution of this state authorizes the Governor, after conviction, which means after return of a verdict of guilty *** to grant commutation for all offences, except, etc. "

CONCLUSION.

In a recent opinion to you, we held that loss of civil rights of citizenship as punishment for crime attached under the Missouri Constitution and statutes after judgment and sentence of the court, but not prior to judgment and sentence.

Construing Article V, Section 8 of the Missouri Constitution, supra, the right to pardon one against the loss of civil rights of citizenship as a punishment for crime, is exclusively a constitutional executive function. The conduct of any governmental agency or the construction of any statutes which would operate to hinder, control or curtail the executive power to grant clemency "after conviction" by reprieve, commutation or pardon, was not intended by the framers of our Constitution, and would be unconstitutional to that extent.

In our opinion, the phrase "after conviction" was placed in the Constitution to indicate the instant of time that the Governor may first exercise his constitutional prerogative of reprieve, commutation or parole. In the Collins case, supra, it was decided that the Governor can start functioning with commutation as soon as a jury has returned a verdict of guilty.

We are of the opinion that as soon as a jury has returned a verdict of guilty, or as soon as a defendant pleads guilty, then at that stage of criminal

Hon. Frank G. Harris

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May 6, 1938

proceedings, the Governor may first exercise his constitutional prerogative of a reprieve, commutation or pardon.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

TAXATION:
COUNTY COLLECTOR:
ADVERTISING DELINQUENT LANDS:
COUNTY BUDGET ACT:

Tax collector in letting contracts
for publication of delinquent
lands should follow the provisions
of Section 19 of the County Budget
Act, page 350, Laws of Missouri, 1933.

May 16, 1938

5/18



Mr. Edwin O. Harper,
Comptroller--St. Louis County,
Clayton, Missouri.

Dear Sir:

This is in reply to yours of May 11, requesting an
official opinion from this department based on the follow-
ing statement:

"Will you kindly render an opinion in
the following matter:

It being the duty of the Collector of
Revenue of St. Louis County to adver-
tise delinquent tax lists under the
provisions of Section 9952 B, must he
advertise for bids covering the print-
ing of such delinquent lists as pro-
vided for by Section 19 of the County
Budget Law, because of the fact that
the cost exceeds \$500.00 (actually
\$8000.00) and is payable out of the
General Fund? The County of St.
Louis has no annual printing contract."

Your inquiry involves the research of a number of
statutes and laws of Missouri, among which are the follow-
ing: Section 9952b, page 403, Laws of Missouri, 1935,
provides in part as follows:

"The county collector shall cause a
copy of such list of delinquent lands
and lots to be printed in some news-
paper of general circulation and pub-
lished in the county, for three con-

secutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November

The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

Section 10, page 346, Laws of Missouri, 1933, which is a part of County Budget Act provides in part as follows:

"The annual budget of any such county shall present a complete financial plan for the ensuing budget year. It shall set forth all proposed expenditures for the administration, operation and maintenance of all offices, departments, commissions, courts and institutions; the actual or estimated operating deficits or surpluses from prior years; all interest and debt redemption charges during the year and expenditures for capital projects. In addition, the budget shall set forth in detail the anticipated income and other means of financing the proposed expenditures.

All receipts of the county for operation and maintenance shall be credited to the general fund, and all expenditures for such purposes shall be charged to such fund; provided, that receipts from the special tax levy for roads and bridges shall be kept in a special fund and expenditures for roads and bridges may

be charged to such fund. All receipts from the sale of bonds for any purpose shall be credited to the bond fund created for the purpose, and all expenditures for such purpose shall be charged to such fund."* * * * *

Section 11, page 347, Laws of Missouri, 1933, provides in part as follows:

"On or before October 1 of each year, each department, office, institution, commission, or court of the county receiving its revenues in whole or in part from the county shall prepare and submit to the budget officer estimates of its requirements for expenditures and its estimated revenues for the next budget year compared with the corresponding figures for the last completed fiscal year and estimated figures for the current fiscal year."* * * * *

Section 18, page 350, Laws of 1933, provides in part as follows:

"Except as in this section otherwise specified, all offices, departments, courts, institutions, commissions, or other agency spending moneys of the county, shall perform the duties and observe the restrictions set forth in the preceding sections relating to budget procedure and appropriations."* * * * *

Section 19, page 350, Laws of Missouri, 1933, provides as follows:

"All contracts shall be executed in the name of the county by the head of the department or officer concerned,

except contracts for the purchase of supplies, materials, equipment, or services other than personal made by the officer in charge of purchasing in any county having such officer.

No contract or order imposing any financial obligation on the county shall be binding on the county unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred and unless such contract or order bear the certification of the accounting officer so stating: provided that in case of any contract for public works or buildings to be paid for from bond funds or from taxes levied for the purpose it shall be sufficient for the accounting officer to certify that such bonds or taxes have been authorized by vote of the people and that there is a sufficient unencumbered amount of such bonds yet to be sold or of such taxes levied and yet to be collected to meet the obligation in case there is not a sufficient unencumbered cash balance in the treasury. All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least 500 copies per issue, if there be such, except that such advertising shall not be required in case of contracts or purchases involving an

expenditure of less than \$500.00,
in which case notice shall be posted
on the bulletin board in the
court house."* * * * *

On the question of what is meant by "county budget"
the court, in the case of Graves v. Purcell, 85 S.W. (2d)
543, 1.c. 548, said:

"* * * * Coming now to a consideration of the County Budget Law here in question, it must be observed that the title to the law contains language of very comprehensive import followed by other language of narrower meaning. The title, of course, must be considered as a whole, but in order to develop the nature and merits of the various contentions made, we will first discuss the more comprehensive language used and will later consider the effect which must be given to the language of narrower meaning. The initial words of the title are, 'An Act to provide for a County budget.' We must take judicial notice of the fact that the word 'budget' has a well-recognized general meaning. As applied to governments or governmental units, a 'budget' is a plan or method by means of which the expenditures and revenues are so controlled for a definite period, by some budgetary authority, as to effect a balance between income and expenditures."
* * * * *

The collector by virtue of the provisions of said Section 9952b, supra, may take the position that because of the fact that the lawmakers had directed to advertise

May 16, 1938

the delinquent lands, that in performing this duty he is not bound by the provisions of the County Budget Law which requires that the contract for such publication shall be let as provided by said Section 19 of the Budget Act.

Said Section 9952b, supra, provides that the expenses for the publication of the delinquent lands shall be paid out of the county treasury. This money would have to be drawn from the general revenue fund of the county which is required to be budgeted under the County Budget Law. In the case of Layne-Western Co. v. Buchanan County, Missouri, 85 Fed. 343, l.c. 347, Thomas, Judge of the United States Circuit Court of Appeals in discussing the County Budget Law as it applies to the Planning Commission, said:

"* * * The statute in the instant case, however, provides that 'all contracts and purchases' shall be let after competitive bidding. It would be hard to imagine a more inclusive statute. The fact that the Commission Act provides that the commission may make all 'necessary contracts' in no way militates against the requirement of competitive bidding where the contract is in its nature competitive."

The same reasoning would apply to the county collector that applies to the Planning Commission, that is, because the legislature directed the collector to advertise the delinquent lands in no way militates against the requirement of competitive bidding where the contract in its nature is competitive. In the said Buchanan County case cited before, 85 Fed. (2d) 343, l.c. 347, the court further said:

"It is clear in this case that it was the intent of the Legislature of Missouri in enacting the County Budget Law and including therein the requirement that 'all contracts' should be let upon competitive bidding to declare a public policy. That such a policy is

wise is evidenced by the universality of such statutes found in the laws of Congress and of all the state Legislatures. At any rate, it is for the Legislatures and not the courts to pass upon their wisdom.

As the section that requires competitive bidding also requires adequate appropriation and funds to meet the contract obligation and that the contract bear the certification of the accounting officer so stating, what has previously been said as to the application of the first requirement, viz., competitive bidding, applies equally to the other requirement."*****

By said Section 19 of the County Budget Act, the contract for the printing should be let by the collector in the name of the county, and if the consideration for the contract is in excess of five hundred dollars (\$500.00), it should be advertised for letting in a newspaper with a circulation of at least five hundred copies per issue if there be such.

Section 9952b, Laws of Missouri, 1935, page 403, became effective two years after the County Budget Act, and if the terms of the Tax Act are in conflict with the County Budget Act which was passed in 1933, then under statutory construction, the 1935 Tax Act would be repealed by any portion of the Budget Act which might be in conflict with it and the provisions of the County Budget Act would have to yield to the provisions of the Tax Act of 1935. In the Layne-Western Company v. Buchanan County, Missouri, case, supra, the court also said:

"Finally, the appellant contends that the Commission Act is a special act, and therefore must take preference over the Budget Act, which is general. If there were any repugnancy between the two acts, the contention might have

merit. The Commission Act, however, nowhere says that competitive bidding may be dispensed with in contracts made by the commission. The rule is applicable, therefore, that where statutes are in pari materia they are to be construed as one system and governed by one spirit and policy."
* * * * *

The Tax Act of 1935, under which the collector is to advertise delinquent lands, does not provide that competitive bids shall be taken for the contract for the printing of the lists of delinquent lands. We think the same rule, however, applies to the county collector that applies to the County Planning Commission as stated in the Buchanan County case, supra.

CONCLUSION

This office is, therefore, of the opinion that the county collector, when contracting for the advertising of the lists of delinquent lands for sale for taxes, must advertise for bids covering the printing of such delinquent lists if the cost of printing such lists exceeds the sum of five hundred dollars (\$500.00), and that in the letting of a contract for such printing, he must follow the provisions of Section 19 of the County Budget Act, Laws of Missouri, 1933, pages 340 to 351.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

PENAL INSTITUTIONS -- Intermediate Reformatory inmates entitled to parole hearing after serving seven-twelfths of sentence orderly and peacefully.

June 25, 1938.

Honorable Frank G. Harris, Chairman
Board of Probation and Parole
Jefferson City, Missouri



Dear Governor:

We acknowledge your request for an opinion dated June 23, 1938, which reads as follows:

"Section 8477, R. S. of Missouri, 1929, relating to the Intermediate Reformatory at Algoa states as follows:

'Any inmate who should be confined in said reformatory, who shall serve seven-twelfths of the time for which he may have been sentenced in an orderly and peaceable manner, without having any infractions of the rules of the reformatory or rules of the same recorded against him, shall be eligible for making application for parole and shall be given a hearing for parole.'

"I would be pleased to have your opinion as to whether or not the section of which the quotation is a part was repealed by the Probation and Parole law passed at the last Legislature. In other words, I desire to have your opinion as to whether or not we, in our hearings and the granting of paroles at Algoa are bound by the part of the section of the statute above quoted."

Laws Mo. 1937, page 400, Section 2, reads as follows:

"There is hereby created and established a Board of Probation and Parole. The powers and duties relative to paroles, commutations of sentence, pardons, and reprieves, now vested in the Commissioners of the Department of Penal Institutions and the Intermediate Reformatory Parole Board are hereby vested in the Board created and established by this Act. Said Board shall be deemed a continuation of the Department of Penal Institutions and the Intermediate Reformatory Parole Board in so far as the Commissioners of that Department and the Intermediate Reformatory Parole Board are empowered to act in relation to investigations, paroles, commutations of sentence, and pardons, and all matters pending before such Commissioners and the Intermediate Reformatory Parole Board in connection with paroles, commutations of sentence, and pardons shall be carried on and completed by the Board created in this Act."

Laws Mo. 1937, page 403, Section 11, reads as follows:

"All Acts and parts of Acts in conflict herewith are hereby repealed."

CONCLUSION

Section 8477, R. S. Mo. 1929, as quoted in your request, is still the law, unless it be in conflict with

Hon. Frank G. Harris

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June 25, 1938

the provisions of the 1937 probation and parole laws.

Section 8477, supra, was intended to favor orderly and peaceful inmates of the Intermediate Reformatory with a statutory right to a parole hearing before the Parole Board after completing seven-twelfths of a sentence. In our opinion there is no provision in the 1937 probation and parole laws which conflicts with the statutory right given to inmates of the Intermediate Reformatory who qualify, and we believe the present Parole Board is legally bound to give such qualified inmates a parole hearing after completion of seven-twelfths of their sentence. This is a legislative favor for good behavior.

Very truly yours

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

PENAL INSTITUTIONS -- Parole Board may investigate and recommend for a parole at any time after sentence is pronounced and before sentence is finally completed.

July 5, 1938.

Honorable Frank G. Harris, Chairman
Board of Probation and Parole
Jefferson City, Missouri



Dear Governor:

We acknowledge your request for an opinion dated June 28, 1938, which reads as follows:

"Section 8477, R. S. of Missouri, 1929, relating to the Intermediate Reformatory at Alcoa, states as follows:

'Any inmate who should be confined in said reformatory, who shall serve seven-twelfths of the time for which he may have been sentenced in an orderly and peaceable manner, without having any infractions of the rules of the reformatory or rules of the same recorded against him, shall be eligible for making application for parole and shall be given a hearing for parole.'

"Keeping in mind, of course, the 1937 Act of the Legislature relating to probation and parole, I would be pleased to have your opinion as to whether or not the Board of Probation and Parole created under the new act is authorized to give to an applicant for parole confined at Alcoa a hearing and a recommendation for parole at any time before applicant has served seven-twelfths of the time for which he may have been sentenced."

Laws Mo. 1937, page 400, Section 2, reads as follows:

"There is hereby created and established a Board of Probation and Parole. The powers and duties relative to paroles, commutations of sentence, pardons, and reprieves, now vested in the Commissioners of the Department of Penal Institutions and the Intermediate Reformatory Parole Board are hereby vested in the Board created and established by this Act. ** "

Laws Mo. 1937, page 402, Section 5, reads as follows:

"The Board of Probation and Parole shall have authority and it shall be its duty to study prisoners committed to State correctional and penal institutions to select prisoners to be recommended to the Governor for parole, commutation of sentence, or pardon; *** The Board may adopt rules and regulations relative to the eligibility of prisoners for parole. *** "

Laws Mo. 1937, page 403, Section 10, reads as follows:

"Upon request of any peace officer or upon its own motion, the Board may make an investigation of any person convicted of a felony for the first time for the purposes of probation before execution of sentence and may make recommendations concerning probation to the trial court or the judge thereof, the Board, and the Governor. *** "

Laws Mo. 1937, page 403, Section 11, reads as follows:

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" All Acts and parts of Acts in conflict herewith are hereby repealed."

CONCLUSION

Section 8477, R. S. Mo. 1929, as quoted in your request, is not in conflict with the provisions of the 1937 probation and parole law, and it is our purpose to construe said Section with the 1937 probation and parole law, so that both be given force and effect.

In our opinion to you of June 25, 1938, we held that pursuant to Section 8477, supra, there is a legal duty upon the present Parole Board to give qualified Intermediate Reformatory inmates a parole hearing after they have completed seven-twelfths of their sentence.

The Board of Probation and Parole, under the 1937 Act, although empowered to make rules on eligibility of prisoners for parole, cannot legally make a Board rule in conflict with this Legislative seven-twelfths rule, which favors orderly and peaceful Reformatory inmates. Construing the 1937 law, supra, together with Section 8477, supra, the Board of Probation and Parole is under no legal restraints by virtue of Section 8477, supra, from investigating at any time before execution of sentence, the case of any person sentenced to the Intermediate Reformatory, for the purpose of recommending probation. The Legislature has provided that the Board's investigating and recommending jurisdiction begins on sentence. This means that the Board's investigating and recommending powers start even before incarceration in the Reformatory, and said powers continue at all times until the sentence is finally and completely executed. The Legislature, by the 1937 Act, intended such procedure by the language of the Act, and the Legislature intended the repeal of any procedure contrary to the language of said Act.

We are not holding that Section 8477, supra, is repealed, as we believe our construction of Legislative intent reasonably shows that there is no repugnancy in the law.

Respectfully submitted

APPROVED:

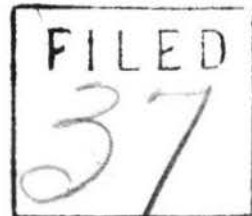
WM. ORR SAWYERS
Assistant Attorney General

ELECTIONS: Voters may write in on their ballot names of a committeeman and committeewoman and may designate the election district for which such committeeman and committeewoman are being selected, even though there is no space left on the ballot for such offices.

July 28, 1938

7-29

Hardin
Jackson County
Board of Election Commissioners
Court House
Independence, Missouri



Gentlemen:

This will acknowledge receipt of your inquiry of the 27th which reads as follows:

"Our Board of Election Commissioners has a copy of an opinion given by your Mr. Harry H. Kay, dated June 17, 1938, addressed to Mr. Hampton Tisdale of Boonville, Missouri. This opinion was in response to a request to interpret Section 10278, R. S. of Missouri, 1929.

"This opinion holds that -- 'Each ward in an incorporated city is entitled to one committeeman and one committeewoman on the County Committee and in addition to these the territory of a township lying outside of such incorporated city or cities and within the township is entitled to one committeeman and one committeewoman on the County Committee.'

"In Jackson County (outside of Kansas City) it has been the custom in the past to elect

a committeeman and a committeewoman from each township, but none for each ward of incorporated towns. Our tickets as printed to be used in the Primary Election next Tuesday have printed on them the candidates for County Committee in each township and a line under the candidate's name that a voter may write in another name for the office (and scratch the printed name) if he desires.

"It has recently been reported to members of our Board that at the coming Primary Election voters, under instructions from party workers, will write at the foot of the ballot used in the various wards of Independence and of other incorporated towns of the County and the names of a man for committeeman and a woman as committeewoman and designate under the name that they are voting for such names as committeeman and committeewoman for a certain ward. For instance, a voter in the First Ward of Independence will write on the ballot 'John Doe, as Committeeman for First Ward, Independence, Missouri.' Writing not only the name, but the office on the ballot. We enclose a sample ballot.

"Our Board would like to have your opinion as to whether the Judges of Election should count the votes for such offices so written on the ballot as above specified and should the Board then certify them.

"Also, in Jackson County we have two towns, Levasy and Grain Valley, that are incorporated, but not divided into wards. In your opinion, would such a town be entitled to elect a committeeman and a committeewoman on the County Committee.

"We have talked to Mr. Harry H. Kay of your office by phone this morning and advised him of

the situation here and of the fact that we are sending this letter.

"The Judges and Clerks under our supervision are to meet here in independence on Saturday evening of this week and we should like very much to have your opinion in this matter by Saturday morning if possible."

Reference is made in your letter to an opinion rendered by this office giving our interpretation of Section 10278, R. S. Mo. 1929. Said latter section reads as follows:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county, or in the case of a city not within the county, of the city of which such voting precinct, or district is a part: Provided, that any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot, or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 10257, R.S. 1929. (Laws 1923, p. 197, section 1.)"

It will be seen that the above section of the statutes distinctly gives the right to each voter to write in the space left on the ballot for that purpose the names of a man and a woman for committeeman and committeewoman for such voter's voting district. Said section also provides that the man and the woman receiving the highest number of such votes in such election district shall be the members of the party committee of that county.

July 28, 1938

In the opinion from this office to which you make reference, being the opinion dated June 17, 1938, addressed to Mr. Hampton Tisdale, Boonville, Missouri, we pointed out that Section 10284 defined "precinct" and "election districts" to be wards of incorporated cities and the part of townships lying outside of such incorporated cities.

The question presented by your recent inquiry amounts to asking whether voters can be deprived of their right to vote on a committeeman and committeewoman from their respective wards or townships by reason of the fact that the officials who prepare the printed ballots do not leave a blank space for that particular office on the ballot. It has been held that members of a party committee are officers. (State ex rel v. Hamilton, 240 S.W. 445.) Therefore, in view of Section 10278, these particular officers are to be voted on at the primary election. This fact is known to the authorities who prepare printed ballots for such primary election, since they are presumed to know the law touching such elections. Each voter has a statutory right to vote for such officers at the primary, and your inquiry narrows down to the question of whether the failure of the election officials who prepare the ballots to leave a blank space for writing in the name of such officers (party committeemen) deprives the voters of their right to cast their ballot for their choice of such officer.

We think the rules to be applied in construing Section 10278, as well as any other statute relating to elections, has been announced in the case of Nance v. Kearbey, 251 Mo., 1.c. 383-4 in the following language:

"Election laws must be liberally construed in aid of the right of suffrage. (State ex rel. v. Hough, 193 Mo. 1.c. 651; Hale v. Stinson, 198 Mo. 134.) The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors. (Stackpole v. Hallahan, 16 Mont. 40.) The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious, because of a disregard of mandatory statutory safeguards.

"The uppermost question in applying a statutory regulation to determine the legality of votes

cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. (Gass v. Evans, 244 Mo. 1.c. 353; Hehl v. Guion, 155 Mo. 76.) 'Such a construction' (says this court, speaking through BARCLAY, J., in Bowers v. Smith, 111 Mo. 1.c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other. (Wells v. Stanforth (1885), 16 Q. B. Div. 245.)' Again (pp. 61-2): 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. (Ledbetter v. Hall (1876), 62 Mo. 422.) In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial.'"

The same principle is found in 20 C.J. 152, in the following language:

"Since electors cannot be disfranchised because of the neglect of the officers charged with the duty of preparing the ballots, technical errors on the part of an officer charged with the preparation of official ballots will not destroy the efficacy of the ballots nor invalidate the election, unless the statute expressly makes a specified irregularity fatal."

In view of the above rules, it is clear that to say that voters could not exercise the rights given to them by Section 10278 to vote for party committeemen in their respective election

July 28, 1938

districts because the printed ballots did not have a space left on them for that particular office, would be to hold that large bodies of voters would be disfranchised because of an error of the election officials, and such a holding is not warranted by the law. The statute in question gives the voter the right to write in on his ballot his choice for committeeman and committeewoman for his particular election district. It would seem, therefore, that if the voter writes in his choices on the ballot and designates for what office they are his choices, election officials would be obligated to count such votes. If a liberal construction is to be given this statute, which must be done in view of the holding in *Nance v. Kearbey*, supra, then it follows that where a voter clearly expresses his intention by writing in on his ballot the name of his choices for committeeman and committeewoman of his election district, such vote should be counted. There could be no question in such case about the intention of the voter. He would clearly express his intention by actually writing out on his ballot the name of his choice and the office for which he is making his choice. It would seem that such an action by the voter would more clearly express his intention than filling out a blank with the name of the office printed under it. Since the ultimate purpose of all elections is to ascertain the choice of the voters, then we think that where the choice is expressed as clearly as it would be in the instance you inquire about, the votes should be counted.

As to the other inquiry about the rights of towns which are incorporated but are not divided into wards, we think the statute is clear. There is nothing in the statute which says or even intimates that a city or town is entitled to a committeeman and committeewoman. The unit which is entitled to representation on the county committee is an election district which is defined by Section 10284 to be a ward of an incorporated city or a township outside of such city.

CONCLUSION

It is, therefore, the opinion of this office that if voters write in on their ballot the names of a man and a woman for committeeman and committeewoman and designate under or in

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connection with said names that they are the choice of such voter for committeeman and committeewoman of the ward in which such voter resides, the judges of election should count the votes for such officers so written on the ballot and should certify the results of such a count; and if a voter lives in a ward of an incorporated city and no blank space has been left on the ballot marked for committeeman and committeewoman of the ward of such voter, then the voter may write in on the bottom of said ballot or at any other place on said ballot the names of a man and a woman and designate under or near their names the words of "committeeman, Ward No. _____, Independence," or "committeewoman, Ward No. _____, Independence," or other words which will show for what office the voter is making his selection. It is also the opinion of this office that incorporated towns which are not divided into wards are not entitled to have a committeeman and committeewoman elected therefrom to serve upon the county committee.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

HHK/w

ELECTIONS -- Temporary absence with continuous intention to return will not deprive persons of their residence even though they have no particular spot which they call "home."

September 16, 1938

Honorable John H. Hardin, Chairman
Board of Election Commissioners
Jackson County
Independence, Missouri



Dear Sir:

We wish to acknowledge your request for an opinion, wherein you state in part as follows:

"Will you kindly give our Election Board an opinion on the following questions touching our Election laws:

"FIRST: A man and wife who own a home in a certain precinct are registered as voters therefrom, but leave the home for employment elsewhere. They continue on the registration books and vote by mail. Later the home is lost by foreclosure sale so that they have no tangible place in the precinct as a domicile or residence. They still intend and desire to continue as residents of the precinct. Are they rightfully on the registration books or should the names be stricken from the books?"

Section 10178, R. S. Mo. 1929 provides the qualifications of voters in part as follows:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers

to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides:
*** "

Section 18, Laws Mo. 1937, p. 304, relating to registration of voters in all cities of 300,000 to 700,000 inhabitants, which includes Kansas City, Missouri, and to which we assume your facts refer, declares who shall be entitled to vote as follows:

"Who shall be entitled to vote.--

Every citizen of the United States who is over the age of twenty-one years, who has resided in the state one year next preceding the election at which he offers to vote, and during the last sixty days of the time shall have resided in the city where such election is held, who has not been convicted of bribery, perjury or other infamous crime, or of a misdemeanor connected with exercise of the right of suffrage, nor while kept at any poorhouse or other asylum at public expense except soldiers and sailors homes or hospitals, nor while confined in any public prison, shall be entitled to vote at such election, for all officers, state or municipal, made elective by the people, or at other elections held in pursuance of the laws of the state, but shall not vote elsewhere than in the precinct where his name is registered, and whereof he is registered as a resident."

20 C. J., Section 28, page 71, declares the following rule with respect to change of residence:

"In order to work a change of residence there must be both in fact and intention an abandonment of the former residence and a new domicile acquired by actual residence, coupled with an intention to make it a permanent home. Thus an absence for months or even years, if all the while the party intended it as a mere temporary arrangement, to be followed by a resumption of his former residence, will not be an abandonment of such residence or deprive him of his right to vote thereat, the test being the presence or absence of the animus revertendi. *** "

In the instant case, the facts reveal that there never was an intention on the part of the husband and wife to abandon their former residence. By force of circumstances they were required to leave their home in search of work, and subsequently lost their property by foreclosure. They desire to continue as residents and vote in the precinct in which they were registered. Can it be said that by reason of their temporary absence and the fact that there is no particular spot in the precinct which they can now call "home", that their names must be stricken from the registration books?

We have made an extensive search of the authorities and have found few cases in point. The court, in the case of Ison vs. Watson, 183 S. W. (Ky.) 468, 1.c. 469, was considering an election contest, and made the following statement with respect to the temporary absence of voters:

"While there is evidence to the effect that both James Smith and Nathan Osben were absent from the subdistrict for quite a while, it appears from their evidence and the evidence of other witnesses that they always claimed their homes in the subdistrict in question; that they were

absent for temporary purposes only and always had the intention of returning to the subdistrict. We conclude that they had the right to vote."

The case of *In re Rooney*, 159 N. Y. S. 132, 1.c. 136, dealt with a cemetery caretaker who, although he owned the premises from which he registered, did not occupy same, but rented same to a tenant. He had moved with his family to a house furnished by the cemetery association, and the court, in holding that since he did not intend to make the cemetery his home, his former domicile continued his residence, said:

"So far as John Donohue is concerned, he appears to have been the owner of the premises from which he registered, although they were occupied at the time by a tenant. He formerly resided at this place, and it may be fairly inferred from his testimony that he still regarded the premises at 445 Sixth avenue, Watervliet, as home. He says that he had voted from these premises for 20 years or more; that he did not hardly think it was right to vote in Colonie; it was too far from home: 'it was more to home than where I was.' At the time of his registration he was the caretaker of a cemetery in the town of Colonie, and occupied the caretaker's house within the cemetery grounds. It may be assumed that he did not intend to make the cemetery his permanent home; that he intended to remain there only so long as his job as caretaker should continue, for upon the termination of that employment the cemetery association would require the house for his successor. If this was the situation, and nothing different appears in the record, then he would not be deemed to have gained a residence in the cemetery at Colonie. He had a residence in Watervliet; he owned the property which had been his legal residence,

and, having once had a residence, he could not lose it until he had gained a new one, for a man can have but one residence in the sense of a domicile (Cincinnati, Hamilton & Dayton R. R. Co. v. Ives, 3 N. Y. Supp. 895; Bell v. Pierce, 51 N. Y. 12, 17), and the law does not recognize the possibility of a man being without a domicile."

In the case of Smith vs. Thomas, 52 Pac. (Cal.) 1079, 1.c. 1080, the court, in holding that a woodchopper who had no home, but who had made a particular place in a ward his home whenever in town or out of work, and who never voted in any other place for eleven years, was a legal voter in such ward, said:

"The remaining error claimed by appellant is in the finding 'that one George Phoebus voted at said election in the Third ward precinct, but said Phoebus was a legal voter therein at said time, and voted for the defendant for the office of supervisor.' The only testimony as to this vote was given by Phoebus himself. He testified in part as follows: 'Whenever I came into town, I had one certain place to go to. I went there whether I had money or not. I made that my home. That was the Noel Place *** I registered in the Third ward. *** I never voted anywhere else than in Visalia for eleven years. *** I never voted any place except in the Third ward in any years. *** I have been a wood chopper for eleven years. *** When I was out of a job, I came back to Visalia, and went to Noel's to live. That has been my practice for over five years. *** I took contracts. At the present time I am cutting by the cord. *** I voted there (in the Third ward) because I

considered I lived there. I intended to make Noel's my home. *** I have been sick at Noel's three different times. If I got sick in the country, I was always taken to Noel's. I considered it the only home I had.' We think the evidence was sufficient to justify the finding of the court as to this voter. He belongs to a class of persons whose place of residence must be deemed to be in the city, town, or village, where they choose in good faith to establish it. Because this voter has not a home, such as wife and children can give, he should not be deprived of rights of the highest value to the citizen. The judgment is affirmed."

The closest case in point that we have been able to find is Langhammer vs. Munter, 31 Atl. (Md.) 300, 1.c. 301, which was an appeal from an order of the court of common pleas of Baltimore, dismissing the petition of appellant praying that the names of James Bosley and Charles Williams be stricken from the registry of voters of the fifth precinct of the first ward of Baltimore city. The testimony of a witness who resided at the place Bosley had stated as his residence in the ward and district, was that neither of the alleged voters had ever lived there, but that he knew them, and had at their request permitted them to sleep on various occasions in the kitchen. The court, in holding that a voter need not have any particular spot which he calls home, provided he makes his residence (in the sense of having no other home) anywhere or in however many places, for the required times, within the limitations of the state and voting district, said:

"That section prescribes, as the qualification of a voter, that he shall be a resident of the state for one year, and a resident of the district six months. There is no requirement that the proposed voter shall have some particular spot which he calls his home, provided he makes his home (in the sense

of having no other home) anywhere, or in however many places, for the required times, within the limits of the state and the voting district. Probably, it was borne in mind that numbers of citizens, through misfortune or otherwise, were without dwelling places, but there is no evidence to be found in any part of the constitution that these were to be denied the privilege of the elective franchise."

From the foregoing, we may conclude that temporary absence, with a continuous intention to return, will not deprive persons of their residence though it extends over a period of time, and this is true even though they have no particular spot which they call "home" when they return, provided they make their residence (in the sense of having no other home) anywhere or in however many places within the limits of the state and voting precincts from which they registered as voters.

Under the above circumstances, we are of the opinion that the names are rightfully on the registration books.

Your second question reads as follows:

"If a voter is challenged as to party affiliation in a Primary Election and makes the affidavit required by law, should such affidavit be written or printed and signed by the voter? Also, can such affidavit be kept and produced by the judges at the following general election and the elector be required to vote in accordance with his affidavit formerly made?"

In answer to the above question, we are enclosing copy of an opinion rendered by this department under date of July 29, 1938 to the Honorable Lloyd C. Stark, Governor of Missouri, wherein we held that a verbal oath meets the full requirement of the statute when a voter is challenged, and that there is no provision in the law requiring any voter

Hon. John H. Hardin

-8-

September 16, 1938

to sign an affidavit. Any attempt by the judges to determine whether an elector has voted in accordance with his former affidavit would of course violate Article VIII, Section 3 of the Missouri Constitution, which provides for secrecy of the ballots.

Your third question is as follows:

"If a voter requests the judges of election to assist him in preparing his ballot because he is not sufficiently informed or instructed so that he can properly prepare it himself, should he be required to declare under oath that he 'cannot read or write, or that by reason of physical disability he is unable to mark his ballot' (Sec. 10313, Rev. St. 1929)? "

In answer to your third question, we enclose copies of opinions rendered under date of March 15, 1938 and March 19, 1938, to the Honorable W. W. Graves, Prosecuting Attorney of Jackson County, Kansas City, Missouri, wherein we held that the oath required of a voter under Section 10313, R. S. Mo. 1929 meant an oral oath, and that the voter could inform the judges of election in any manner he chooses, how he wants his ballot prepared.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:FE
Enc.

ELECTIONS: Judges of election in Jackson County can change address of registered voters on election day when such voter moves to another address in same precinct.

November 3, 1938



Jackson County Board of
Election Commissioners
Court House
Independence, Missouri

Gentlemen:

We have received your letter of October 3, 1938, requesting an opinion from this Department, which letter reads as follows:

"Please give us your opinion as to whether judges of Election on Election day, should erase the former address of a voter and insert the new on the registration, where the voter has changed his residence within the same precinct (See third Subdivision of Sec. 10504 R. S. 1929).

"Some workers here are insisting that under the latter part of Section 10517 all changes of registration shall be made in the presence of the Board of Election Commissioners. We think 'Such changes of registration' mentioned in this Section do not include change of address within the same precinct."

The population of Jackson County as shown by the last decennial census is 470,454. Therefore, registrations and elections in said county are governed by the provisions of Article XV, Chapter 61, R. S. Missouri 1929.

Section 10504 contained in said article, provides in part as follows:

"Third: Each voter shall vote only in the precinct in which he or she resides and is registered, but if a change of residence is made in the same precinct such voter, at the time of voting shall designate such change and be allowed to vote, if said judges are satisfied that such voter has not moved out of the precinct and shall request the judges and clerks at the time he or she offers to vote to erase the former address and insert the new, and, if required by said judges, shall make oath that such change of residence has been made in good faith."

This section is applicable when the voter moves to another address in the same precinct in which such voter is properly registered. The judges of election are by this statute specifically authorized to change the address on the registration books when such voter presents himself for the purpose of voting on election day.

Section 10517 which you mention in your letter, and which is also contained in Article XV, is not in conflict with Section 10504. Section 10517 reads as follows:

"If, on any one of the days of registration, any registered voter who has moved in the same precinct appears to have his residence number or postoffice address corrected, the judges shall make the correction by drawing a line through the old address and writing the new address in the space provided for that purpose. If any voter who has registered in one precinct shall remove to another at any time before Wednesday next preceding the election at which he or she desires to vote or if such voter shall appear before the board of election commissioners or the clerk thereof at any time before said Wednesday and declare his or her intention to move and be

domiciled in another precinct on election day and shall request a change of registration and a certificate thereof, it shall be the duty of the board of election commissioners to allow such change of registration to be made by having the voter enter his or her name on the registry of the precinct to which such change is made or is to be made and to erase the name from the registry in the precinct from which such voter removes by drawing a red line through the name and noting in some appropriate way that the change has been granted and certificate issued. The board of election commissioners shall thereupon issue to such voter a certificate in appropriate terms allowing such change giving the number of precinct from which the voter removes and the number of the precinct to which removal is made and when such voter offers to vote in the precinct to which he or she shall remove he or she shall present such certificate of removal to the judges if by them required before being allowed to vote. All such changes of registration so made after the close of the regular registration shall be made in the presence of the board of election commissioners or a majority of them and attested at the end thereof by such board of election commissioners before the registration books are delivered to the election judges in same manner as attestation is required of the judges by section 10516. After such change is made such voter shall cease to be a registered voter of the precinct in which he or she shall have first registered and shall become a registered voter entitled to vote in the precinct to which removal is made."

The first sentence of the above statute deals with the change of address of any registered voter within the same precinct. It says that if a registered voter appears on any one of the days of registration to have his residence number or postoffice address corrected, the judges shall make the correction "by drawing a line through the old address and writing the new address in the space provided for that purpose." In other words, the registered voter may follow this procedure in changing his address in the same precinct, if he so desires, and in that event the judges are required to make the changes. This part of the section applies in such a situation "if, on any one of the days of registration" such registered voter shall present himself for that purpose.

Section 10517 then proceeds to outline the procedure in the event such registered voter moves from the precinct in which he is registered to an entirely different precinct. The statute then provides that all "such changes" of registration so made after the close of the regular registrations shall be made in the presence of the Board of Election Commissioners, or a majority of them, and attested by the Board before the registration books are delivered to the election judges. The next and last sentence in the statute then provides that after "such change" is made such voter shall cease to be a registered voter of the precinct in which he or she shall have first registered and shall become a registered voter entitled to vote in the precinct to which removal is made. The way the legislature used the terms "such changes" and "such change" it is quite apparent that it was referring only to changes of address from one precinct to another. If this is not the proper construction why should the last sentence of the statute recite that after "such change" the voter would be a registered voter only in the precinct "to which removal is made".

The voter who merely moves to another address in the same precinct does not cease to be a registered voter in the precinct in which he first registered and he does not thereby become a registered voter in another precinct. The term "such change" as used and intended in the statute does not in our opinion refer to a change of address in the same precinct.

November 3, 1938

The effect then of Section 10517 is that if a registered voter shall move into a new and different precinct after the close of the regular registration only the Board of Election Commissioners, or a majority of them, can effect such change. This for the reason that the election judges on election day cannot add new names to the registration lists. The election judges are specifically authorized by Section 10504 to "erase the former address and insert the new" in the same precinct on election day. The judges are not, however, thereby adding a new name to the registration list in the precinct or changing said list in any way, except the address of the particular voter, since such voter is already properly registered as a voter in the precinct and his name is on the list given the judges by the election commissioners.

CONCLUSION

The judges of election in any precinct in counties containing 150,000 or more inhabitants and governed by Article XV of Chapter 61, R.S. Missouri 1929, are authorized to permit any registered voter who has changed his residence to another residence in the same precinct to vote, and such judges are also authorized to erase the former address and insert the new. Section 10504 R.S. Missouri 1929, provides for this procedure if the judges are satisfied that such voter has not moved out of the precinct. It is not necessary for a registered voter to appear before the Board of Election Commissioners in order to accomplish a change in address in the same precinct.

Respectfully submitted,

APPROVED:

J. F. ALLEBACH
Assistant Attorney General

J. W. BUFFINGTON
(Acting) Attorney General

JFA:MM

OFFICERS:
SALARIES AND FEES:

Salaries of clerks of circuit courts
and ex-officio recorder of deeds in
certain counties.

December 22, 1938

Mr. Fred W. Harvey
Clerk of the Circuit Court
Knox County
Edina, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an official opinion based upon the following letter:

"May I have your opinion as to pay commencing Jan. 1939 for circuit clerk and ex-officio recorder in counties having a population of over 7500 and less than 10,000. Also as to Clerk of Juvenile Court in same."

The salaries of clerks of circuit courts and ex-officio recorder of deeds are fixed by Section 11786, Laws of Missouri, 1937, page 445, which is as follows:

"The Clerks of the Circuit Courts of this State shall receive for their services annually the following sum: In counties having a population of less than seven thousand five hundred persons, the sum of twelve hundred (\$1200) dollars; in counties having a population of seven thousand five hundred persons and less than ten thousand persons, the sum of fifteen hundred (\$1500) dollars; in counties having a population of ten thousand persons and less than fifteen thousand persons,

the sum of seventeen hundred (\$1700) dollars; in counties having a population of fifteen thousand persons and less than seventeen thousand five hundred persons, the sum of nineteen hundred (\$1900) dollars; in counties having a population of seventeen thousand five hundred persons and less than twenty thousand persons, the sum of twenty-one hundred (\$2100) dollars; in counties having a population of twenty thousand persons and less than twenty-five thousand persons, the sum of twenty-three hundred (\$2300) dollars; in counties having a population of twenty-five thousand persons and less than fifty thousand persons, the sum of twenty-five hundred (\$2500) dollars; in counties having a population of fifty thousand persons and less than seventy-five thousand persons, the sum of thirty-six hundred (\$3600) dollars; in counties having a population of seventy-five thousand persons and less than one hundred fifty thousand persons, the sum of four thousand (\$4000) dollars; in counties having a population of one hundred fifty thousand persons and less than four hundred thousand persons, the sum of five thousand (\$5000) dollars; Provided, that in any county wherein the Clerk of the Circuit Court is ex-officio Recorder of Deeds, said offices shall be considered as one for the purpose of this Section: Provided, it shall be the duty of the Circuit Clerk, who is ex-officio Recorder of Deeds, to charge and collect for the county in all cases every fee accruing to his office as such Recorder of Deeds and to which he may be entitled under the provisions of Section 11804 or any other statute, such Clerk and ex-officio Recorder shall, at the end of each month, file with the County Clerk a report of all fees charged and accruing to his office during such month, together with

the names of persons paying such fees. It shall be the duty of such Circuit Clerk and ex-officio Recorder of Deeds, upon the filing of said report, to forthwith pay over to the County Treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the County Clerk, and every such Circuit Clerk and ex-officio Recorder of Deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County treasury as herein provided: Provided, further, that the Clerks of the Circuit Courts shall be allowed to retain in addition to the sums allowed in this Section, all fees earned by him in cases of change of venue from other counties; Provided, further, that until the expiration of their present term of office, the persons holding the office of Circuit Clerk shall be paid the maximum amount as now provided by law, in the manner provided by this Act."

You will note that this section places the counties of seventy five hundred (7500) to ten thousand (10,000) in the bracket in which the circuit clerk receives fifteen hundred dollars (\$1500) per annum. This section also provides that in case the circuit clerk is ex-officio recorder of deeds that such offices are considered as one for the purpose of determining the salary of the circuit clerk. You will also note that this section requires the circuit clerk and recorder to report all fees and turn them into the county treasury, that is, the fees which are charged and accrued to his office. This section also authorizes the circuit clerk to retain the fees earned by him in cases of change of venue from other counties. This amount is in addition to the fifteen hundred (\$1500) dollar salary that you shall receive.

In addition to the salary provided in Section 11786, supra, the lawmakers in 1937 provided for circuit clerks to get additional compensation for their service as clerks of the juvenile courts. This is provided by Section 11814a, Laws of Missouri, 1937, page 447. By this section you will note that a county having a population of seventy five hundred (7500) and less than ten thousand (10,000) that the clerk shall receive two hundred (\$200) dollars per annum for his services as clerk of the juvenile court. This section also provides that the salary for services as clerk of the juvenile court shall be in addition to the salary allowed by law for his service as circuit clerk, that is, in addition to the fifteen hundred (\$1500) dollars per annum allowed by Section 11786, supra.

CONCLUSION.

It is, therefore, the opinion of this department that in counties having a population of over seventy five hundred (7500) and less than ten thousand (10,000), that the clerk of the circuit court shall receive a salary of fifteen hundred (\$1500) dollars per annum and two hundred (\$200) dollars per annum as salary of the clerk of the juvenile court, and in addition thereto whatever fees he may collect in cases of change of venue from other counties to the court in which he is clerk.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SOCIAL SECURITY ACT: Interpretation of money payment in
the Federal Social Security Law, Title
1, Section 6

January 21, 1938.

Honorable George I. Haworth,
Administrator,
Social Security Commission,
Jefferson City, Missouri.



Dear Sir:

This will acknowledge receipt of your request
for an opinion from this department under date of January 6,
1938, which reads as follows:

"Under the Federal Social Security Law
(Public #271-74th Congress, Title 1,
Sec. 6) it is provided that 'old age
assistance means money payments to aged
individuals.'

"We would appreciate receiving an opinion
from you as to when a money payment is
made, in other words, does the mailing
of a check to a recipient constitute
money payment, or is it necessary for the
recipient to receive, indorse and cash
such check before it can be construed as
money payment?

"The above question has arisen in connec-
tion with the cashing of assistance checks
of deceased recipient's by their legal
representative. We are advised that
Federal participation in payment to legal
representatives will be allowed on the
basis of the date that the money payment
was made."

1/21/38

It is settled law in this state that in the absence of an agreement to accept a check in payment of a debt or obligation, a check is not considered payment until said check is paid.

48 C. J., Sec. 50, page 617, in part, reads as follows:

"The delivery to, or acceptance by, the creditor of his debtor's check, although for convenience often treated as the passage of money, is not payment, even though the check is certified before delivery, in the absence of any agreement or consent to receive it as payment, or any laches or want of diligence on the part of the creditor, or the negotiation of the check by him."

There are numerous cases supporting this principle of law.

In Groomer v. McMillan, 143 Mo. App. 612, 615, the court said:

"In our opinion this evidence did not show a payment. The law is that the payment, to be effective in avoidance of the Statute of Frauds, must be an absolute payment. But it need not be in money. The buyer's check for the money will suffice if it is received by the seller and agreed that it is an absolute payment; and this must be clearly established. For 'Nothing is better settled than that a check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is just the contrary.'"

In Words and Phrases we find only one decision defining "money payment." That is Wing v. Credit Guide Co., 164 N. W. 627, 181 Iowa, 370, wherein the court said:

"This is not a case coming under the ban of the statute which prohibits the issue of stock for other than a money payment of the subscription, except upon permission given by the state executive council. The money had been paid to or for the corporation, though the stock had not yet been formally issued, and there is nothing in the language or intentment of the statute which forbids recognition by the corporation of payments and expenditures so made in its behalf, or the issuance of its stock to the amount thereof."

There are several principles of law relative to the question found in Corpus Juris. In 48 C. J., Sec. 218, p. 703, we find the following:

"Ordinarily the delivery of the check of the debtor or of a third person will not be presumed to have been accepted as absolute payment of the debt, but the presumption is that it was accepted merely as conditional payment or as collateral security, so that the debt is not discharged until the check is paid to the creditor or some person authorized by him to receive payment."

In 48 C. J., Sec. 38, page 793, we find the following:

"The receipt of a check by a pensioner which he has only indorsed, but which has not been transferred by him in his lifetime, is not a payment, but is only one step in the process of payment."

In First Nat. Bank of Belle Plaine v. McConnell, 103 Minn. 340, 114 N. W. 1129, 14 L. R. A. 616, 1. c. 619, the court said:

"It is well settled that the giving of a check by a debtor for the amount of his indebtedness to the payee is not, in the absence of express or implied agreement

to that effect, a discharge or payment of the debt. The presumption, in the absence of evidence to the contrary, is that the check was accepted conditionally, and the debt is not discharged until the check is paid."

Likewise, in *Tanner v. Turner*, 64 Iowa 690, 691, 21 N. W. 140, the court said:

" * * * the issuance of the check was evidence that the claim was settled. By the issuance the process of payment was initiated, but not consummated. The check was designed to be negotiated to banks or others who would cash the same. The claim was so far settled that a transfer of the check could not be deemed prohibited by the statute."

In Vol. 19 of *Opinions of Attorneys General of the United States*, page 1, l. c. 2, 3 and 4, it was held that receipt by a pensioner of a check for the amount due him on his pension, which was indorsed but not transferred by him in his life-time, is not payment. The opinion, in part, reads as follows:

"The question is thus reduced to, what is a payment to a pensioner in his life-time? In the absence of special contract the presumption is that the payment of an obligation shall be made in money. This presumption applies to a pensioner as well as to any one else. Till he gets his money or that which in law is its equivalent, he is not paid nor is the Government discharged. If he receives a check but never transfers it nor gets the check cashed he has not received his money; for a 'banker's check is not money' (*Chitty on Bills*, 399). If he receives a check and payment is refused he has no right of action against the bank. 'The holder of a bank check can not sue the bank for refusing payment in the absence of proof that it was accepted by the bank or charged against the drawer.'

"The fact that the check was properly drawn on a national bank (a public depository) by an officer of the Government in payment of a public creditor does not alter this general rule, (Bank of Republic v. Millard, 10 Wall, 152). 'The payee of a check before it is accepted by the drawee can not maintain an action upon it against the latter, as there is no privity of contract between them.' So held, where a check of the Treasurer of the United States upon a national bank duly designated as a depository of the public money, having been paid upon an unauthorized indorsement of the name of the payee, suit to recover the amount of the check was brought by its true owner against the bank (First National Bank v. Whitman, 94 U. S., 343). A check, then, until presented, accepted, or marked good by the drawee, is only a personal obligation of the drawer. 'When the United States by its unauthorized officer become a party to negotiable paper they have all the rights and incur all the responsibility of individuals who are parties to such instruments. We know of no difference except that the United States can not be sued.' (United States v. Bank of Metropolis, 15 Peters, 392; and United States v. State Bank, 96 U. S., 30.)

"The United States, then, stands upon the same plane as others who issue negotiable paper, except that the United States can not be sued. The general rule is, if a debtor give his creditor his own promissory note or obligation of no higher order than the original debt, the debt is not thereby paid nor the debtor discharged (Peter v. Beverly, 10 Peters, 567; James v. Hackly, 16 Johns, 277). It is stated by Kent, Chief-Justice, in the People v. Howell (4 Johns, 304), 'unless a check is paid it is no payment.'

1/21/38

"In the case of Burnet v. Smith (10 Foster, 264), it is ruled: 'Until cashed, it (a check) is no payment of a pre-existing debt any more than a promissory note is payment of such debt without an agreement to receive it as such.'

* * * * *

"It is therefore concluded that the receipt of a check by a pensioner, which he has only indorsed but which has not been transferred by him in his life-time, is not a payment but is only one step in the process of payment."

In view of the above and foregoing, it is the opinion of this department that the words "money payment" as used in the Federal Social Security Law (Public #271-74th Congress, Title 1, Sec. 6), providing Federal participation, should not be construed to mean the mailing of the State check to the pensioner or the receipt of said check by the pensioner, but the payment of said check.

Yours very truly,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney General.

APPROVED:

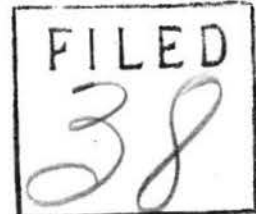
J. E. TAYLOR,
(Acting) Attorney General.

ARR:HR

PENSIONS:

Social Security Commission may appoint someone
to preside at hearings.

February 10, 1938



Mr. George I. Haworth,
State Administrator,
State Social Security Commission,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your request for an
opinion, under date of January 28th, which reads as follows:

"Under Section 16, C.S.S.B. 125, it is provided that aggrieved applicants may appeal to the State Commission in the manner and form prescribed by the State Commission for a fair hearing. It is further provided that the State Commission shall, upon receipt of such appeal, give the applicant reasonable notice of and opportunity for a fair hearing. The State Commission is directed to determine all questions presented by the appeal.

Section 4, under 'Powers and Duties of the Commission', it is provided that the State Commission shall have power "to administer oaths, issue subpoenas for witnesses, examine such witnesses under oath and to make and keep a record of same."

QUESTION: Can an examiner be authorized by the Commission to hold such hearings and transmit transcripts of all evidence adduced at such hearings to the Commission for their determination of all questions presented at the hearing?"

Section 15, C.S.S.B. No. 125, page 475, Laws of 1937, provided the administrator or someone designated by him shall decide whether an applicant is eligible for benefits and to also determine the amount said applicant is entitled to receive.

"Whenever the county office receives an application for benefits an investigation and record shall be promptly made of the circumstances of the applicant by the county office in order to ascertain the facts supporting the application. Upon the completion of such investigation the State Administrator, or some one designated by him, shall decide whether the applicant is eligible for benefits and if entitled to benefits determine the amount thereof and the date on which such benefits shall begin. The Secretary of the County Commission shall notify the applicant of the decision."

Section 16, of C.S.S.B. No. 125, page 475, Laws of 1937, provides for an appeal from the decision of the State Administrator or someone designated by him to the State Social Security Commission and said section reads as follows:

"If an application is not acted upon within a reasonable time after the filing of the application, or is denied in whole or in part, or if any benefits are cancelled or modified under the provisions of this Act, the applicant for pensions or old age assistance, or aid to dependent children, may appeal to the State Commission in the manner and form prescribed by the State Commission. The State Commission shall upon receipt of such appeal give the applicant reasonable notice of and opportunity for a fair hearing. The State Commission shall determine all questions presented by the appeal. Any applicant aggrieved by the action of the State Commission in the denial of benefits in passing upon the appeal to the State Commission may appeal to the circuit court of his or her judicial circuit within

ninety days from the decision appealed from, by giving the State Commission notice of such appeal. Such appeal shall be tried in the circuit court de novo on the sole question of whether the applicant is entitled to benefits and not as to the amount thereof, and the circuit clerk shall notify the State Commission of such decision. If the judgment be in favor of the applicant, a certified copy of same shall be mailed to the State Commission. Appeals may be had from the circuit court as in civil cases."

The above section clearly states the procedure in case said applicant decides to appeal from the decision of the Administrator or someone designated by him.

Section 16, supra, further requires the State Commission to give the applicant reasonable notice of and opportunity for a fair hearing. A fair hearing has been defined by the courts as an opportunity to be present and present testimony in support of his cause and to meet testimony presented against him.

Volume 29, C.J., page 284, Section 2, defines a hearing as follows:

"The receiving of facts and arguments thereon for the sake of deciding correctly."

In Ex Parte Petkos 212 Federal 275 - 277, the court said:

"Fair hearing of an alien's right to enter the United States means a hearing before the immigration officers in accordance with the fundamental principles that inhere in due process of law, and implies that the alien shall not only have a fair opportunity to present evidence in his favor, but shall be apprised of the evidence against him, so that at the conclusion of the

hearing he may be in a position to know all the evidence on which the matter is to be decided, it being not enough that the immigration officials meant to be fair."

A general principle of law is that only ministerial duties can be delegated to someone else to perform and no duty which requires discretion may be delegated.

The State Social Security Commission, therefore, can only delegate such acts required by them to perform as are ministerial. If any act required to be performed by the Commission requires any discretion on the part of said Commission, then this power cannot be delegated by them.

Mechem on Public Officers, Section 567, page 368, in part reads as follows:

"It is a well settled rule, in the case of private agents, that where the execution of the trust requires, upon the part of the agent, the exercise of judgment or discretion, its performance can not, in the absence of express or implied authority, be delegated to another. In such cases it is presumed that the agent was selected because his principal desired and relied upon the agent's personal judgment and discretion, and, unless authority to delegate it be expressly or impliedly given, the agent can not entrust the performance to another to whom the principal may be, perhaps, a stranger, and in whom he might not be willing to confide.

This rule applies also to public officers. In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his

place has been given to him, he can not delegate his duties to another.

The applicability of the principle would be obvious in the case of judges of courts, who clearly could not be permitted to delegate or farm out their judicial duties to others, but it applies as well to all cases in which judicial and discretionary power is to be exercised. Thus the power to fix and to admit to bail is a judicial one which can not be delegated.

It is also frequently invoked in the case of municipal boards and officers. Wherever these boards and officers are vested with discretion and judgment, to be exercised in behalf of the public, the board or officer must exercise it in person and can not, unless expressly or impliedly authorized to do so, delegate it to others. * * * * *

Section 568, page 370, provides mechanical and ministerial duties may be delegated and reads in part as follows:

"Where, however, the question arises in regard to an act which is of a purely mechanical, ministerial or executive nature, a different rule applies.*.*.*"

Volume 46, C.J., Section 303, page 1036, makes a distinction between ministerial and discretionary duties.

"A ministerial duty is a simple and definite duty imposed by law, arising under conditions admitted or proved to exist, and regarding which nothing is left to discretion. If the prescribed duty is definite and precise, it is none the less ministerial because the person who is required to perform it may have to satisfy himself of facts which raise the duty or are collateral to its performance, or because he is per-

mitted a choice of methods or instrumentalities in its decision. An act which requires the exercise of judgment in its performance, or an act which an officer may, or may not, do in the exercise of his official discretion, is not ministerial, but discretionary. A discretionary duty may be executive or judicial, according to the nature of its subject matter."

In *State vs. Toliver*, 287 S.W. 312, 1.c. 316, it was held the county court had certain discretionary duties to perform in appointing another justice of the peace. The court said:

* * * "Thus the situation provides for the exercise of a discretion on the part of the county court. An act which an officer may do or may not do, in the exercise of his official discretion, cannot be considered a ministerial act.

It is not necessary to lengthen this opinion further in the consideration of cases. We hold that the act of making the appointment of respondent necessarily involved a finding by the county court that such a state of facts existed as to authorize it to appoint an additional justice of the peace, including the finding that two additional justices of the peace had not already been appointed, or if they had previously been appointed, that both were not qualified and acting at the time." * * * * *

Section 3, C.S.S.B. No. 125, page 469, Laws of Missouri, 1937, in part reads as follows:

*** "Each Commissioner shall receive no salary or other compensation, but shall be paid his traveling expenses and other necessary expense in the performance of his duty, to be paid out of funds appropriated for use of the State Commission."

Section 8, C.S.S.B. No. 125, page 472, Laws of Missouri, 1937, in part designates the number of commissioners required to constitute a quorum.

* * * "Three members of the State Commission shall constitute a quorum for the transaction of business and for the exercise of any of the powers and the discharge of any of the duties now or hereafter authorized or imposed by law."

One of the cardinal rules of construction is to determine the intention of the legislature. *Wallace vs. Woods*, 102 S. W. (2d), 91.

Another fundamental rule of construction is that all facts of an act should be construed together and harmonized if possible. In *Re: Rosings Estate*, 85 S.W. (2d), 495; 375 Mo. 544.

Section 16, *supra*, does not specifically require the Commission to appear in person and hold these hearings, but requires a fair hearing in the manner and form prescribed by the Commission and further that the Commission shall determine all questions presented by the appeal. In view of the above and foregoing, the requiring of three commissioners to constitute a quorum, the Commission shall act without compensation other than their actual expenses incurred in the performance of their duties requiring the Commission to prescribe the manner and form of these appeals and that they shall determine all questions presented by the appeal. We are of the opinion that the General Assembly, in enacting C.S.S.B. No. 125 never intended the State Commission should be actually present and hear each and every hearing on appeal.

In our opinion the State Commission cannot delegate any discretionary power vested in them; also that the authority vested in them to determine all matters presented at the hearing is discretionary. We are further of the opinion the holding of the hearing does not in itself constitute a discretionary power, but is more in the nature of a ministerial duty. It requires no decision on any particular matter to be made at that particular time.

In *Waring vs. Metropolitan Life Insurance Company*, 39 S.W. (2d), 418, l.c. 423, the court rendered a decision which was somewhat analogous to the instant case. A request for rehearing before the full Workmen's Compensation Commission, as required by law, was made and without any objection one

commissioner heard the testimony. The appellate court held on appeal from the circuit court that complainant waived any right to be heard to complain. The court held further and admitted it was the practice for litigants to agree that a referee may take the testimony and waive the right to have it heard before the court.

"Respondent insists that under section 3341, just quoted, it was imperative that the full commission hear the additional testimony after the case was once reopened, and that the hearing of additional evidence by a single commissioner was improper, and resulted in placing before the full commission incompetent evidence, as well as that which had been properly received, and that the act of the commission in reviewing the whole case and making the final award was in excess of its power. The reason which is now urged by respondent in support of the judgment of the circuit court was not the reason assigned in the finding made by that court. This reason may have been in the mind of the trial judge, although it was not stated. However, we do not believe it a sufficient ground to support the judgment in view of the facts in this case. The rehearing was to accommodate plaintiff. He appeared before the commissioner and submitted his additional testimony and examined the witness who was called by the commissioner at plaintiff's request. There was no objection at any time to the competency of any of the evidence so offered on the ground that it was not being received before the full commission, and, when the whole transcript of the evidence reached the full commission, it was with the implied, if not with the express, consent of plaintiff that all the testimony was properly before the commission for review.

The conduct of plaintiff's case, by him and by his attorney, was equivalent to

an agreement that all proof shown in the record should be treated as the evidence in the case. We think the point urged by respondent was waived. Even though it was incompetent for a single commissioner to hear testimony upon reopening the case, we think it was competent for plaintiff to consent, and that he did consent, that one commissioner hear the testimony; and that it was competent for plaintiff to waive, and that he did waive, his right to have all the members of the commission personally view the witnesses and observe their conduct and demeanor while testifying. This was the only right, if any, of which plaintiff was deprived. He deprived himself of it.

It is common practice in the trial of lawsuits for litigants to agree that a written statement, or an affidavit, or a statement of facts contained in an application for a continuance, or in a deposition, or in a bill of exceptions, may be received and accepted as the testimony of an absent witness the same as though he were personally present testifying in court. It is also the practice for litigants to agree that a referee may take testimony and waive their right to have it heard before the court."

In *State vs. Shain*, 108 S.W. (2d), 122, 1.c. 128, the court said:

"We are also of the opinion that respondents' holding, that the claimant did not waive her right to have all of the commissioners hear the evidence on review, is in conflict with controlling decisions of this court. The principle of law is well established that a party objecting to evidence on certain grounds, cannot, on appeal, rely upon an entirely different theory. The claimant, at the hearing held on April 1, did not insist that all the members of the commission be

present to hear the evidence. Having failed to make a request that all the commissioners hear the evidence, the point was waived."

In view of the above decision complainant waives any right he might have by failure to object at the proper time to the holding of any hearing by someone other than the State Commission. Likewise any agreement of the parties to permit the holding of these hearings by others than the State Commission would waive any right complainant might otherwise have.

However, we think this not material for the reason the holding of these hearings does not constitute a discretionary power and the authority given the Commission to hold said hearings may be delegated to someone else.

With regard to the administering the oath to witnesses who may testify at these hearings, the appointee is not authorized to perform this duty. Such authority is vested in the State Commission and cannot be delegated by them.

Section 4, C.S.S.B. No. 125, reads in part as follows:

* * * "To administer oaths, issue subpoenas for witnesses, examine such witnesses under oath, and may make and keep a record of same."

In 46 C.J., Section 6, page 840, in part reads as follows:

"An oath, to be effective, must be administered by some officer authorized by law to administer oaths. Any officer possessing general authority to administer oaths or affirmations may administer an oath or affirmation in a particular case or for a particular purpose where no particular officer is designated for the case or purpose in question, or even, it is held, where a particular officer is designated. * * * "

Volume 46, C.J., Section 7, reads in part as follows:

"A court has inherent authority to administer an oath; an oath administered by an officer or other person in open

court under the direction of the court is administered by the court, even though the officer or person would otherwise be incompetent to administer the oath; it seems that an oath administered out of the presence of the court by its delegate is likewise deemed to be administered by the court through its agent." * * *

It is the opinion of this department that anyone authorized by law to administer oaths may administer same to witnesses testifying at these hearings. As a general rule these hearings will be held where an officer of the court, a notary public, or some other person authorized to administer the oath will be available.

Therefore, in view of the above and foregoing, it is the opinion of this department that merely presiding at these hearings does not constitute a discretionary duty, but it is a ministerial duty, and the State Commission may appoint some competent person to preside and hold these hearings in the absence of the Commission and present a transcript of all the evidence adduced at said hearings for consideration by the State Commission and for final decision.

Respectfully submitted,

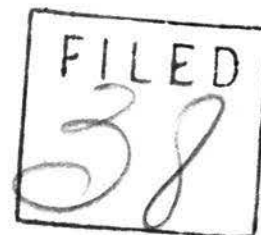
AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

CANCER COMMISSION: County courts may be billed for patients at cancer clinics at State Hospitals Nos. 1 and 2 and said funds when allowed by county courts must be paid to the State Treasurer.

July 28, 1938



State Cancer Commission
3713 Washington Boulevard
St. Louis, Missouri

Attention: Miss Dorothy Hermann, Executive Secretary

Gentlemen:

This department wishes to acknowledge receipt of your letter of recent date which is as follows:

"Please advise us whether we may begin billing the various counties under Section 11 of the Laws of Missouri, 1937, p. 499, for patients admitted to the cancer clinics established at State Hospital Nos. 1 and 2 and how the funds collected are to be disposed of."

By "cancer clinics" we assume that you are not referring to the cancer clinics authorized under Section 13 of the Cancer Act, Laws of Missouri, 1937, p. 499, in part as follows:

"The Cancer Commission of the State of Missouri is empowered and directed to establish cancer clinics in the larger cities of the State on request of the local medical societies. All clinics

are to be administered by committees appointed by the local medical organizations (county medical societies) these committees to have charge of the administrative details connected with their respective clinics but in all cases they must conform with the minimum standards set by the Cancer Commission of the State of Missouri."

We assume that you are referring to the temporary hospitalization afforded indigent cancer patients in Hospitals Nos. 1 and 2 until such time as the State Cancer Hospital can be constructed. Said temporary hospitalization having been passed upon by this department in an opinion rendered to the late Dr. Ellis Fischel, Chairman of the State Cancer Commission and concluding as follows:

"From the foregoing we are of the opinion that the State Cancer Commission may establish hospitalization for the care of indigent cancer patients in the tumor clinics already established in State Hospitals Nos. 1 and 2 and spend such funds as are necessary out of the amount appropriated by the Legislature to 'Operation'."

We further assume that the treatment and hospitalization being afforded cancer patients at State Hospitals Nos. 1 and 2 is in the nature of the treatment and hospitalization that may be afforded them when the State Cancer Hospital is constructed. We further assume that the statutory procedure outlined in Section 8 of the State Cancer Act has been complied with, such as providing for application to the county court for treatment; an examination and report of the condition of the patient by a physician; an order by the county court finding that the applicant needs treatment, and is unable financially to provide himself with same; a determination by the county court from the Administrator of the State Cancer Hospital that the applicant can

be received as a patient; and the certification by the county court of its approval of the application to said hospital.

Section 11 of the Cancer Act, Laws of Missouri, 1937, p. 498 provides as follows:

"The Administrator shall, under the direction of the Cancer Commission of the State of Missouri, cause, monthly, to be made out and forwarded to any county court which may send to the State Cancer Hospital a patient as described in this Act, an exact amount of the sum due and owing by such county court on account of such patient. Said county court, at its first session thereafter, shall proceed to allow and cause to be paid over to the Treasurer of the State of Missouri the amount of said account."

From an examination of the above section it is evident that it was the intention of the Legislature that the county share the expense of the state in maintaining the State Cancer Hospital. Therefore, although it is true that said hospital has not as yet been constructed, yet since the State of Missouri is spending funds for temporary hospitalization until the hospital is built, the county must, as was intended by the Legislature, bear its proportionate expense in an amount provided for in Section 14 of the Cancer Act, Laws of Missouri, 1937, p. 500.

CONCLUSION

Assuming the temporary hospitalization being provided patients at the cancer clinics at State Hospitals Nos. 1 and 2 is in the nature of the treatment and hospitalization that will be afforded indigent cancer patients when the State Cancer Hospital is erected, and further assuming that the statutory procedure outlined in Section 8 of the State Cancer Act, Laws of Missouri

July 28, 1938

1937, pages 497-498 relating to the admission of indigent cancer patients to the State Cancer Hospital has been complied with, we are of the opinion that the counties may now be billed monthly for patients sent to the cancer clinics at State Hospitals Nos. 1 and 2.

II.

Section 11, supra provides that the county court, having received its monthly bill from the State Cancer Commission, must at its first session thereafter proceed to allow and cause same to be paid over to the Treasurer of the State of Missouri.

CONCLUSION

From the foregoing, we are of the opinion that all funds billed by the State Cancer Commission to county courts for patients in State Hospitals Nos. 1 and 2 must, after being allowed by the county court, be paid over to the Treasurer of the State of Missouri.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

MW/w

CANCER COMMISSION: Definition of the terms "legal residents" and "indigent patients" as used in Section 7 of the Laws of Missouri, 1937, page 497.

July 26, 1938



State Cancer Commission,
3713 Washington Blvd.,
St. Louis, Missouri.

Attention: Miss Dorothy Hehman,
Executive Secretary

Gentlemen:

We acknowledge your recent request for an opinion as follows:

"Kindly render us an opinion as to the meaning of the phrase 'legal residents of Missouri' as used in Section 7 of the Session Acts of Missouri, 1937, page 497. Does this require that a person live a prescribed length of time in the state in order for him to become eligible for treatment for cancer?"

We would also like your opinion as to the meaning of 'indigent patients' as used in said section."

Section 7 of the Laws of Missouri, 1937, page 497, provides that the State Cancer Hospital is to provide for the care of legal residents of Missouri only as follows:

"The State Cancer Hospital shall be primarily and principally designed for the care and treatment of indigent persons afflicted with cancer, such scientific research as will promote the welfare of indigent patients committed to its care and for the care of legal residents of Missouri

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only. Where such patient is unable financially to secure such care or, in the case of a minor, where the parent, guardian, trustee or other person having lawful custody of such minor's person, as the case may be, is unable financially to secure such care the State Cancer Hospital is hereby designated as a place of treatment for such persons."

The above section fails to define what constitutes a legal resident of Missouri. We have a number of sections in our statutes relating to residents but they throw no light on the question presented. Section 8893, R. S. Mo. 1929 provides in order for a person to be eligible for a blind pension he must have been "a resident of the State of Missouri for ten consecutive years or more next preceding the time for making application for the pension herein provided." Section 12 of the Laws of Missouri, 1937, page 474, provides that Old Age Assistance shall be granted persons who have "resided in the state for five years or more within the nine years immediately preceding application for assistance and for the one year next preceding the date of application for assistance." And in the case of voters there is a specified length of residence required. Section 10178, R. S. Mo. 1929.

19 Corpus Juris, section 12, page 403, makes the following statement with reference to the period of time required to establish a residence in the absence of any statutory regulation on the subject as follows:

"In the absence of any statutory regulation of the subject, no definite period of residence or specified length of time in a particular place is required to establish a domicile, but when coupled with the element of intent, any residence, however short, will be sufficient, * * * *"

In the case of Trigg v. Trigg, 41 S. W. (2d) 583, 1.c. 589, 226 Mo. App. 284, the court said:

July 26, 1938

"We hold in accord with the general expression of the law that residence is largely a matter of intention evidenced by some act or acts in conformity with such intention * * *"

And in the case of Nunn v. Hamilton, 26 S. W. (2d) 526, 1.c. 530, 233 Ky. 663, the court said:

"Legal residence consists of actual residence at a place, coupled with intent to remain at such place."

Again in the case of Wade v. Wade, 113 So. 374, 1.c. 375, 93 Fla. 1004, the court said:

"Legal residence or domicile in this state may be acquired by one who, coming from another state or county, actually lives in this state within the intention of permanently residing here. * * * Legal residence consists of fact and intention. Both must occur."

From the foregoing definitions we are of the opinion that "legal residents of Missouri" within the meaning of Section 7, supra, are such persons who, however short the period, actually live in the state of Missouri and do so with the intention of permanently residing here. Same to be determined by some act or acts in conformity with such intention.

II.

In the case of State ex rel. Buchanan County v. Imel, 219 S.W. 634, 1.c. 637, 280 Mo. 554, the court in holding that in the construction of the words of a statute they must be construed in connection with the context of the statute, said:

"* * * Words, like things instinct with life, take color and force from their environment. An attempt, therefore, to construe the word free from its

setting in the phrase or sentence in which it appears or independent of the other words with which it is used, would deprive the inquirer of one of the well-recognized aids to interpretation and as a consequence lead to a lame conclusion as to the meaning of this portion of the statute.* * * *

Looking to the context of the statute we note that patients to be treated are those who are "unable financially to secure such care."

In the case of *Weeks v. Mansfield*, 80 Atl. 784, 1.c. 786, 84 Conn. 544, the court, in defining the term "indigent", said:

"The term 'indigent,' on the other hand, is one which in its common acceptation is used with more direct and single reference to financial ability and resources. It is ordinarily used to indicate one who is destitute of property or means of comfortable subsistence, and for that reason is needy or in want.* * * * *

Does this mean, however, that a person must be a pauper? In the case of *Depue v. District of Columbia*, 45 App. D. C. 54, 1.c. 59, the court answers this by saying that "to be indigent does not mean that a person must be a pauper."

A "pauper" is defined in the *Week's* case, *supra*, 1.c. 786 as follows:

"The term 'pauper' has a distinct and well-defined meaning in our law. It is used to designate those persons whose support imposes a burden upon the public treasury. * * * * *

From the foregoing we are of the opinion that a person may be "indigent" within the meaning of Section 7

July 26, 1938

supra, without being a pauper and that the term "indigent patients" as used in said section means any person lacking the property and resources necessary to secure medical and surgical treatment for tumors and diseases of a cancerous nature.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

MW:DA

ST. LOUIS BOARD OF ELECTION COMMISSIONERS -- No authority to provide meals for employees during overtime work.

September 10, 1938

Mr. Richard D. Hatton
Chief Clerk
Board of Election Comm.
208 South 12th Blvd.
St. Louis, Missouri



Dear Sir:

We have your request of September 6, 1938 for an opinion, which request reads as follows:

"By order of the Board, there is sent to you the following:

- " 1. Copy of voucher, made payable to Richard D. Hatton, in the amount of \$73.00, for expenses incurred on account of meals because of night and Sunday work since and during the set-up of the new Permanent Registration Law;
- " 2. Copy of voucher made payable to George J. Hug, in the amount of \$73.00, for like expenses;
- " 3. Copy of letter dated September 2nd, from the Deputy Comptroller, to which is attached copy of an opinion dated September 1st from the City Counselor.

"The Board's position in certifying these two vouchers for payment to the Comptroller was and is that they are for legitimate expenses incurred by order of the Board in the conduct of registrations and elections held especially under the new Permanent Registration Act, since December 1, 1937; on the sixty-eight

September 10, 1938

nights and five Sundays, the Board required its Chief Assistant and Assistant Hug to be present almost continually to supervise the office staff in handling the registrations and in the preparation of the records incidental to the setting up of the new Permanent Registration system. The Board is not attempting to increase the salaries of these employees, as it recognizes the salary provisions of the Act, but feels its legal obligation to reimburse them for their out-of-pocket expense for meals on the nights and Sundays in question just as any other business establishment does when it asks its salaried employees for continuous work.

"In view of the present stand of the Comptroller, the Board asks your opinion (a) by what authority in law is the Comptroller withholding payment of these amounts; (b) with no thought of being arbitrary, is it not the duty as well as the legal requirement of the Board to decide what are and what are not legitimate registration and election costs and expenses and to take such action in connection with expenses as in its judgment will save the taxpayers money in the long run; and (c) what is your interpretation of Section 85, particularly does the word 'claims' cover all items of registration and election costs and expenses?"

It appears that the vouchers in the amount of \$73.00 were issued to employees on account of "meals, because of night work and Sundays" for the period of December, 1937 to August, 1938. The general rule as to the payment of expenses for public officers is found in 46 C. J., p. 1018, Sec. 246, in the following language:

"But where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement therefor, and where

a public duty is demanded of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done."

This rule has been consistently followed in Missouri. County of Boone vs. Todd, 3 Mo. 140; Hark Reader vs. Vernon County, 216 Mo. 696; Buchanan vs. Ralls County, 283 Mo. 10, 222 S. W. 1002.

We have been unable to find any authority which classifies meals as a necessary expense of a public office. The mere fact that employees or officers may work overtime does not give rise to any rule requiring the state to furnish them meals. It is a matter of common knowledge that most of the state officers and many of their appointees now and for a number of years, have worked at nights, during holidays and Sundays, yet there is no provision for paying them additional compensation or for furnishing them meals during such periods of overtime.

The business of the state is not conducted upon the same basis in all details as that of a private business. It is a well established rule in this state that public officers are presumed to render their services gratuitously unless there is some specific statutory provision made, authorizing payment for such services. King vs. Riverland Levy District, 279 S. W. 195. No such rule prevails with reference to the conducting of private business.

Section 85 of the registration law, Laws 1937, p. 277, provides that the Board shall audit all claims. This section merely imposes upon the Board the first duty to examine the legality of claims presented to the Board for payment. This same power to audit claims is vested in the State Auditor with reference to certain accounts. Section 11404, R. S. Mo. 1929. Yet it is the duty of the Auditor to deny and refuse payments for accounts which are not authorized by law. State ex rel. vs. Thompson, 293 S. W. 391, 316 Mo. 1169.

Meals have never been classified as a necessary office expense, and can only be paid for when specifically authorized by statute. It is true that meals are essential to the welfare of the individual, the same as the extraction

Mr. Richard D. Hatton

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September 10, 1938

of an infected tooth or the removal of infected portions of the body by the application of modern surgery. Yet, these are essentials for the welfare of the individual and are not necessities for the conduct of a public office. We have carefully examined the opinion issued September 1, 1938 to the Honorable Edgar H. Wayman, City Counselor of St. Louis City, and this office is in accord with the conclusions reached in that opinion.

It is, therefore, the opinion of this office that the expense items of \$73.00 for meals because of night work and overtime work, cannot be allowed, lacking specific authority for the payment of same.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE

APPROPRIATION ACT -
CANCER COMMISSION -
NEW YORK WORLD'S FAIR -

Term "operation" does not authorize
expenditures for World's Fair exhibit.

September 26, 1938

Miss Dorothy A. Hehmann
Executive Secretary
Cancer Commission of Missouri
3713 Washington Blvd.
St. Louis, Missouri



Dear Miss Hehmann:

We have your request for an opinion as to whether the Cancer Commission can pay for the construction of an exhibit at the New York World's Fair, 1939, from funds contained in the operation account.

The "operation" account you refer to is that portion of the appropriation made by the 1937 Legislature, Session Acts 1937, page 166, which reads as follows:

"For operation of Cancer Hospital
for one year. \$100,000.00"

We find that the Legislature has made provision for exhibits at the New York World's Fair in Section 58a, Session Acts 1937, page 121, and has appropriated \$225,000.00 for the purpose of preparing, installing, maintaining and disposing of exhibits at the New York World's Fair, and also the San Francisco Exposition. In construing appropriation acts, we are required to construe them strictly. *Meyers vs. Kansas City et al.* 18 S.W. (2d) 900.

It is, therefore, not possible under the above rule to construe the 1937 appropriation act, "for operation of Cancer Hospital for one year" in any manner so as to authorize the expenditure of any portion of this fund outside of the State of Missouri or for any purpose other than the actual expense of operating and maintaining a Cancer Hospital for the specified period.

Miss Dorothy A. Hehmann

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September 26, 1938

It is, therefore, the opinion of this office that no portion of the 1937 appropriation act, supra, can be used for the construction and maintenance of an exhibit at the New York World's Fair in 1939.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE

COUNTY COURTS: Contributions by counties to State Social Security Commission.

October 4, 1938

State Social Security
Commission of Missouri
Jefferson City, Missouri



Gentlemen:

This will acknowledge receipt of your letter of September 27, 1938, wherein you request an opinion of this office on the following two questions, to-wit:

"1. Can the County Court hire, pay for and furnish the services of a person to cooperate with the State Social Security Commission in the administration of the Social Security Law?

2. If the County Court can hire, pay for and furnish the services as referred to above, shall such expense be classified and charged as 'Contingent and Incidental Expenses and Expense of Paupers not otherwise classified', as set forth in Class 5 of the County Budget Act? (Laws of Missouri 1933, pp. 341-342.)"

Answering your first question, we say as follows:

I.

Section 10 of the Social Security Act, page 473, Laws of Missouri 1937, provides in part as follows:

"For the purpose of establishing and maintaining county offices, or carrying out any of the duties of the State Commission, the State is authorized to enter into agreements with any political subdivision of this state, and as a part of such agreement the State Commission may accept moneys, services or quarters as a contribution toward the support and maintenance of such county offices. * * * * * Other employees in the county office shall be residents of such county and shall be employed with due regard to the population of the county, existing conditions, and purposes to be accomplished and shall be paid by the State Commission." (Emphasis Ours).

A county is a political subdivision of the State. In authorizing the State Commission to accept services from the county, the county necessarily must have the correlative authority to furnish such service.

A county as such can only act through human agency, or in other words, persons. Hence, by the apt terms of this section the State Commission is authorized to enter into a contract with the county, whereby the county is to furnish and the State Commission is to receive the services of a person or persons designated by the county as a contribution towards the support and maintenance of the Commission's County office.

Manifestly, it is clear that the services provided for in said section are services rendered by a human being designated or furnished by the county for such purpose.

October 4, 1938

A companion question is whether the county is given authority by said section, or otherwise, to pay such person or persons rendering such service, out of the county funds.

It is a rule, generally, in this state, and all others, that "the laborer is worthy of his hire". The rule as stated in legal phraseology in 39 C.J. Sec. 192, page 142, is:

"The right of an employee to compensation rests in general upon the performance of services, under an agreement, express or implied, that compensation shall be had therefor,***"

However, we believe the authority given the county to pay such person is found in Section 10, itself, if not in express terms, at least by strong implication. We attach significance to the concluding sentence of the section, to-wit:

"Other employees in the county office shall be residents of such county and shall be employed with due regard to the population of the county, existing conditions and purposes to be accomplished and shall be paid by the State Commission." (Emphasis ours).

Manifestly, by the words "other employees" in the county office, such words or terms comprehend that there are additional persons or employees in such office, other than the "other employees" placed in such office by the Commission. The further fact that the section provides that the "Commission" shall pay such of the employees as are placed in the office by the Commission, reasonably leads to the conclusion that the Legislature intended that an employee or employees placed in the office by the county should likewise be paid by the county.

Additional reasons for our conclusions that the section itself provides authority for such payment by the county, lies in the fact the county is authorized to contribute money directly to the commission for the support and maintenance of the county office. Hence, the county authorized to use its funds in such last mentioned way, it would appear stultifying to the intention of the legislature to say that the county could not use such funds in paying the employees it furnishes for the benefit of the county office but must send such funds, if it contributes any at all, direct to the commission for the same purpose. It is to be noted, that the county is entitled to contribute three elements for the benefit of the county office, namely, moneys and services, and quarters.

Referring to the last element mentioned, to-wit, furnishing quarters for the county office, it would seem idle to say that the county could not pay rent for and furnish such quarters, if it were necessary so to do.

The county given the express authority, as it is, to contribute money, services and quarters for the benefit of the county office, then if it is to be prohibited in using such money, or any other county funds, in payment for the services mentioned, and/or, for rent and furnishing of quarters, the authority to furnish such services and quarters is destroyed and the evident legislative intent frustrated.

It is our conclusion that a county has the authority to furnish a person or persons to render service in support and maintenance of such county office of the State Commission, and to pay directly to such person such compensation as may be agreed upon between the county and such individual.

October 4, 1938

II.

Relative to your second question, it is to be noted, that the division of the county funds under the County Budget Act, Laws of Missouri 1937, p. 423, requires that Class 5 shall provide for a contingent and emergency expense fund.

It is our conclusion that the payment for the services hereinbefore dealt with, can and should be classified and charged as contingent and incidental expense and expenses of paupers not otherwise classified. Or if Class 6 of the Budget Act contains the balance mentioned after the obligations called for therein, if any, are met, then payment for such services can be made out of either Class 5 or 6 as the case may warrant.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney-General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney-General

JTB:MM

CANCER COMMISSION - County Courts should transmit payment for indigent patients to the State Treasurer, where it becomes a part of the General Revenue Fund

December 22, 1938

State Cancer Commission
3713 Washington Boulevard
St. Louis, Missouri



Gentlemen:

This will acknowledge receipt of your letter of November 17, requesting an opinion from this office as per your letter as follows:

"As per your ruling of July 28, 1938, the Cancer Commission has been billing the various counties for care given patients in the cancer wards now being operated at Fulton and St. Joseph. To date we have received a total of \$425.00 in payment of statements rendered.

"The Cancer Commission fully realizes it cannot expend these funds for any reason whatever. However, the law does not specifically provide for the disposal of these funds. The Cancer Commission is desirous of knowing whether this money should be turned over directly to the State Treasury and put into the General Fund, whether the State Treasurer should set up a separate fund for these payments, designating it as belonging to the Cancer Commission and holding same until the next meeting of the Legislature,

or whether the Commission should deposit all funds in some bank, holding same until the Legislature again meets.

"On November 16th we opened an account at the Mercantile Commerce National Bank in St. Louis, in the name of the Cancer Commission of the State of Missouri, depositing therein all checks received to date. The Commission intends to leave the money in this fund until we receive an opinion from your office as to what we should do with same."

Our opinion of July 28, 1938, to which you refer, we believe very definitely disposes of the question to whom a county court should make payment for treatment of indigent patients, as provided for in Section 11, Laws of 1937, page 499, by the conclusion stated in such opinion, as follows:

"From the foregoing, we are of the opinion that all funds billed by the State Cancer Commission to county courts for patients in state hospitals Number 1 and 2 must, after being allowed by the county court, be paid over to the treasurer of the State of Missouri."

Consequently, the money you have on deposit in the St. Louis bank should be promptly transferred by you to the Treasurer of the State of Missouri, and we believe it would be well for you to hereafter

December 22, 1938

direct county courts to make their warrants payable to the State Treasurer and either sent direct to such treasurer or else can be transmitted through you.

Relative to your second question, namely, whether such payments by county courts is to be set up by the treasurer as a separate fund for the benefit of the Commission, beg to say that in view of the absence of any such provision in the Cancer Commission Act such payments, when received by the treasurer, go into the general revenue fund and by reason of Section 15 of the Act the General Assembly can appropriate such funds or any part thereof, together with any other money in the general revenue fund for the use of the Cancer Commission that the Legislature deems advisable.

Very truly yours

J. W. BUFFINGTON
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

JWB LC

INSURANCE DEPARTMENT: State not liable for fees of special counsel not employed as provided by statute.

January 20, 1938

Hon. Charles L. Henson, Chief Counsel
Insurance Department
Jefferson City, Missouri



Dear Judge Henson:

This will acknowledge receipt of your letter of recent date in which you submit the following inquiry:

"Enclosed is a memorandum by Judge Carlin P. Smith and Dean S. Leshner covering their services to this Department in some Federal Court proceedings which are plainly therein described.

"We submit this memorandum to you with the request that you advise us if this Department is liable for this fee, and if so, whether or not it can be paid out of the appropriation made for this biennium to this Department. If liability is fixed on us, we will undertake to negotiate with them on the amount."

The rule as to when the state is liable on a claim against it has been stated in *State ex rel. Buder v. Hackmann*, 305 Mo. 1.c. 351, in the following language:

"Before the State can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment."

It is also well settled that the state is not liable for any compensation, fees or allowance to any person who renders services under any contract or agreement made without express authority of law. Article IV, Section 48, Constitution of Missouri, provides as follows:

"The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

We must, therefore, determine whether the claimants you inquire about rendered their services under a contract or agreement expressly authorized by law.

The authority for the Superintendent of Insurance to employ counsel is found in Section 5678, R.S. Missouri, 1929, which provides, in part, as follows:

"The attorney-general shall be his legal adviser, but the superintendent may, with the approval of the governor, employ other counsel for the purpose of enforcing the insurance laws, except in criminal prosecutions."

There is also a provision in Section 5954, Laws of 1933, Extra Session, page 70, which provides as follows:

"In proceedings to enjoin, rehabilitate, dissolve, wind up or otherwise settle the affairs and dispose of the assets of insurance companies, the superintendent of the insurance department shall receive no fees nor compensation for any services personally performed by him. He shall have power and authority, however, in such cases, and through the course of the whole case, to employ the necessary legal counsel and assistance, and clerical and actuarial force, subject to the approval of the court as to the amount of compensation to be paid them, and the expenses of such employment, together with all necessary expenses in the settlement of the business of the company, or the collection, disposition or distribution of its assets shall be taxed as costs, and paid by the superintendent out of the assets of such company; or, in case it is reinsured, by the reinsuring company, or if the company proceeded against has no assets, then as by law in such cases provided, to the persons doing the work and rendering the service."

The foregoing provisions are all the provisions we find covering the authority of the Superintendent of Insurance to employ counsel.

The following excerpts from the memorandum submitted with your inquiry are all the references there are to any employment of the claimants. They read as follows:

- "In May, 1936, while a hearing was being held in the United States District Court for the District of Kansas to determine the solvency of the Federal Reserve Life Insurance Company, a Kansas Corporation, the

Superintendent of the Insurance Department of the State of Missouri requested Judge Carlin P. Smith to observe the proceedings and to report the result thereof."

"Mr. O'Malley, Superintendent, requested Judge Smith to resist the appointment of anyone other than himself as the Ancillary Receiver in Missouri and to attempt to vacate the receivership."

"We were requested by the Superintendent to file a return to this order and to represent him in connection therewith."

It will be seen from the foregoing record of employment that claimants were not employed in accordance with either Section 5678, R.S. Missouri, 1929, or Section 5954 of the Session Acts, supra, and we must therefore conclude that they were not employed by express authority of law. That being true, the state is not liable to them for any fee or compensation for services. It follows that if the state is not liable to the claimants, then no compensation can be paid them out of the appropriation for the Insurance Department for the current biennium, for as was said in State ex rel. v. Hackmann, 314 Mo. 1.c. 53:

"And it might be said in passing, that the Legislature could not now pass a valid act appropriating money out of which relator's claim could be paid, because his claim is based upon a contract entered into without authority of law and Section 48 of Article IV of the Constitution expressly prohibits the General Assembly from authorizing the payment of any claim hereafter created against the state under any agreement or contract made without express authority of law, and that all such authorized contracts shall be null and void."

The major portion of the memorandum submitted by claimants deal with the nature and extent of the work done by them, and in said memorandum claimants say:

"Throughout this entire period preceding the appointment of Judge Henson as counsel, the Insurance Department was without counsel except for the performance of such legal duties as Mr. Allebach could perform in connection with his functions as chief Deputy Superintendent."

We have no doubt but that claimants put in much time and effort in the matter they were handling, but such consideration is beside the question, since we can only pass upon the legality of their claim. State ex rel. Bradshaw v. Hackmann, 276 Mo. 1.c. 611:

"If so it be that the crying exigencies brought about by a World War unforeseen and undreamed of when the act in question was passed had so altered national and domestic conditions when the trips in question were made as to make it absolutely necessary and praiseworthy for the relator to incur the expense in controversy in the first and second counts, we are yet forced, however much the situation may appeal to our personal sympathies to relegate this phase of the case to the Legislature. Our duty in the premises is done when we are unable to lay our finger on any existing statute which, when construed under the rules laid down, supra, will justify us in adjudging payment.

Hon. Charles L. Henson

- 6 -

January 20, 1938

CONCLUSION

It is, therefore, the opinion of this office that the Insurance Department is not liable for the fee claimed by Judge Carlin P. Smith and Dean S. Lesher, upon the facts submitted in their memorandum and that no fee or compensation can be paid them out of the appropriation for this department for the current biennium.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED BY:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

INSURANCE: Compensation that may be paid insurance examiners for examination of foreign and domestic companies doing business in this state and method of accounting.

February 3, 1938

Honorable Charles L. Henson
Chief Counsel
Insurance Department
Jefferson City, Missouri



Dear Sir:

We wish to acknowledge your request for an opinion under date of January 29, 1938, wherein you state as follows:

"There are several sections of the insurance laws touching the amount of compensation examiners for the Superintendent of Insurance can receive in connection with the examination of insurance companies. We are referring particularly to Sections 5674 and 5685 of Article 1, Chapter 37, Revised Statutes of Missouri 1929.

We would like to have you advise us as to the amount of compensation an examiner can receive in examining each of the various kinds and types of insurance companies or associations doing business in this state, either foreign or domestic, together with the proper method to be used in approving such accounts."

I.

(A) Insurance Companies

We will consider first the compensation that can be paid examiners under our statutes and then the proper method to be used in approving accounts.

Article I, Chapter 37, R. S. Missouri 1929, relates to the Insurance Department and contains the following sections, among others:

Section 5684 provides for the employment of examiners by the Superintendent of Insurance, in part as follows:

"The superintendent may accept, in lieu of an examination by himself, or by his authority, a certificate of an examination, accompanied by a statement of all the facts in the case made by the insurance commissioner or superintendent of another state, of a company organized under the laws of such state. The said superintendent may make and conduct such examination in person, or he may appoint one or more persons to make and conduct the same for him. If made by another than the superintendent in person, the person thereunto duly appointed by said superintendent shall have the same powers as above granted to the superintendent; and a certificate of appointment, under the official seal of said superintendent, shall be sufficient authority and evidence thereof for the person or persons to act. For the purpose of making such examinations, or having the same made, the superintendent may employ the necessary clerical, actuarial and other assistance."

Section 5685 provides for the payment of expenses incurred in examination of insurance companies as follows:

"The expenses of proceedings now or hereafter had against insurance companies, and of examinations of the assets or liabilities and valuations of policies of insurance companies doing business in this state, shall be assessed by the superintendent of the insurance department upon the company proceeded against or examined, or whose policies have been valued, and shall be in the first instance paid by such company, on the order of the superintendent, directly to the person or persons making such examination or valuation, or rendering the

service. In case of such examination, or valuation or proceeding, if the company has been or shall be adjudged insolvent, or shall neglect, fail or refuse to pay said expenses, the superintendent may, in his discretion, retain from the fees collected under the next succeeding section enough to pay for the same, in whole or in part; and the amount so paid by him, together with costs, charges and fees for collecting the same, shall be a first lien upon all the assets and property of such company, and may be recovered by the superintendent in any court of competent jurisdiction, by suit; or, if said company be in liquidation, or process of being wound up, the cost and expenses of settling its affairs shall, except in cases of companies now in the hands of receivers, be allowed and taxed as costs against said company, and shall be a first lien upon and payable out of its assets. When collected by the superintendent, the amount retained by him shall be by him applied to the reimbursement of the fund of the department, and shall then be paid into the treasury, as provided in section 6090: Provided, however, that before any costs of an examination or valuation shall be paid, vouchers for the same shall be submitted to and approved by the state auditor; and provided further, that when any examination or valuation is made by the superintendent in person, the cost of making the same, excepting his traveling or other necessary personal expenses, shall be paid by him, when collected, into the department fund; and provided further, that the fees for an examination of the assets or liabilities of a company shall not exceed ten dollars per day for any one examiner, together with all necessary expenses incurred and actually paid, and reported under oath of the examiner, and that the fees for making valuations of policies or other obligations of assurance shall not exceed ten dollars for each million dollars of insurance, or fractional part thereof, for all ordinary forms of policies; and for forms of policies requiring special construction of tables for valuation, the cost of computing such tables shall be added."

The above sections appear in the Revised Statutes 1919, numbered 6095 and 6096 respectively.

In 1929 the Legislature adopted Section 5674 R. S. Mo. 1929 (Laws of Missouri 1929, Section 6085a, page 239), providing for the employment among others of a chief examiner and one or more examiners to assist him, as follows:

"Said superintendent of insurance may appoint and employ an actuary, who shall be subject to removal at the pleasure of said superintendent. The salary of said actuary shall not exceed the sum of five thousand dollars (\$5,000.00) per annum, and shall be payable in the same manner as the salary of the superintendent of insurance; said actuary shall have had at least five years' experience in actuarial work. The duties of said actuary shall be those usually performed by actuaries and he shall further do such things connected with the department of insurance as he may be directed to do by the superintendent of insurance. All fees, allowed or paid to the actuary as provided by the laws of the state, shall be paid to the state treasurer in the same manner as other fees collected by the superintendent of insurance. The superintendent of insurance may also appoint a chief examiner, who shall be subject to removal at the pleasure of said superintendent. Said examiner shall have had at least five years' experience in examination work and insurance matters. The salary of said chief examiner shall not exceed five thousand dollars (\$5,000.00) per annum, said salary to be paid in the same manner as are the other salaries of the insurance department. The said actuary and the said chief examiner shall not be or become interested in any insurance company other than as a policyholder. The superintendent of insurance shall, through the chief examiner, have the right to examine into the affairs and good faith of any corporation, association, person or persons who

is engaged in, or is claiming or advertising that it is engaged in, organizing or receiving subscriptions for or disposing of stock of, or in any manner aiding or taking part in the formation of or business of, an insurance corporation, association or organization and such chief examiner shall conduct or assist in conducting the examination of insurance companies, associations and organizations and reciprocal or inter-insurance exchanges as required by law, and do such other things pertaining to the department of insurance as he may be directed by the superintendent of said department. The superintendent of insurance may also employ one or more expert actuaries, or examiners, to assist the chief examiner in making such examinations--the fees and expenses in all such cases to be reasonable and to be paid by the company, association, organization or reciprocal or interinsurance exchange under examination, upon accounts approved by the superintendent of insurance. Said actuary and chief examiner shall each file bond as required by the superintendent of the insurance department, said bond not to exceed the sum of ten thousand dollars (\$10,000.00)."

And also adopted Section 5676 R. S. Missouri 1929 (Laws of Missouri 1929, Section 6087, page 233), as follows:

"Said superintendent shall receive an annual salary of \$6,000.00, and his deputy an annual salary of \$4,500.00, which salaries shall be paid monthly in the manner hereinafter provided, which said salary shall be paid and accepted in full compensation for all services performed by said superintendent and deputy in any capacity. All fees paid the said superintendent or any employe of said department or any appointee for any special purpose shall be paid into the state treasury to the credit of the insurance department fund and no fees shall be retained

by any official, employe or appointee of said department. Provided, nothing contained herein shall apply to the per diem to be paid to special examiners or actuaries employed by the superintendent of insurance and which is paid by the company under examination upon accounts approved by the superintendent of insurance."

An examination of the above statutes reveals that under Section 5685 fees for the examination of a company "shall not exceed Ten Dollars per day for any one examiner, together with all necessary expenses incurred and actually paid."

Section 5674 passed subsequently to Section 5685 provides that "in making such examinations--the fees and all expenses in all such cases to be reasonable."

The question arises whether the legislature in enacting the latter section intended that the only limitation on the amount to be paid examiners was that they be reasonable.

A similar question was presented in the case of State vs. Westhues, 9 S. W. (2) (Mo.) 612, l. c. 618, 619. One section provided that "there shall not be allowed for such publication a higher rate than one dollar per square," etc, and another section provided that it was the duty of the Secretary of State "to obtain the most advantageous terms possible." The Court in holding that there was no conflict between the two sections, and that they should be read and construed together, said:

"*****respondent held that it was the duty of the secretary of state under the law (section 10402, R. S. 1919) 'to obtain the most advantageous terms possible.' Respondent then set forth what he considered is meant by the words 'most advantageous terms.'

It is the contention of relator that section 10402, R. S. 1919, was impliedly repealed by Laws of 1923, pp. 322 and 323, whereby section 10401, R. S. 1919, was expressly repealed and new section 10401 was enacted in lieu thereof, in this contention we are unable to concur.

The first eleven lines of new section 10401 are substantially the same as section 10401, R. S. 1919, except that 'constitutional amendments or other questions to be submitted to the people' are added. The following language is identical in both sections, to-wit:

'There shall not be allowed for such publication a higher rate than one dollar per square of two hundred and fifty ems for the first insertion, and fifty cents for each subsequent insertion; and for fractional squares and parts of squares in the same proportion.'

New section 10401 concludes as follows:

'When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments, or other questions to be submitted to the people, order or notice, shall be required by law to be published in any newspaper, the rates herein specified shall prevail, and all laws or parts of laws in conflict herewith, except sections 10405, 10406 and 10407, Revised Statutes of Missouri, 1919, are hereby repealed.'

'The rates herein specified' are the rates specified in the first sentence comprising eleven lines of new section 10401. Such rates may not be higher than \$1, etc. We are unable to perceive any conflict between new section 10401 and section 10402, R. S. 1919. Hence the latter section must be deemed to be in full force and effect. New section 10401 and section 10402, R. S. 1919, must be read together and construed as if they read: There shall not be allowed for such publication a higher rate than \$1 per square, etc., but, in procuring such publication, the public officers shall accept of the most advantageous terms that can be obtained, not exceeding \$1 per square, etc."

And in the case of State ex rel. vs. Lemay Ferry Sewer District of St. Louis County, 92 S. W. (2) (Mo. Sup. En Banc) 704, l. c. 706, 707, we had the following situation: One section provides that the Board of Supervisors may levy "not more than ten cents per square of one hundred square feet". Another section provides that the Board of Supervisors "shall make such additional uniform tax levies as will be necessary to pay such deficiencies". The Court in holding that the two sections should be read and construed together and both given force and effect reached the conclusion that the additional levies could not exceed the maximum levy of ten cents, but was intended to provide for additional levies to pay deficiencies within such limits. The Court in its opinion said:

"A literal construction of section 11062, standing alone, would destroy the limitation placed on the levy by section 11037, allow the district to incur preliminary expenses in any amount it saw fit, without limit, and, upon dissolution of the district, permit additional levies to be made to pay the outstanding obligations of the district, even though the combined levies be far in excess of the maximum levy of 10 cents authorized by section 11037. It thus appears that, when these two sections are considered separately, they appear to be in hopeless conflict. However, as they are parts of the same act and relate to the same subject-matter, they should be read and construed together and both be given force and effect, if by so doing we can effectuate the intention of the Legislature, and at the same time not violate any recognized rule of statutory construction.

As heretofore seen, section 11037 fixes the maximum levy which can be made for the purpose of paying preliminary expenses incurred and to be incurred at 10 cents per 100 square feet, but it does not require that the maximum of 10 cents per square be levied in the first instance. The Legislature knew that fact. If a district should levy less than the maximum

limit of 10 cents, then incur expenses in excess of the levy made, but within the authorized limit of 10 cents, such deficiency should be paid because incurred within the limit authorized. Evidently the Legislature intended by the enactment of section 11062 to care for such a deficiency by providing for additional levies within the limit authorized, to pay deficiencies within, but not in excess of, such authorized limit. We so construe section 11062. Such a construction is not only reasonable but it accredits the Legislature with a laudable purpose in enacting both sections and gives to both sections life and operative effect. The presumption is that the Legislature had a purpose in enacting both sections and intended that both should be effective. To give the sections the construction contended for by relators would emasculate section 11037 by removing the limit placed on the levy by that section, and make possible the incurring of useless and unnecessary expenses which would finally result in the imposition of unjust and unfair tax burdens."

Returning to the consideration of Sections 5674 and 5685 we are unable to perceive any conflict between them. Reading the two sections together we are of the opinion that examiners making insurance examinations of both foreign and domestic companies are entitled to reasonable fees, but not to exceed Ten Dollars per day for any one examiner, together with all necessary expenses incurred and actually paid.

We are of the opinion that the above conclusion is further strengthened by reason of the language of Section 5675, supra, which was adopted at the same legislative session as Section 5674, in that the former section specifically refers to a per diem to be paid examiners employed by the Superintendent of Insurance. The words "special examiners" being merely used to distinguish them from examiners attached to the Insurance Department as regular employees of the State and paid by the latter.

(B) Insurance on the
Assessment Plan.

Article III, Chapter 37, Section 5756 R. S. Missouri 1929, relates to insurance on the assessment plan and provides that the fees and costs of examination shall be the same as now provided by law for the examination of life insurance companies, as follows:

"The fees for issuing certificates of authority to do business, for making the report to the circuit court upon an application for incorporation, and for filing annual statements, shall in each of aforesaid cases be the sum of twenty-five dollars; and the fees and costs of examinations and the fee for each agent's license shall be the same, and paid by the company in like manner, as now provided by law for the examination of life insurance companies."

From the foregoing we are of the opinion that examiners in making examinations of insurance companies doing business on the assessment plan, both foreign and domestic, are entitled to reasonable fees but not to exceed Ten Dollars per day for any one examiner, together with all necessary expenses incurred and actually paid.

(C) Insurance on Stipulated
Premium Plan.

Article IV, Chapter 37, Section 5762 R. S. Missouri 1929, relates to insurance on the stipulated premium plan and provides that Sections 5684 and 5685 are applicable in part as follows:

"*****shall be deemed to be engaged in the business of life insurance upon the stipulated premium plan and shall be subject only to the provisions of this article, except that the provisions of sections 5684 and 5685, Revised Statutes 1929, shall be applicable."

The above section refers only to Sections 5684 and 5685, but considering all the sections relating to the same subject matter we would necessarily include Section 5674, and we are therefore of the opinion that examiners in making examinations of insurance companies doing business on the stipulated premium plan, both foreign and domestic, are entitled to reasonable fees, but not to exceed ten dollars per day for any one examiner, together with all necessary expenses incurred and actually paid.

(D) Industrial and
Prudential Insurance.

Article V, Chapter 37, Section 5788 R. S. Missouri 1929, relates to industrial or prudential life insurance business, and provides that the fees shall be the same as now paid by other life insurance companies, as follows:

"All companies organized under the provisions of this article shall pay the same fee and license as are now paid by other life insurance companies, except that the annual license for each agent and solicitor shall not exceed the sum of fifty cents."

From the foregoing we are of the opinion that examiners in making examinations of insurance companies doing an industrial or prudential business, both foreign and domestic, are entitled to reasonable fees, but not to exceed Ten Dollars per day for any one examiner, together with all necessary expenses incurred and actually paid.

(E) Reciprocal or Inter-
Insurance Contracts.

Article XI, Chapter 37, Section 5972, R. S. Missouri 1929, relates to individuals, partnerships and corporations, both domestic and foreign, exchanging reciprocal or inter-insurance contracts with each other, and provides in part as follows:

"The business affairs and assets of said reciprocal or inter-insurance exchanges, as shown at the office of the attorney thereof, shall be subject to examination by the superintendent of insurance, as often as he sees fit and the cost thereof shall be paid by the exchange examined."

Section 5685 supra, providing for payment of a per diem fee, relates to examination of insurance companies generally. Section 5674 supra, providing for the payment of a reasonable fee, relates to an insurance company generally, but also specifically includes reciprocal or inter-insurance exchanges. Construing the aforementioned sections with Section 5972, we are of the opinion that examiners in making examinations of reciprocal or inter-insurance exchanges, both foreign and domestic, are entitled to reasonable fees not to exceed Ten Dollars per day for any one examiner, together with all necessary expenses incurred and actually paid.

(F) Fraternal Beneficiary Associations.

Article XIII, Chapter 37, Section 6016, relates to fraternal beneficiary associations and provides compensation for the examiners of domestic companies in part as follows:

"The superintendent of insurance, or any person he may appoint, shall have the power of visitation and examination into the affairs of any domestic society.***** The expense of such examination and all valuations, including compensation and actual expenses of examiners, shall be paid by the society examined, or whose policies are valued, upon statements furnished by the superintendent of insurance, and each society shall be examined at least once every three years. The compensation of examiners shall be ten dollars per day for each examiner for regular or special valuations of the policy obligations of such societies."

Article XIII, Chapter 37, Section 6018 relates to fraternal beneficiary associations and provides compensation for the examiners of foreign companies in part as follows:

"The superintendent of insurance, or any person whom he may appoint, may examine any foreign society transacting or applying for admission to transact business in this state. *****The compensation and actual expenses of the examiners making any such examination, and for all general or special valuations, shall be paid by the society examined or whose policy obligations have been valued upon statements furnished by the superintendent of insurance: Provided, the fees of examiners shall not exceed fifteen dollars per day for each examiner."

From the foregoing we are of the opinion that examiners in making examination of insurance companies doing business as fraternal beneficiary associations, are entitled to Ten Dollars per day for any one examiner, together with actual expenses, if the association be a domestic one, and not to exceed Fifteen Dollars per day for any one examiner together with actual expenses if the association be a foreign one.

(G) Town Mutual
Insurance Companies.

Article XVI, Chapter 37, Section 6078, R. S. Missouri 1929, relates to town mutual insurance companies and provides compensation for the examiners in part as follows:

"The expenses of such examination shall be paid by the company examined, but the amount charged therefor shall not exceed the sum of five dollars per day for the time actually expended in making the same, and actual traveling and hotel expenses, and shall not exceed in the aggregate the sum of fifty dollars."

From the foregoing we are of the opinion that examiners in making examinations of insurance companies doing business as town mutual insurance companies, both foreign and domestic, are entitled to a fee of not to exceed \$5.00 per day, together with actual traveling and hotel expenses, but in no event must the cost of the entire examination, including the per diem and expenses, exceed the sum of Fifty Dollars.

II.

Method of Approving Examiners Accounts.

Section 5684 R. S. Missouri 1929 provides that the Superintendent of Insurance shall examine any insurance company incorporated by or doing business in this State, in part as follows:

"The superintendent of the insurance department shall examine and inquire into all violations of the insurance laws of the state, and examine the financial condition, affairs and management of any insurance company incorporated by or doing business in this state*** **."

Section 5685 R. S. Missouri 1929, provides that the expenses of examinations of insurance companies doing business in this State shall be assessed by the Superintendent of Insurance upon the company examined, and on his order paid by the Company directly to the person or persons making the examinations. It is further provided that before any costs of an examination are paid vouchers for the same must be submitted by the examiners under oath and approved by the Auditor (See Section 5685 supra).

Sections 5674 and 5676 R. S. Missouri 1929 provide that the fees and expenses of examiners are to be paid by the company, association, organization, reciprocal or inter-insurance exchange under examination, upon accounts approved by the Superintendent of Insurance (See Sections 5674 and 5676 supra).

February 3, 1938

Construing the aforementioned sections together so as to give each force and effect, we are of the opinion that the proper method to be used in approving accounts of examiners employed by the Superintendent of Insurance to examine insurance companies incorporated by or doing business in this State is to have the superintendent examine them and if correct and under oath to approve them, submit same to the auditor for his approval, and then forward to the company examined for their payment directly to the examiner.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

LIQUOR CONTROL:

- (1) Counties not authorized to issue licenses, but should give dealer something as evidence or proof that he had paid county fee.
- (2) Person not paying county fee is subject to prosecution and his state liquor license may be revoked.
- (3) County Court may not pay salary of employee of Liquor Department.

February 14, 1938

Mr. George E. Heneghan
St. Louis County Counselor
418 Olive Street
St. Louis, Missouri

2-17
FILED
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Dear Sir:

This department is in receipt of your letter of January 22, 1938, in which you request an opinion on three questions. We shall take these questions up in the order you have presented them.

I

"Has the County Court authority to issue a liquor license to a dealer, or is the County Court confined to the collection of a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such permit or license) as the County Court shall, by order of record, determine?"

Section 25, Laws of 1935, page 276, is in part as follows:

"In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, or in case such premises are located in the City of St. Louis, to the collector of revenue of said city, a fee in such sum (not in excess of the amount by this act required to be

paid into the state treasury for such state permit or license) as the county court, or the corresponding authority in the City of St. Louis, as the case may be, shall by order of record determine."

It is true, as you have stated in the body of your letter, the repeal of Section 24, Laws of 1933, Ex. Sess. Acts, page 77, and the enactment of Section 25, supra, has made the provisions of Section 25, supra, confusing as to whether or not the county courts of this state may now issue a license or only collect a fee for the privilege of selling liquors within a county.

The section itself at no time refers to a license to be issued, but we think the reasonable interpretation to be given the provisions of this section is as follows:

The county court is authorized to charge each dealer in liquors a certain sum. This is to be done by an order of record. The payment of this sum is a prerequisite to engaging in the business of selling liquors in the county, (as we shall illustrate later). This being true, it is necessary that the person paying said sum to the county receive something as evidence that he has complied with Section 25, supra, and the order of the court made pursuant thereto. The necessity of a person having something as evidence that he has paid the county charge is illustrated by reference to a ruling of the Supervisor of Liquor Control to the effect that each applicant for a state license must, before said state license is issued, submit proof that he has paid the charges made by counties or cities of this state. This evidence, we think, may be in the form of a receipt, permit, license or a certified copy of the order of the county court concerning said liquor dealer, showing payment by him of the charge fixed by the court. It may also be, we think, by any other means which will effectuate the rule above referred to.

The mere application of one of the above terms to the evidence given by the Court to the dealer when he pays this charge does not make it that. However, it may well be termed any one of these terms since, in effect, its only use is to enable the dealer in liquors to obtain his state license, and the payment of the fee is to provide the county with revenue.

As heretofore stated, the payment of the charge made by a county is a prerequisite to engaging in the liquor business, not only because of the rule of the Supervisor aforementioned, but also for this reason. This department ruled, in an opinion rendered to G. Logan Marr, Prosecuting Attorney of Morgan County, on August 28, 1935, that a person may be prosecuted for engaging in the liquor business without paying the charge or fee to the county. A conviction of this offense would have the effect of automatically revoking that person's state license under the provisions of Section 30, Laws of 1933, Ex. Sess. Acts, page 88. We are enclosing a copy of this opinion for your information.

Therefore, upon this question, it is the opinion of this department that although Section 25 of the Liquor Control Act does not provide that the county court issue any license when a dealer in liquors pays the county charge or fee, the county court may and should give the person something in the form of a receipt or permit as evidence so that that person may present the same to the State Department of Liquor Control when he applies for his state license.

II

"Does the failure of the dealer to obtain a county license or pay the fee, as the case may be, come within the provisions of Section 26, Laws Missouri, 1927, constituting a violation of the provisions of the Liquor Control Act, so as to warrant the revoking or suspension of the license of the dealer by the Supervisor of Liquor Control?"

Concerning this question, we wish to state that the situation cannot now exist. On the 16th day of December, 1937, the Supervisor of Liquor Control promulgated the following rule:

"All applicants for state permits must first obtain city and county permits."

Under this rule, no one will be able to obtain a state license without first having paid the charges made by

the county and submitting proof of such payment to the Supervisor. Consequently, no violation such as you point out can now exist. However, if such a condition does exist, due to the fact that the above rule is of a comparatively recent date, then the proper procedure to remedy such condition is to institute prosecution as pointed out in the opinion enclosed herewith.

In State ex rel. v. Dykeman, 153 Mo. App., l.c. 418, the court in speaking of the old dramshop laws, said:

"A license to sell liquor is in no sense a contract with the state, but is a mere permit to do an act that would otherwise be unlawful, and is subject at all times to the police powers of the state government. The party receiving such a license takes it subject to all the provisions of the law relating thereto, and knows when he secures the license that it may be revoked at any time for the cause mentioned in the statute."

The causes mentioned in the statute for which a state liquor license may be revoked are found in Section 26, Laws of 1937, page 530, which provides that the Supervisor of Liquor Control may revoke or suspend a state license whenever he "has knowledge that a dealer licensed hereunder has not at all times kept an orderly place or house, or has violated any of the provisions of this act".

Under the ruling in the enclosed opinion, the failure or refusal to pay the county charge or fee is a violation of the law, and being such, Section 26, supra, provides that the Supervisor may revoke or suspend said license.

Therefore, it is the opinion of this department that a person now holding a state license who has not paid the charge or fee required by the county is subject to criminal prosecution, and also his state license may be revoked for his failure to pay the county charge or fee.

III

"May the County Court, by order of record, pay the salaries of State Liquor Inspectors and have those Liquor Inspectors be under the actual control of the Supervisor of Liquor Control and the activities of the Inspectors confined to enforcement of the Liquor Control Act in the counties wherein their salaries are paid by the County Court out of the general fund?"

The determination of this question depends entirely upon whether the statutes of this state give the county court the authority to act in this manner.

In Ray County ex rel. v. Bentley, 49 Mo., 1.c. 242, it is said:

"The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. It acts directly in obedience to State laws, independently of the county. Where it acts for and binds the county, it exercises its authority by virtue of power derived from the State government, and it obtains authority from no other source. (Reardon v. St. Louis County, 36 Mo. 555.)

"The principle is well settled that a corporation can exercise only such powers and employ such agencies as its charter may permit. But counties have not the powers of corporations in general. They are merely quasi corporations, political divisions of the State, and they act in subordination to and as auxiliary to the State government."

February 14, 1938

In *Sturgeon v. Hampton*, 88 Mo., 1.c. 213, it is further stated that:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void."

Keeping in mind that the county courts of this state are creatures solely of statutory origin and only have such authority as is expressly given by statute or necessarily implied therefrom, we do not find where the county court on any occasion can be said to be authorized to pay out of county revenue the salary of an employee of the Department of Liquor Control. Not being given this power, we must therefore conclude that such may not be done, although we are fully aware that if such could be done, it would aid greatly the enforcement of the liquor laws of this state.

Therefore, it is the opinion of this department that the action of the county court of St. Louis County in paying the salary of any employee of the Department of Liquor Control would be beyond the court's statutory authority and, consequently, void.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

COLLECTORS: Collector's compensation for deputy hire and expense of office.

March 18, 1938.

3-24



Honorable George E. Heneghan,
County Counselor,
Clayton, Missouri.

Dear Sir:

This will acknowledge yours of March 2nd last wherein you request the opinion of this department on the following questions:

- "1. Does Section 9935a, Laws of Missouri, 1935, apply to St. Louis County, and does it constitute a limitation on the amount the Collector of St. Louis County can expend for deputy and clerk hire by requiring the Collector to limit himself for deputy and/or clerk hire to 25% of the total fees and commissions he is permitted to charge; i.e., to 'collect, receive and retain' under the provisions of Section 9935, R. S. Mo. 1929, as amended by Laws, Missouri, 1933 and 1937?
2. Does the Collector of St. Louis County come within the provisions of the County Budget Law, or does the provisions of Section 11, p. 347, pertaining to departments, etc., receiving revenues in whole or in part from the County exclude the Collector on the theory that he does not receive his revenues in whole or in part from the county but from commissions, fees, etc.?

You are aware, of course, that certain revenues of his office are allowed to him indirectly by the County out of the general fund, and therefore, we contend that part of his revenue does come from that source; and further, in a broad sense, a greater part of his revenues does come from the County in that it does not come from the state, municipalities, etc.? "

I.

Approaching your first question, we note that Section 9935 of the 1929 Statutes, as reenacted in the Laws of 1937, page 548, has been on the statute books for a long number of years in substantially the same general form as to subdividing the collectors in the several counties into fourteen subdivisions according to the amount of taxes levied and collected in the respective counties, and fixing the collectors' compensation on a commission or percentage basis in proportion to the amount of taxes collected. Subdivision 14 deals with collectors in counties where the amount of taxes collected exceeds two million dollars and is the subdivision applying to the Collector of St. Louis County.

For a long period of time prior to 1933 the commissions or pay of the collectors in the first thirteen subdivisions was limited to a maximum of nine thousand dollars. Collectors in the fourteenth subdivision were and are still limited to ten thousand dollars. In 1933 Section 9935 was amended to the end that the maximum amount of commission or pay that the collectors in the first thirteen subdivisions were permitted to retain out of the taxes collected was materially, if not radically, reduced. Subdivision 14, however, was in no wise affected or changed so far as the collector's commission or pay was concerned.

Ever since the original enactment, many years ago, of the statute pertaining to collectors' compensation, no provision was ever made, or at least no express provision made, relative to collectors in the first thirteen subdivisions for the payment of deputies employed or other expense of the office until such provision was finally made in 1935.

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On the other hand, during all of such period and up to the present time an express provision exists relative to collectors in the fourteenth subdivision for the payment of deputy hire, etc.

In the legislative session of 1935 Section 9935 was amended by adding thereto Section 9935a, which is as follows (Laws of 1935, page 406):

"That the officers referred to in Section 9935, in addition to the maximum amount of fees and commissions permitted to be retained by County Collectors as provided in Section 9935 Revised Statutes of Missouri for 1929, as amended by an act of the General Assembly, approved May 11, 1933, and found in the Session Laws for 1933 at pages 454 to 458, inclusive, each such officer may retain for the payment of Deputy and/or clerical hire a sum not to exceed twenty-five per cent of the maximum amount of fees and commissions which such officer is permitted to retain by said Section as so amended, but such Deputy and/or clerical hire shall be payable out of fees and commissions earned and collected by such officer only and not from general revenue."

Paraphrasing the above section, in substance and effect it would read as follows:

"That the officers referred to in Section 9935, as amended, shall be permitted, in addition to the maximum amount of fees and commissions allowed to be retained by county collectors as provided in said section, as amended, to retain for the payment of deputy and/or clerical hire a sum not to exceed twenty-five per cent of the maximum amount of fees and commissions which such officer is permitted to retain by said section as so amended," etc.

It is to be noted that in the amending, and by the amendment, of Section 9935 by the Legislature in 1933 the only change that was made, namely, the change in the maximum fees, referred to and affected solely the officers in the first thirteen subdivisions. The change made by the amendment in no wise referred to the officers in subdivision 14, nor were such officers in said subdivision 14 in any way affected by the purpose of the amendment (to reduce the possibilities as to amount of pay that the collectors in the first thirteen subdivisions might receive).

This substantial, if not radical, reduction in possibilities of pay for such collectors, and without allowance for any additional compensation to pay deputies and other expenses, undoubtedly worked hardship in some, if not all, cases of collectors in the first thirteen subdivisions. Hence, when the Legislature convened at the 1935 session this situation was made known and it no doubt undertook to remedy the situation by the enactment of Section 9935a, which gave to the collectors in the first thirteen subdivisions the additional allowance provided for by said amendment.

When Section 9935a was considered and passed by the Legislature at the 1935 session, collectors in subdivision 14, at the time of the consideration and passage of said section, were provided with an allowance for deputy hire and expenses, as shown by the language in the 1933 law (Section 9935, page 454), as follows:

"Said collector shall present for allowance proper vouchers for all disbursements made by him on account of salaries and expenses of his office and other costs of collecting the revenue, which shall be allowed to him as against the commissions retained by him."

Consequently, there could be no reason for, or purpose in, the consideration and passage of Section 9935a so far as expenses of deputy hire, etc., of collectors in subdivision 14 were concerned.

We further notice that the allowance made for deputy and clerical hire is based upon the maximum amount of fees and commissions that a collector is permitted to retain under

Section 9935, as amended. Turning to said section, we find, so far as collectors in the first thirteen subdivisions are concerned, the only place the word "retain" is used is in connection with the enumerated scale of commissions allowed such collector. Likewise, in subdivision 14 the word "retain" is used only in connection with the net commission remaining after salaries and expenses have been paid.

Consequently, the additional allowance of the twenty-five per cent provided for in Section 9935a being based on the maximum amount of commissions permitted to be retained, the Collector of St. Louis County (along with all collectors in subdivision 14), if the act applies to such collectors, would be limited to twenty-five hundred dollars for deputy salary and expenses of office.

By Section 5 of an act of the 1933-1934 Extra Session Laws of Missouri, page 106, collectors in counties of fifty thousand to eighty thousand population are entitled to have three deputies at a salary of one hundred seventy-five dollars per month, each, or a total of sixty-three hundred dollars for the year. We find by the census figures that Buchanan and Greene Counties are the two counties in the state which fall within such population bracket, and we are authoritatively informed that the annual tax collections in said counties run from something over a million dollars to close to two million dollars. As there are no other counties in the state anywhere comparable in population to Buchanan and Greene Counties (save Jackson and St. Louis Counties, which far exceed them), and hence could not collect anything like a million dollars or more, it is apparent that there were no collectors in the state falling within subdivision 13 of Section 9935 when the Legislature enacted Section 9935a a year or more later. We must assume that the Legislature knew at the time it considered the last mentioned section that collectors who, prior to the Special Session Act of 1933-1934, fell in subdivision 13, had been taken out and placed on a salary basis and allowed in addition thereto as much as sixty-three hundred dollars per annum for deputy hire.

In view of the fact that St. Louis County is at least two and one-half times greater in population than either Greene or Buchanan Counties, it is fair to presume that the increase in tax collections in St. Louis County over the other two would be in like proportion. In fact, if we are reliably informed,

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St. Louis County has an average annual collection of eight million dollars or better. Accordingly, it would seem unreasonable that the Legislature at the 1935 session, presumably with knowledge at the time that the collectors of Buchanan and Greene Counties were being allowed at least sixty-three hundred dollars per year for deputy hire in collecting less than two million dollars in taxes, intended to limit the Collector of St. Louis County and the City of St. Louis to only twelve hundred fifty dollars for deputy hire in collecting two and one-half times or more in taxes. Hence, we are impelled to the conclusion that the Legislature did not intend that Section 9935a applied to collectors in subdivision 14, and that consequently said section does not apply to the Collector of St. Louis County because:

1. The only officers affected by the amendment to Section 9935 being the officers included in the first thirteen subdivisions, it is hardly good reasoning to conclude that an act of the Legislature "refers" to some person or thing whom or which is in no wise affected by the act. Hence, the officers referred to as stated in the act are those in the first thirteen subdivisions only.

2. In view of the fact that collectors in subdivision 14, at the time of the act, were, and had been, provided with an additional allowance for deputy hire and expenses, it was unnecessary and needless for the Legislature to enact Section 9935a for the benefit of such collectors.

3. In view of the further fact that the Legislature knew, or was presumed to know, at the time Section 9935 was considered, it deemed it fair and wise at a former session to allow certain collectors the sum of sixty-three hundred dollars per year for their labors in collecting a far less amount of taxes than is collected in St. Louis County, to then say that the Legislature in 1935 intended that the Collector of St. Louis County--who was collecting upwards of four times the amount of taxes that was being collected in Buchanan and Greene Counties--should be limited to one-fifth of the allowance given to the two collectors, for his expense in such collections, is to charge the Legislature with an apparent unreasonable, if not absurd, intention and act.

Chief among the cardinal rules for statutory construction is to find and declare the meaning and legislative intent of the law, giving to it a reasonable and not an unreasonable

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and absurd construction. The rules and principles of statutory construction applicable here are forcibly stated in the case of Lumber Company v. Railroad, 216 Mo. l. c. 671-672, where the court said:

"With the laws before us the chief purpose of the court is to find and declare the meaning and legislative intent thereof. If the statute (or the words thereof) is susceptible of two constructions, one of which renders the law unconstitutional, and the other makes it valid, the court should adopt the latter. * * *

"Nor should we give the statute such construction as would make it unreasonable and absurd, for it is to be presumed that such was not the legislative intent. And after all the legislative intent and purpose is the thing to be sought, when there is doubt as to the meaning of the language used. This doubt may arise from the statute itself or from cognate statutes, which must be considered therewith. * * *

"* * * The inartificial manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not infrequently met with, often require the court to look less at the letter or words of the statute than at the context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law-giver."

Many additional decisions of like tenor could be cited, but we believe the one will suffice to show the principle to be followed.

However, in reaching the conclusion that Section 9935a does not apply to the Collector of St. Louis County, we do not mean to say that no limit is or can be placed on the allowance he is entitled to for deputy hire and expenses. We say, to the contrary, there can be such limit.

Subdivision 14 of Section 9935 applies to and controls collectors in both counties and cities wherein the taxes levied for any one year exceed two million dollars.

Both such collectors are required to pay all deputy salaries and other expenses of the office in collecting the respective revenue.

Both such collectors are required to make settlement annually at one and the same time, to-wit, on the first Monday in March.

Both such collectors are required to present for allowance the total expense of collecting the revenue.

Both such collectors are permitted to retain a maximum of ten thousand dollars for compensation.

Hence, we say that the salient features of the provision for payment of deputy hire and expenses of office and compensation are identical in the case of both or all collectors in subdivision 14.

Section 9935 provides, among other things, as follows:

"Provided, that the municipal authorities of such cities may limit the maximum number of and maximum salaries to be paid to all employees of the collector."

Then follows the words, "The collector shall make settlement," etc.

Then follows the further words, "Said collector shall present for allowance," etc.

Recurring to the above quoted provision of Section 9935, it is our conclusion, in view of what we have outlined above, and also other considerations, that the Legislature evidently intended that the word "cities" should be given a sufficiently comprehensive meaning to include the word "counties," or, realizing as a matter of law that a collector who has authority to collect state and county taxes, even if solely in a city, is as much a state officer as one who collects taxes in the county, the Legislature intended that the same restriction should be placed on both collectors as to limiting the number and pay of deputies and expense of office.

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Our courts have definitely passed upon the status of an officer who performs state and county duties solely within a city, as, for example, the City of St. Louis, which falls within subdivision 14 as to tax collections.

In the case of State ex rel. v. Bus, 135 Mo. 1. c. 337, the court said:

"While the city of St. Louis is strictly a municipal corporation its territory is also a subdivision of the state in which officers are elected to perform the functions of the state government as distinguished from those pertaining to municipal government. Those officers are in so sense municipal officers. Their designation as officers of the city of St. Louis refers to their territorial jurisdiction rather than to the governmental duties they perform. They are officers under the laws of the state and perform their duties within the city limits. The sheriff of the city of St. Louis is an officer of the city in the same sense that a sheriff of a county is an officer of the county. He is no more a municipal officer than a sheriff of a county is an officer of a municipal corporation, the territory of which is included in his jurisdiction. These propositions are settled by the decisions of this court."

In State ex inf. v. Koeln, 270 Mo. 1. c. 185-186, the court said:

"The territory confined within the boundaries of the city of St. Louis forms a political subdivision of the State. This territory has no county organization in the ordinary use of that term, but by the Constitution the said city is to 'collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a county as in this Constitution defined.' If this

political subdivision of the State were styled a county no confusion would arise in arriving at the conclusion that the person whose duty it was to collect the State taxes was an officer of the State and that his election would be a subject of legislative control.

"Why then should the election of the Collector of the Revenue of the City of St. Louis (a separate political subdivision of the State which, under the Constitution, bears the same relationship to the State as a county), who, at least so far as collecting the revenue ordinarily collected by a county collector is concerned, performs the same governmental function, be controlled by a law different from that which controls the election of collectors in the other political subdivisions (counties) of the State? No reason is apparent why the election of one should be controlled by a law different from that applying to other officers exercising a like governmental function, and none can be said to exist unless perchance the power of control over the election of this officer in the city of St. Louis was, by the Constitution, permanently transferred to the charter making power of said city."

In State ex rel. Crutcher v. Koeln, 332 Mo. 1. c. 1234, the court said:

"The compensation of all county collectors has for many, many years been governed by statute and fixed by graduated scale based upon a classification of the various counties (the city of St. Louis being regarded as a county), according to the total taxes levied in them respectively for any one year."

In view of the case holding above that the collectors of both the City of St. Louis and St. Louis County perform their functions as state officers, and that both are subject

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to the same and identical provisions as to settlements and allowances for deputy hire and expenses and maximum compensation, no good reason exists, nor could likely be shown, for the belief that the Legislature intended that one collector could be restricted in his expenses, while the other could not be. Consequently, we are of the opinion that the County Court of St. Louis County can limit the maximum number of and maximum salaries to be paid to all employees of the collector, and may otherwise reasonably limit the expenditures of his office and cost of collecting the revenue.

II.

Answering your second question concerning the collector's relation to the Budget law, we first say that we have been unable to find where any Missouri court has passed on the question you asked, and hence it becomes one of first impression.

Undoubtedly the revenue derived from tax collections belongs to the state and county the same as all other fees, commissions and money collected by the other county officers. Certainly such revenue does not belong to or become the property of the collector. Such collector is the mere agent of the state and county to collect such revenue or taxes and thereby satisfy the state and county lien (not any collector's lien) against the taxpayers' property. While the method or manner used by the county in paying the collector, namely, permitting him to retain a part of the total revenue in place of first paying it over to the proper county officer and then having his (the collector's) part paid back to him, may be a different method than ordinarily used, yet it does not alter the fact that all such revenue is the county's and the collector receives his part of such revenue from the county by virtue of his office. Furthermore, the collector's office pays over to the proper officer of the county, annually, revenue derived from tax collections. In view of this fact, that the county receives some of its revenue from the collector's office, we fail to understand how the county or the budget officer could intelligently prepare a budget unless he had an estimate of all of the sources of county revenue. The fact that the county does not pay, at least directly, the expense of the collector's office does not alter

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the apparent difficulty that the budget officer would be in when he knew there was a source of revenue which could be counted on, yet had no estimate of what it would be, so that the county would be in a position to know the total amount of revenue out of which it could budget and make its necessary expenditures. Hence, we conclude that the collector is subject to Section 11 of the Budget Act to the extent at least of preparing annually an estimate of the probable revenue arising from tax collections which on the collector's settlement will be due the county.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR

INSURANCE: Marsh & McLennan-Case, Thomas & Marsh Incorporated may not engage in the insurance business in Missouri under their charter.

March 28, 1938



Honorable Charles L. Henson
Chief Counsel
Insurance Department
Jefferson City, Missouri

Dear Judge Henson:

This is to acknowledge your request for an opinion under date of February 28, 1938, based on the facts contained in an enclosure which reads as follows:

"We desire to submit to you for your consideration the following situation which exists in Saint Louis.

A Delaware corporation, Marsh & McLennan, with principal offices located in Chicago, Illinois, desired to engage in the business of underwriting insurance in the State of Missouri.

Such corporation could not qualify to write insurance in Missouri nor could its principal stockholders who were non-residents, so a domestic corporation was formed in Missouri under the name of Marsh & McLennan-Case, Thomas & Marsh, Incorporated. It then associated with it the following persons to whom agent's licenses, and in some instances broker's licenses, were issued:

Otis V. Bennett
Ralph E. Brown
Edw. G. Marsh, Jr.
Roger W. Marsh
Claude D. Meyers

Jas. D. Row
John B. Sturges
Melvin A. Thomas
A.J. Fellhauer

A Mr. Seabury and a Mr. McLennan, residents of Chicago, Illinois, who operate Marsh & McLennan, Inc., are the principal stockholders in Marsh & McLennan-Case, Thomas & Marsh, Incorporated, and the letterheads of Marsh & McLennan, Incorporated, as a branch office of Marsh & McLennan, Incorporated, with Edward G. Marsh as Resident Vice-President.

It is unquestioned that a share of the profits earned by Marsh & McLennan-Case, Thomas & Marsh, Incorporated, goes to Mr. Seabury, Mr. McLennan and Marsh & McLennan, Incorporated, in Chicago, Illinois.

We submit for your consideration that the corporation known as Marsh & McLennan-Case, Thomas & Marsh, Incorporated, is thus being used to evade the resident agency law of Missouri, in attempting to do what Marsh & McLennan, Incorporated, of Chicago could not do in its own name and what Mr. Seabury or Mr. McLennan could not do as individuals.

If, therefore, it appears that the domestic corporation Marsh & McLennan-Case, Thomas & Marsh, Incorporated, and the agents associated therewith, are operating in violation of law, it would appear to follow that renewal licenses should not be issued to the above named individuals.

We would appreciate very much receiving from you a general ruling covering this and similar situations.

The facts and questions presented may be stated as follows:

A foreign corporation desires to engage in the business of underwriting insurance in the State of Missouri. Such corporation cannot qualify to write insurance in Missouri nor can its principal stockholders who are non-residents. To overcome this difficulty such non-resident stockholders then form a domestic corporation, arrange to have certain persons licensed as resident agents and then proceed to write and place insurance business in the State of Missouri through such domestic corporation which, in turn, forwards a share of the profits to said non-residents and said foreign corporation.

Query: Is such domestic corporation, and are the agents associated therewith, operating in violation of the law in the State of Missouri, and if so, does the Superintendent of Insurance have the right to revoke the licenses of said agents and to refuse to issue new licenses?

In approaching this question it is obvious we must first analyze the law governing such a situation as set forth in the Statutes of Missouri and in the rulings of the Superintendent of Insurance. There exist certain definite unequivocal principles which shall be listed and commented upon as follows:

- (1) Only licensed agents can engage in the writing of insurance.

This principle is specifically set forth in its application to agents in Section 5902 R. S. Mo. 1929, as follows:

"Foreign companies admitted to do business in this state shall make contracts of insurance upon property or interests therein only by lawfully constituted and licensed resident agents, who shall countersign all policies so issued. And any such insurance company who shall violate any provision of this section shall suffer a revocation of its authority by the superintendent of insurance to do business in this state, in addition to the penalty prescribed in Section 5909, such revocation to be for the term of one year."

The same principle appears with reference to brokers in Section 5904, R. S. Missouri 1929, as follows:

"Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance for any person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, shall be deemed an insurance broker, and no person shall act as such insurance broker, save as provided in this section. The superintendent of insurance may, upon the payment of a fee of ten dollars, issue to any person a certificate of authority to act as an insurance broker to negotiate contracts of insurance or reinsurance, or place risks, or effecting insurance or reinsurance with any qualified domestic insurance company or its agents, and with the authorized agents in this state of any foreign insurance company duly admitted to do business in this state."

- (2) A license to write insurance will be issued to natural persons only.

In the operation of the affairs of the insurance department the principle has long existed that in order for the business of insurance to be properly controlled and policed in this state it is necessary to require that licenses be issued to natural persons only. As a result the insurance department has complete control and supervision over the individuals who are engaged in the business of insurance in this State. The promulgation of such a rule prevents persons from using the fiction of a corporation to avoid the responsibility which logically falls upon the individuals engaged in such business.

It is beyond question that such a ruling by the insurance department is well within the discretion of the superintendent as it is in full accord with the spirit and letter of the law.

In State ex rel. Mackey v. Hyde, 286 S.W. 363, the Supreme Court of Missouri held that inasmuch as the Superintendent of Insurance was authorized to issue licenses to engage in the insurance business that he was entitled to exercise reasonable discretion in the performance of his duties. No one can deny that the instant ruling is within the discretion of the superintendent.

Although from the above it is clear that a license will not issue to a corporation as such, yet it is perfectly proper in Missouri for a corporation to engage in the insurance business through properly licensed associates, if it does so legally.

A case bearing upon this point is James N. Tardy Company vs. Tarver, 39 S. W. (2d) 848 (Tex.) 1. c. 850, in which the Court said:

"It has been held also that while a license cannot issue to a corporation as such, it is competent for the corporation to take out a license in the name of a designated agent or employe, or agents or employes, and the latter may lawfully act in pursuance of the license."

In accord with this also is the case of Rogers vs. Ramey, 248 S. W. 254 (ky.)

The business of writing insurance in Missouri may be handled only by licensed natural persons but such persons may be associated with a corporation in the business of insurance if such licensed persons and the corporation comply with the other provisions of the insurance law of this state.

- (3) A natural person must be a resident of Missouri in order to qualify as an agent.

This principle of law is contained in Section 5902, R. S. Missouri 1929, which is as follows:

"Foreign companies admitted to do business in this state shall make contracts of insurance upon property or interests therein only by lawfully constituted and licensed resident agents, who shall countersign all policies so issued. And any such insurance company who shall violate any provision of this section

shall suffer a revocation of its authority by the superintendent of insurance to do business in this state, in addition to the penalty prescribed in section 5909, such revocation to be for the term of one year."

The intent of the Legislature is clearly expressed herein to the effect that the issuance of licenses shall be confined to residents of this state.

See Noble v. English, 183 Iowa, 893, 167 N.W. 629.

In this case the Supreme Court of Iowa held that even though the Statutes of Iowa did not provide that foreign companies could be represented only by resident agents, yet the State Insurance Commissioner had the power and the right to hold that no license would be issued to an agent of a foreign company who was a non-resident of Iowa.

- (4) A licensed agent may not share or divide the whole or any part of any commission, except with another duly licensed agent or broker.

This principle is contained in the following section of the Missouri Statutes, Section 5904 R. S. Missouri 1929, as follows:

"Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance for any person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, shall be deemed an insurance broker, and no person shall act as such insurance broker, save as provided in this section."

It is clear from the above section that the Legislature intended that whoever aids in placing insurance for compensation, if he is not an agent, must be a broker.

If A, a layman, assists B, an insurance agent, in selling a policy of insurance, then A, in order to receive part of the commission, must have either an agent's license or a broker's license.

It, of course, follows logically that if A assists B to obtain a commission and if A accepts part of said commission without having an agent's or broker's license A is violating the law. If A and B form a partnership in which A aids in placing insurance and receives therefor part of the commission, the situation is still unchanged for A would still be receiving part of the commission unlawfully.

In the event A and B should form a corporation and A holds part of the stock from which he receives dividends which are merely his share of the commissions for assisting in placing business, does this make it legal for A to accept his share of the commissions, in the form of dividends, even though he does not hold an agent's or broker's license?

Obviously not.

If it is unlawful for A to receive part of the commissions as a partner of B, then it is just as unlawful if it is done through the artifice or device of setting up a corporate entity.

Applying this reasoning to the present question presented, it is clear that should the licensed resident agents involved, forward their commissions to the foreign corporation, which, of course, does not hold an agent's or broker's license, they would be doing so unlawfully. If their commissions were forwarded to such foreign corporation under a partnership agreement, it would still be in violation of the law of Missouri. So also it is just as unlawful if in order to circumvent the clear intent of the law the licensed resident agents deliver their commissions to the domestic corporation which in turn forwards such earnings to the foreign corporation. The forming of the domestic corporation, which merely adds another step to the chain of transactions which culminate in the splitting of commissions between the licensed resident agents and the non licensed foreign corporation, will not legalize the attempt to circumvent the law.

The rule is well recognized that individuals may not use a corporation as a means to accomplish those acts which they are prohibited from doing as individuals. A general statement of this principle of law is found in 14a Corpus Juris, 309, Section 2158, which reads as follows:

"It may be stated as a general rule that to the extent and within the limits discussed elsewhere in this work, corporate transactions which are illegal as distinguished from merely ultra vires, contemplate the doing of some essentially unlawful act, violate some public duty, or contravene some rule of public policy, are, like similar transactions between individuals, void, and cannot support an action nor become enforceable by performance, ratification, or estoppel."

If, therefore, it appears that the agents and brokers heretofore referred to are operating illegally and unlawfully, the question arises as to whether or not the Superintendent of Insurance has the right to revoke any license issued to agents and brokers and to refuse to issue new licenses.

With reference to agents, the statutes provide as follows, Section 5892 R. S. Missouri 1929:

"* * *The superintendent of insurance for cause shall have the authority to refuse to issue a license to an agent or may suspend or after 15 days' notice of its intention to do so given in writing to the agent and the company represented by such agent revoke any such license after a hearing before the superintendent of insurance. If the ruling of the superintendent of insurance be adverse, then, within thirty days after receiving notice of the revocation, suspension, or refusal to license, the person aggrieved shall have the right to petition any court of record of the county wherein the applicant resides to require said superintendent of insurance to show cause why the license so revoked, suspended, or refused, should not be reinstated or issued."

March 28, 1938

With reference to brokers the statutes provide as follows,
Section 5904 R. S. Missouri 1929:

"* * *The superintendent of insurance may, upon the payment of a fee of ten dollars, issue to any person a certificate of authority to act as an insurance broker to negotiate contracts of insurance or reinsurance, or place risks, or effecting insurance or reinsurance with any qualified domestic insurance company or its agents, and with the authorized agents in this state of any foreign insurance company duly admitted to do business in this state. Such certificate shall remain in force one year, unless revoked by the superintendent of insurance for cause."

Upon a thorough consideration of the questions involved we are of the opinion that the operation of the domestic corporation and its associated agents and brokers as outlined above is clearly illegal and unlawful under the law of Missouri and that the Superintendent of Insurance has the right, the power and the duty to revoke the licenses issued to such agents and brokers and to refuse to issue new licenses to such persons.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

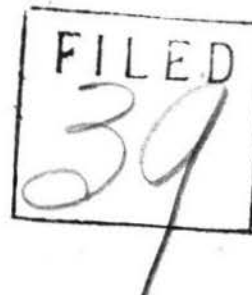
ROY McKITTRICK,
Attorney General

MW:MM

CITIES, TOWNS AND VILLAGES:) City officers may purchase
MUNICIPAL PLANTS:) securities with customers' deposit
funds.

June 10, 1938

6-11



Mr. J. F. Hensley
Mayor
City of Fulton
Fulton, Missouri

Dear Sir:

This is to acknowledge your letter of May 23d, in which you request the opinion of this Department on the question therein submitted. Your letter of request is as follows:

"As Mayor of the City of Fulton, Missouri, a City of the third class, I desire to obtain some legal advice.

"The City of Fulton owns and operates Municipal Gas, Light and Water Systems. A deposit is required from all consumers before these services are connected for use. At the present time we have balances of approximately \$1726 in the Gas Deposit Fund, \$3622 in the Electric Deposit Fund and \$2781 in the Water Deposit Fund. As the new deposits during any one month balance or nearly balance off the withdrawals, the money is lying in the bank drawing no interest, while at the same time we are paying interest to the consumers on their deposits.

"My question is whether or not the City has a legal right to

June 10, 1938

invest this money in good security in order to obtain a little revenue. Such securities as I have in mind would be our own Municipal Bonds, or tax bills for Street Improvements, leaving a small revolving fund sufficient to take care of all withdrawals that might occur."

We note that the City of Fulton is a city of the third class and also that it does not have a board of public works. The management of the various municipally owned utilities, we assume, are managed and operated directly by the City Council through its agents.

In your letter of request you state that the City has more than \$8000.00, which money has been deposited by the users of gas, electricity and water, and that same remains approximately at that sum at all times. You desire to know whether, in our opinion, you may purchase high grade securities with this money so deposited with the City authorities and obtain some revenue, in view of the fact that you pay interest to the various depositors of the above money.

The direct management, operation and control of the above utilities being directly under the supervision of the Mayor and the City Council, and they having the responsibility of the operation of same, we can see no good reason why, in the exercise of their discretion and best judgment, they would not be permitted to invest this fund in high grade securities. Of course, they should keep on hands in cash a sufficient amount to take care of the withdrawals at all times. If we understand the situation correctly, the retaining of this fund by the City under the present conditions is at a loss to the City for the reason that it pays interest on this fund to the depositors and receives no income, so that either the various municipal plants pay the interest or it is paid out of city revenue.

Mr. J. F. Hensley

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June 10, 1938

It is, therefore, our opinion that the City Council may, in its discretion, buy high grade gilt-edged securities and thereby derive some interest from the fund. The city authorities should exercise extreme care in choosing the securities so purchased.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

JUSTICE OF THE PEACE: Number to be elected annually.

July 11, 1938



Honorable Emil F. Helmendach
County Clerk
Franklin County
Union, Missouri

Dear Sir:

We have your request for an opinion, as follows:

"In Franklin County we have two townships in which the number of Justices of the Peace to be elected is in question.

First, there is Union Township which consists of a good deal of rural territory and in which there is a city of more than 2000 population.

Second, there is Washington Township which is also the City of Washington containing approximately 6000 population. Said township includes no territory outside the corporate limits of the city.

The question is: How many Justices of the Peace are the two aforesaid townships to elect? Are they permitted to elect just two justices or may they elect an additional justice?"

July 11, 1938

Article VI, Section 37, Missouri Constitution, provides that the number of justices of the peace may be regulated by law.

Section 2136 R. S. Missouri 1929, provides in part as follows:

"Every municipal township, except as otherwise provided by law, shall be entitled to two justices of the peace, * * *; but in case there shall be in any such township an incorporated town or city having a population of over 2000 inhabitants and less than 100,000 inhabitants, said town or city shall be entitled to one additional justice of the peace* * *".

It is therefore apparent that Washington Township in your county, which includes the City of Washington with a population of approximately 6000 inhabitants is entitled to three justices of the peace. All townships are entitled to a minimum of two justices of the peace.

It is therefore the opinion of this office that all townships should be permitted to elect two justices of the peace, and in all townships where there is a city of over 2000 inhabitants and less than 100,000 inhabitants three justices of the peace should be elected.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

INSURANCE DEPARTMENT:

Approval as to the form and sufficiency of the papers submitted in connection with the increase of capital stock of the St. Louis Fire and Marine Insurance Company.

October 10, 1938.

10-11

Judge Charles L. Henson
Chief Counsel
Insurance Department
Jefferson City, Missouri



Dear Judge Henson:

This is to acknowledge receipt of your letter of October 5th, also your supplementary letter of October 8th, in which you request the opinion of this Department as to the form and sufficiency of the papers submitted in connection with the increase of capital stock of the St. Louis Fire and Marine Insurance Company.

We have examined the original affidavit of publication of the notice of the special meeting of the stockholders of said company and also a certificate of the Secretary of said company as to the proceedings of the special meeting aforesaid, and meeting of the board of directors of said company, and find same in due form and have the approval of this Department.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

INSURANCE DEPARTMENT:

Approval of Articles of Incorporation
of the United States Health and Accident
Company, proposed to be formed under
Art. 4, Chap. 37, R. S. 1929.

October 20, 1938



Judge Charles L. Henson
Chief Counsel
Insurance Department
Jefferson City, Missouri

Dear Judge Henson:

This is to acknowledge receipt of your letter of October 19th, in which you enclose the Articles of Incorporation of the United States Health and Accident Company for the examination of this Department, as provided in Section 5760, R. S. Mo. 1929. This Association is proposed to be formed under the provisions of Article 4, Chapter 37, R. S. Mo. 1929.

We have examined the Articles of Incorporation and find that they comply with the provisions of Article 4, Chapter 37, R. S. Mo. 1929, and have our approval as to the form thereof.

We are returning the original Articles and retaining one copy for our files.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

TAXATION - County road and bridge tax is a part of the levy for county purposes.

December 15, 1938

Miss Thela Shuck Henry
Prosecuting Attorney
Shannon County
Eminence, Missouri



Dear Miss Henry:

We have your request of December 14, 1938 for an opinion, which reads as follows:

"Shannon County is one of those counties with an assessed valuation of less than Six Million Dollars (\$6,000,000.00).

"In May of this year our County Court made the following levies: - fifty cents on the \$100.00 valuation for County revenue; twenty-five cents on the \$100.00 valuation for Special Road and Bridge fund, as authorized by Section 22, Article 10 of the Constitution, and an additional twenty-five cents on the \$100.00 valuation which they designated as County Road and Bridge fund.

"I desire an opinion from your office as to whether or not the last mentioned twenty-five cents levy is legal and will appreciate a response at your earliest convenience."

The authority of the county court to levy taxes for county purposes in your county is found in Article X, Section 11 of the Constitution, and in Section 9873, R. S. Mo. 1929, which provides that in counties having \$6,000,000.00 or less of assessed valuation a tax of not to exceed fifty cents on the \$100.00 valuation may be levied for county purposes.

Miss Thela Shuck Henry

-2-

December 15, 1938

It is apparent from your letter that the county court has levied a twenty-five cent special road and bridge tax which is authorized by Section 22, Article X of the Constitution, and has levied the full constitutional limit of fifty cents for county purposes, which is authorized by Article X, Section 11 of the Constitution, but in addition thereto has levied an additional twenty-five cents as a county road and bridge tax. We find no authority in the Constitution for this last additional tax.

Section 7890, R. S. Mo. 1929 provides that the county court of your county may levy a tax of not more than twenty cents on \$100.00 valuation as a road tax, which levy shall be collected and paid and placed to the credit of the "county road and bridge fund."

Any levy made for the county road and bridge fund is a part of the fifty cent levy authorized by the Constitution (Article X, Section 11) and is not in addition to the fifty cent levy. State ex rel. vs. Railroad, 270 Mo. 251; State ex rel. vs. Wabash Railway, 3 S. W. (2d) 378.

It is, therefore, the opinion of this office that the twenty-five cent additional levy for county road and bridge purposes is irregular and in excess of the constitutional limits prescribed in Article X, Section 11 of the Missouri Constitution.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE

RE: PROBATE COURTS: ADMINISTRATION OF INHERITANCE TAX LAWS.

January 12, 1938.



Honorable S. J. Holloway,
Probate Court,
Versailles, Missouri.

Dear Sir:

This department is in receipt of your letter of January 6th requesting an opinion as to the following:

"I had a situation arise in my Court a few days ago that bothered me at the time and I am still not satisfied as to the legality of the proceedings that were taken. A will was presented for probating, leaving to the widow all real estate consisting of about 240 acres and all personal property, the value of which I have not the slightest idea. The attorney for the estate in this case argued that all that was necessary was to have the proof of will made and the recording of the same in my Court and by the Recorder of Deeds. The attorney also prepared a paper setting forth the election of the widow regarding the property.

The point is this: I have been under the impression that a report was necessary showing No Inheritance Tax Due the state in the event the estate was not large enough to be subject to an Inheritance Tax. I am unable to see just how a decision could be reached in the matter, unless Letters Testamentary were issued and an Inventory and Appraisement made. I can hardly see how the law can require a "No Inheritance Due" report in estates that are probated and Letters granted and then allow these estates to escape administration.

I trust that I am not imposing upon you in asking a ruling on the matters I have set forth."

Section 585, Revised Statutes of Missouri 1929, provides, in part, as follows:

"The probate court which grants letters testamentary or of administration, either original or ancillary, on the estate of any decedent, shall have jurisdiction to determine the amount of the tax provided for in this

article and the person, persons, association, institution or corporation liable therefor, and to determine any question which may arise in connection therewith, and to do any act in relation thereto which is authorized by law to be done by such court in other matters or proceedings coming within its jurisdiction. Such court or the judge thereof in vacation shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the said court or judge, that such estate is not subject to the tax provided for in this law, such finding and opinion shall be entered of record in said court, and thereupon the provisions of section 583 shall become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisement be shown. ***** "

This is the only section of the inheritance tax laws requiring a finding by the Probate Court that an estate is not subject to tax, and this section refers specifically to estates on which letters testamentary or of administration shall have been granted. If letters are granted, then, of course, by reason of sections 58 and 61 of our general laws relating to administration, the Court is furnished with ample information as to whether the estate may or may not be subject to tax.

If letters of administration are not granted, it is only because the Court has been satisfied by proof that there will be nothing in the estate after the widow, widower or minor children have been allowed their absolute property. Section 2, Revised Statutes of Missouri 1929. Of course, in such an instance, there can be no possibility of any tax being assessed and the inheritance tax laws do not require a finding that the estate is not subject to tax. We reiterate, however, that the Probate Court should be satisfied by proof that nothing will be left in the estate after the allowance of absolute property rights.

However, even if the Court refuse to grant letters of administration, if, at a later date, it appear that there is property in the estate subject to tax, any person may file an affidavit to that effect, and the Court shall appoint an appraiser and assess the tax in accordance with the provisions of the Inheritance tax laws of Missouri. Section 591, R. S. Mo. 1929.

Respectfully submitted,

JOHN W. HOFFMAN, Jr., Assistant
Attorney General.

APPROVED

J. E. Taylor
Acting Attorney General

BANKS & BANKING:

Circuit Court has no authority to appoint auditor to audit the accounts of liquidation and order same paid out of trust estate.

February 4, 1938

2-5



Honorable R. W. Holt
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Holt:

This is to acknowledge receipt of your letter of January 28th in which you enclosed a letter from Messrs. Carter and Jones, Attorneys at Law, St. Louis, Missouri, relative to the liquidation of the Maplewood Bank and Trust Company, which is pending in Division No. 3 of the Circuit Court of St. Louis County and presided over by Honorable Peter T. Barrett.

The letters state that Judge Barrett has made an order requiring the Special Deputy Commissioner in Charge of the above trust to file in the court a copy of the inventory prepared by the Special Deputy at the time he took charge of the estate, and which was filed by him with the recorder of deeds at that time; and also we note that it is the intention of Judge Barrett to appoint an auditor or amicus curiae to investigate and examine into all of the Special Deputy's transactions as liquidator of this bank.

You inquire of this Department as to the legal authority of a special deputy commissioner in charge of a bank in liquidation:

- First, to file an inventory of his trust with the circuit court, and
- Second, to pay for the services of an auditor appointed by the court to check into the affairs of his trust.

In your letter of request you state that such procedure will not only delay the work of this Special Deputy Commissioner but will greatly increase the expenses of the individual trust involved.

Under the statutes of Missouri, Sections 5316 to 5340, inclusive, R. S. Mo. 1929, the Legislature of Missouri has placed the liquidation of the insolvent banks and trust companies in the hands of the Commissioner of Finance. It has provided a complete and exclusive scheme and method of procedure to liquidate insolvent banks. The statutes set forth specifically and with particularity the methods to be pursued by the Commissioner of Finance in the liquidation of these trusts. Section 5323, R. S. Mo. 1929, provides that the Commissioner of Finance appoint a special deputy commissioner to perform such duties connected with a liquidation as he may deem necessary and advisable; that the Commissioner may employ such expert assistants and counsel and may retain such of the officers or employes of such corporation or banker as he may deem necessary in the liquidation and distribution of the assets of such corporation or banker. And said section further provides:

"that no salaries or attorney's fees shall be paid unless approved by the circuit court, or judge thereof in vacation, which circuit court, or judge thereof in vacation, may refuse to approve any salaries or attorney's fees that he may deem exorbitant, and set a less fee or salary, which less fee or salary shall be the amount paid."

And Section 5324, R. S. Mo. 1929, provides in part that "all expenses of liquidation, subject to the approval of the circuit court, or judge thereof in vacation, in the county or city in which the principal office of such corporation or banker is located," shall be paid by the Commissioner out of the funds in his hands in said trust, and provides that the Commissioner of Finance shall "fix and pay the compensation of special deputy commissioner, assistants, counsel and other employes appointed to assist him in such liquidation pursuant to the provisions of this article."

Section 5327, R. S. Mo. 1929, provides that after he has completely taken possession of the bank and decided that he will not permit the corporation or banker to resume business pursuant to the provisions of Section 5322, he shall file one copy of an inventory of the assets prepared by him in his office and shall cause one copy to be filed in the office of the recorder of the county or city in which the principal office of such corporation or banker is located.

Replying then to your first question, we find from the statutes no duty or obligation on the Commissioner of Finance or his special deputies to file an inventory of the trust with the circuit court and that the filing of the inventory with the Commissioner of Finance and another in the office of the recorder of deeds, is all that is required under the statute.

The courts of our State have stated many times that the statute has provided a complete and exclusive scheme for the liquidation of insolvent banks and the distribution of their assets. In *Commerce Trust Co. v. Farmers' Exchange Bank*, 61 S. W. (2d) 928, 1. c. 930, it is said:

"The statute relative to the department of finance and to banking institutions was designed to and does provide a complete and exclusive scheme for the liquidation of insolvent banks and the distribution of their assets. *State v. Farmers Exchange Bank of Gallatin*, 56 S. W. (2d) 129; *Bowersock Mills & Power Co. v. Citizens Trust Co.*, 298 S. W. 1049, 1051."

And in the case of *Kirrane v. Boone*, 66 S. W. (2d) 861, 1. c. 865, the Supreme Court said:

"As has several times been held by this court, such statutes (referring to Article 1, Chapter 34, Sec. 5282 et seq. R. S. Mo. 1929, St. Ann. Art. 1, Chap. 34, p. 7226 et seq.) provide a complete and exclusive

scheme and method of procedure to liquidate insolvent banks. Koch v. Missouri-Lincoln Trust Co. (Mo. Sup.) 181 S. W. 44, 47, where the court said: 'The intent of that act to provide an exclusive system for winding up the affairs of banks cannot be doubted. * * * This is a sufficient epitomization of the act to show that it is, and was intended to be, a complete scheme and system for winding up the affairs of insolvent banks and trust companies in the condition described in the act. The fact that the statutory method is complete, and that the act specifically declares its purpose to be the establishment of a state banking department, "which shall have charge of the execution of the laws relating to banks, private banks, trust companies," etc., necessitates the conclusion that the statutory method is exclusive, and that proceedings for receiverships of such institutions must pursue the statutory method.'

In the case of State ex rel. Moberly v. Sevier, 88 S. W. (2d) 154, 1. c. 156 (1935), it is said:

"We have on several occasions held that the statutes relative to the department of finance and to banking institutions were designed to and do provide a complete and exclusive scheme for liquidation of insolvent banks and the distribution of their assets. State ex rel. v. Fidelity & Deposit Co. (Mo. Sup.) 53 S. W. (2d) 1036, 1040, 85 A. L. R. 955; Bank of Oak Ridge v. Duncan, 328 Mo. 182, 40 S. W. (2d) 656; Commerce Trust Co. v. Farmers' Exchange Bank of Gallatin, 332 Mo. 979, 61 S. W. (2d) 928, 89 A. L. R. 373; Kirrane v. Boone et al.,

334 Mo. 558, 66 S. W. (2d) 861.

'There is no doubt but that, so far as administering the assets of the failed bank is concerned, the collection of its assets, the payment of expenses, and the allowance and the payment of claims out of such assets, the jurisdiction of the commissioner and the local circuit court is exclusive.' State ex rel. v. Fidelity & Deposit Co., supra.

'The method provided for liquidating insolvent banks is by and through the commissioner of finance, as statutory receiver, under the supervision of the circuit court where the bank is located.' Kirrane v. Boone, supra, 334 Mo. 558, 66 S. W. (2d) 861, loc. cit. 865."

The Missouri Banking Laws were taken largely from the New York statutes and Sections 5316, 5319 and 5321, Revised Statutes of Missouri, 1929, are taken almost verbatim from New York statutes, and the New York Court said in In Re Union Bank of Brooklyn, 162 N. Y. S. 488, the following:

"The former common-law right of banking is now a franchise derived from the Legislature (Attorney General v. Utica Ins. Co., 2 Johns. Ch. 377; People v. Utica Ins. Co., 15 Johns. 378, 8 Am. Dec. 243), and the superintendent is the head of the department for the state regulation of such franchise. He is not a part of the judicial branch of the government. He does not take his office nor derive any of his original powers from it. He is of the administrative branch of the government, appointed by the Governor and confirmed by the Senate. Section 10, Banking Law. He is a state officer. Article 1, Sec. 2, Public Officers Law (Consol. Laws. c. 47); People ex rel. Baird v. Nixon,

158 N. Y. 221, 52 N. E. 1117. And as such officer he is expressly clothed by the Legislature with this power of liquidation. Section 69, Banking Law. His possession is not that of the court. The statute declares that he may forthwith take possession of the business and property of a banking corporation that has violated its charter or any law, is conducting its business in an unauthorized or unsafe manner, is in an unsound or unsafe condition to transact business, has an impairment of its capital, has suspended payment of its obligations, or has neglected or refused to comply with the terms of a duly issued order of the superintendent. Section 57, Id. When he 'shall have duly taken possession of such corporation, * * * he may hold such possession until its affairs are finally liquidated by him.' Section 58 Id. He 'is authorized, upon taking possession of the property and business of such corporation, * * * to liquidate the affairs thereof and to do all acts and to make such expenditures as in his judgment are necessary to conserve its assets and business.' Section 69. 'The moneys collected by the superintendent shall be from time to time deposited in one or more state banks, savings banks or trust companies.' Section 70, Id. As to his further duties and powers, see section 79, Id. Thus it appears as superintendent he takes possession, holds possession until final liquidation by him, and is authorized to liquidate, outside of any judicial proceedings. The fact that he must receive the sanction of the court before certain steps in his procedure are effective (e. g., sections 63, 69, 74, 78, 79) does not imply that the liquidation itself is judicial."

Many other cases might be cited in Missouri stating that the liquidation of banks is a statutory receivership and not a court receivership. It might be added that in *Farmers and Merchants Bank v. Coleman et al.*, 9 S. W. (2d) 549, the Springfield Court of Appeals in an opinion by Judge Bradley held that:

"The circuit court has no jurisdiction to fix compensation, in first instance of special deputy in charge of insolvent banks, but under Revised Statutes, 1919, 11707 (now Section 5324, R. S. Mo. 1929) compensation in first instance must be fixed by commissioner of finance."

In our search of the statutes we do not find any authority for the circuit court to appoint an auditor, or, as stated in your letter, "a sort of *amicus curiae*" to investigate and examine into the transactions of the special deputy commissioner in charge of the bank. Neither do we find that the circuit court would have authority to make an allowance out of the trust to pay such auditor or *amicus curiae* without it was first sanctioned and the compensation fixed by the Commissioner of Finance. The statutes provide that the liquidator in charge of a bank and the Commissioner of Finance give a bond for the faithful performance of their respective duties, and the statutes have definitely placed the obligation and responsibility of the safeguarding and protection of the assets and funds of the failed bank on the Commissioner of Finance and his special deputies and assistants.

From the above and foregoing we are of the opinion that there is no legal authority or obligation on a special deputy commissioner in charge of a bank in liquidation, first, to file an inventory of his trust with the circuit court, and second, nor do we find any legal authority for the circuit court to appoint an auditor

Hon. R. W. Holt

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Feb. 4, 1938

or amicus curiae to check into the affairs of the trust and allow the compensation for such services out of the funds of said trust estate.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

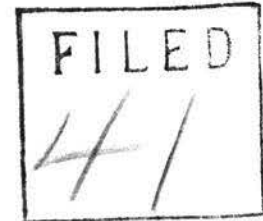
J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

BANKS & BANKING: State banks and trust companies, members of Federal Reserve System, not exempt from paying contributions under Unemployment Compensation Law.

March 10, 1938

3-15



Honorable R. W. Holt
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Holt:

The Attorney-General acknowledges receipt of the letter from the Farmers and Merchants Bank and Trust Company of Hannibal, Missouri, in which the opinion of the Attorney-General is requested on the question submitted in your letter. You request our opinion on the question submitted by the above bank. The query is:

Are Missouri state banks and trust companies, organized and existing under the laws of this State, which are members of the Federal Reserve System, liable and obligated to pay contributions under the Missouri Unemployment Compensation Act?

The Missouri Unemployment Compensation Law was enacted by the 59th General Assembly (Laws of Missouri, 1937, page 574) and sub-clause 5 of clause 6 of sub-division "i" of Section 3 of the Act reads as follows (p. 577):

"The term 'employment' shall not include:

* * * * *

"Service performed in the employ of any other state or its political subdivisions, or of the United States government, or of an instrumentality of any other state or states or their political subdivisions or of the United States."

Section 811, Title VIII, of the Federal Act, provides that:

"The term 'employment' means any service, of whatever nature performed within the United States by an employe for his employer, except --

"(6) Service performed in the employ of the United States Government or of an instrumentality of the United States;"

Section 907, Title IX (c):

"(5) Service performed in the employ of the United States Government or of an instrumentality of the United States."

It will be noticed that the Missouri Unemployment Compensation Law follows somewhat the language used in the Federal Social Security Act, approved by the President August 14, 1935.

After quoting from the State and Federal acts, as above, we deem it necessary to quote the pertinent parts of the section of the Banking Laws of Missouri which authorizes Missouri banks to become members of the Federal Reserve System. By express legislation Missouri has consented that banking institutions may become members of the Federal Reserve System.

Section 5354, paragraph 3, R. S. Mo. 1929, Vol. 11, Mo. St. Ann. p. 7574 (Trust Companies - 5421 R. S. 1929, Sec. 13). Paragraph 3, supra, relating to banks, reads as follows:

"3. To purchase and hold, for the purpose of becoming a member of a federal reserve bank, so much of the capital stock thereof as will qualify it for membership in such reserve bank pursuant to an act of congress, approved December twenty-three, nineteen hundred and thirteen, entitled the 'Federal reserve act' and any amendments thereto; to become a member of

such federal reserve bank, and to have and exercise all powers, not in conflict with the laws of this state, which are conferred upon any such member bank by the 'Federal reserve act' and any amendments thereto. Such member bank and its directors, officers, and stockholders shall continue to be subject, however, to all liabilities and duties imposed upon them by any law of this state and to all the provisions of this chapter relating to banks."

If Missouri state banks and trust companies organized and doing business under the laws of Missouri, which are members of the Federal Reserve System, are instrumentalities of the United States, within the meaning of the Unemployment Compensation Law, then they are not subject to the payment of contributions under the Unemployment Compensation Law.

State banks and trust companies may become members of the Federal Reserve System by making application to the Federal Reserve Board for the privilege, and securing its approval, and by subscribing to a specified number of shares of stock in the Federal Reserve System which is located in the district of the applying bank or trust company, as the case may be.

There are other prerequisites to membership in said Federal Reserve Bank, as set forth in the Federal Reserve Act. It will be seen that by appropriate legislation, as hereinabove set out, the State of Missouri has permitted state banking institutions to become members of the Federal Reserve System.

While paragraph 3 of Section 5354, supra, of the banking law permits state banking institutions to become members of the Federal Reserve System, however, this consent is subject to the limitation that the bank is to have all the powers of a member of the Federal Reserve Bank "not in conflict with the laws of this State," and to the further limitation that such member bank "shall continue to be subject, however, to all liabilities and duties imposed upon them by any law of this state and to all the provisions of this chapter relating to banks." The privilege and benefits of the relationship may be voluntarily acquired by the bank, 12 U. S. C. A., Section 321, and may be relinquished by giving notice, etc., 12 U. S. C. A., Section 328. It is permissive and not mandatory and it is a business arrangement that the bank may or may not enter into.

The additional obligations and duties which are imposed upon a member bank of the Federal Reserve System and the benefits which it derives from the new relationship lend to the bank an additional degree of safety by being under governmental supervision in addition to being under state supervision. This, of course, inures to the benefit of the bank.

We do not find that the term "instrumentality," as used in the Missouri Unemployment Compensation Law, is defined in the Act itself, neither has the act received any judicial interpretation at this date. We must, therefore, search elsewhere as to the meaning of the word "instrumentality" as it appears in the books which might be applicable to the question before us:

Webster's Dictionary says "instrumentality" means: "quality or state of being instrumental; that which is instrumental; anything used as a means or an agency; means; medium; agency."

The Standard Dictionary says "instrumentality" means: "the quality or condition of being instrumental; subordinate agency."

After quoting from the applicable statutes and making the foregoing observations, we shall undertake to examine some of the cases which we think throw light on the question and point the way to a decision.

We are not unmindful of the importance of the question to the banking institutions involved, nor that there seems to be divergent views of the attorney-generals of the various states on this question, and also the apparent contrariety of the cases which might be considered applicable to the point in dispute.

While the question of whether the Federal government may tax a state instrumentality does not enter into this question directly, the Supreme Court of the United States in many cases has said that the immunity is equal and reciprocal and that each must be left free from undue interference from the other, as stated in *Metcalf and Eddy v. Mitchell*, 70 L. Ed. 391, 259 U. S. 514, 1. c. 521-522 (1926), where the court said, speaking through Justice Stone:

"* * * the very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of a state government, and in a similar manner to limit the powers of the states to tax the instrumentalities of the federal government. * * *

"Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application, but this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. * * *

"When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. * * *

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance, but recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the state;

and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other."

In Cooley on Taxation, Vol. 2 (4 Ed.), Section 613, p. 1300, it is said:

"A corporation cannot escape state taxation merely because it was created by the Federal Government nor because it was subsidized by it, nor because it is employed by the Federal Government, wholly or in part, unless it is really an agency or instrumentality for the exercise of the constitutional powers of the United States. (Cases cited)" (Underscoring ours.)

In the case of Thomson v. Pacific Railroad, 76 U. S. Reps. 9 Wall 579 (1869), it was held that although Congress may constitutionally make or authorize contracts with individuals or corporations for services to the government, may grant aids by money or land in the performance of such services and may make contracts and conditions and may exempt, in its discretion, the agencies employed in such service from any state taxation which will prevent or impede the performance of them, yet in the absence of legislation on the part of Congress to indicate that such an exemption is deemed by it as essential to full performance to the party's obligations to the government, the exemption cannot be applied to the case of a corporation deriving its existence from state law, exercising its franchises under such law, and holding its property within state jurisdiction and under state protection, only because of the employment of the corporation in the service of the government.

In the case of Union Pacific Railroad Co. v. Peniston, 18 Wall. 5 (1873), the court said:

"admitting, then, fully as we do, that the company (Union Pacific Railroad) is an agent of the general government, designed to be employed, and actually employed, in the legitimate service of the government, both military and

postal, does it necessarily follow that its property is exempt from state taxation?"

The United States Supreme Court in answering the above question, on page 36, said the following:

"It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power?" (Underscoring ours.)

In *Baltimore Shipbuilding and Dry Dock Company v. Baltimore*, 195 U. S. 375, 49 L. Ed. 242, 25 Sup. Ct. 500 (1904), the Supreme Court said:

"* * * it seems to us extravagant to say that an independent private corporation for gain, created by a state, is exempt from state taxation, either in its corporate person or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In *Fidelity and Deposit Co. v. Pennsylvania*, 240 U. S. 319, 60 L. Ed. 664, 36 Sup. Ct. 298, it was held that a surety company did not by qualifying under the statutes of the United States to become surety on bonds required by the United States, act as a Federal instrumentality so as to be exempt from a state tax on the premiums received, exacted from foreign corporations for the privilege of doing business within the state.

And in the case of *Federal Compress and Warehouse Co. v. McLean*, 291 U. S. 23, 78 L. Ed., 1. c. 627 (1934), the

Supreme Court, through Justice Stone, said:

"The mere extention of control over a business by the National government does not withdraw it from a local tax which presents no obstacle to the execution of the National policy. *Susquehanna Power Co. v. Tax Commission*, 283 U. S. 291, 75 L. Ed. 1042, 51 Supreme Ct. 434 (1931); *Broad River Power Co. v. Query*, 288 U. S. 178-180, 77 L. Ed. 685-686, 53 Supreme Court 326(1933)."

In the case of *Fox Film Corp. v. Doyal*, 286 U. S. 128, 76 L. Ed. 1014 (1932), it is said:

"The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation -- essential to the maintenance of our dual system - has its inherent limitations. It is aimed at the protection of the operations of government. (*M'Culloch v. Maryland*, 4 Wheat. 316, 436, 4 L. Ed. 579, 608), and the immunity does not extend 'to anything lying outside or beyond to governmental functions and their exertions.'"

In the case of *Federal Land Bank of St. Louis v. Friddy*, 295 U. S. 229, 76 L. Ed. 1412, 55 Sup. Ct. 795 (U. S. p. 234) (1935), the court said:

"Joint Stock Land Banks are privately owned corporations organized for profit to their stockholders through the business of making loans on farm mortgages * * * There is nothing in their organization and powers to suggest that they are government instrumentalities."

In the case of *Hiatt v. United States*, 4 Fed. (2d) 374, 1. c. 375, the court said:

"The matter of affiliation between the Dickinson Trust Company and the Federal Reserve Bank, aside from the investment in stock, seems to present merely a business arrangement between the Federal Reserve Bank and the Trust Company, which was not made under compulsion, and was doubtless regarded as advantageous by both concerns. It was simply an arrangement made for the advancement and in the interest of business for which the Trust Company was chartered."

As was said in the case of *Helvering v. Therrell*, handed down by the United States Supreme Court, February 28, 1938:

"The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers; both operate within the same territorial limits; * *"

And further in said opinion the court said:

"By definition precisely to delimit 'delegated powers' or 'essential governmental duties' is not possible. Controversies involving these terms must be decided as they arise, upon consideration of all the relevant circumstances. Notwithstanding discordant views which have sometimes arisen because of varying emphasis given to one or another of such circumstances, it is now settled doctrine that the inferred exemption from federal taxation does not extend to every instrumentality which a State may see fit

to employ. Exemption depends upon the nature of the undertaking; it is cabined by the reason which underlies the inference."

The real question is whether the banking institutions in question are such instrumentalities of the Federal government as to come within the doctrine of the exemption of instrumentalities of one of the two governments from undue burdens by the other, and also whether it was the intention of the Legislature to exempt the member banks from the payment of the contributions. The declaration in the statute that instrumentalities of the United States are exempt was merely a declaration of the fixed and established law for the reason that if the instrumentality was one of those agencies through which the United States government exercised directly and immediately its sovereign powers it would be immune from the taxing power of the state even without such declaration in the law. The tests seem to be whether the instrumentality is acting as such in furtherance of a governmental function or of a proprietary function, and also whether the laying of the tax on the instrumentality would be a direct interference with the functions of government itself?

In arriving at our conclusion in this matter we have not overlooked the fact that the Bureau of Internal Revenue has construed the Federal Unemployment Compensation Act to mean that state banks which are members of the Federal Reserve System are exempt from payment of these taxes under the Federal act and that state banks not members of the Federal Reserve System are not exempt. We must concede that that interpretation given the Federal Act is persuasive, and that a great many states have adopted the policy of following the interpretation given the Federal Act by the Bureau of Internal Revenue.

All of the state banks and trust companies are organized under the same banking laws, governed by the same state laws, pay taxes levied in the same way, and are under the jurisdiction and regulation of the State Finance Department, and because one has seen fit to make application to

become a member of the Federal Reserve System and has been accepted by it, which it voluntarily did for reasons best known to itself, we are unable to say, upon the authority of the cases, that these banking institutions, which are members of the Federal Reserve System, are exempt from paying the contributions under the Missouri Unemployment Compensation Law.

In the *Helvering v. Therrell* Case, *supra*, and the other Federal Income Tax cases handed down by the United States Supreme Court, February 28, 1938, and also the income tax cases, namely, *Helvering v. Mountain Producers Corporation*, and other cases decided by the United States Supreme Court, March 7, 1938, in which the Supreme Court overruled the conclusions reached in the case of *Gillespie v. Oklahoma*, 257 U. S. 501, and *Burnett v. Coronado Oil and Gas Company*, 285 U. S. 393, and while these cases are not in exact point with the matter under consideration, however, we note that the court "in the light of the expanding needs of state and nation" has shown a tendency toward widening the field of taxation with reference to instrumentalities of the government and the income of officers of such instrumentalities. We have also taken cognizance of the very recent case of the Supreme Court of Missouri, decided February 25, 1938, namely, *The State of Missouri at the relation of Baumann, Collector of the City of St. Louis v. Bowles*, No. 35,209, which, however, is now pending on motion for rehearing, in which the Supreme Court in a unanimous opinion held that an employe of the Farm Credit Administration of St. Louis, admittedly a Federal instrumentality created for a public purpose, was liable for the payment of an income tax due the State of Missouri.

From the above and foregoing, it is the opinion of the Attorney-General that membership by state banks and trust companies in the Federal Reserve System does not make them instrumentalities of the United States within the scope of the Missouri Unemployment Compensation Law, and the bank

March 10, 1938

in question must make the reports and pay the contributions as provided therein, assuming, of course, it has eight or more employees as provided by Section 3, clause "h", sub-clause 1.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

Attorney-General

CRH:EG

BOND:) Approval as to form of rider to be attached
COMMISSIONER OF FINANCE:) to Bond No. 39104-07-290-37 (T. Mahan Smith).

June 21, 1938

6-21



Honorable R. W. Holt
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Holt:

We are herewith returning to you, with our approval as to form, rider to be attached to Bond No. 39104-07-290-37, executed on the 2nd day of October, 1937, on behalf of T. Mahan Smith and in favor of State of Missouri, said bond being in the penalty of Ten Thousand and no/100 (\$10,000.00) Dollars, is hereby amended to show the position of the said T. Mahan Smith as "Examiner" instead of as originally written, executed June 10, 1938, by United States Fidelity and Guaranty Company by its Attorney-in-fact.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG
Enc.

Taxation and Revenue: Construction of the words "successor"
Sales Tax: and "purchaser" Section 23, 1934
Extra Session Acts and Section 28 of
the Session Acts of Mo. for 1935 re-
lating to Sales Tax.

August 9, 1938

Honorable John W. Hoffman, Jr.
Assistant Attorney General
Keith & Perry Building
Kansas City, Missouri



Dear Mr. Hoffman:

We wish to acknowledge your request for an opinion in regard to the sales tax, which is as follows:

"Please give me an official opinion on the following case:

A operates a business until December 1935 and fails to pay any tax. B purchases the business and operates until March 1936, paying his tax but not paying A's. C purchases the business from B. Is C liable for A's tax, since the statute only makes A's tax the personal obligation of B?"

The owner operating the business until December, 1935 would be liable to sales taxes under the 1933 Extra Session Acts of Missouri and the 1935 Session Acts of Missouri.

The question involved is embodied in Section 23 of the 1933 - 34 Extra Session Acts and Section 28 of the 1935 Session Acts and said sections being verbatim, we quote Section 28 of said 1935 Session Acts, which is as follows:

"If any person required to remit a tax levied hereunder shall sell his or its business or stock of goods or shall quit the business, he shall make a final return under oath within fifteen days after the date of selling or quitting business. His or its successor,

if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the Auditor showing that they have been paid, or a certificate stating that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold the purchase money as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by the former owner and person."

The Supreme Court of Missouri in *State v. Baker*, 293 S. W. 399, 1. c. 41, 316 Mo. 853 in laying down a general rule as to the construction of revenue laws, says:

"As a general rule, revenue laws are to be strictly construed, but the doctrine of strict construction should be applied with due regard to the intention of the Legislature as expressed in the statute, and with a view to promoting the object of the statute. 36 Cyc. 1189, 1190. It is the duty of the courts to endeavor by every rule of construction to ascertain the meaning of and give full force and effect to every legislative enactment not obnoxious to constitutional provisions, but the legislative intent must be intelligibly expressed. *State ex inf. v. Street Ry. Co.*, 146 Mo. 155, loc. cit. 168, 47 S. W. 959."

In laying down a rule as to the construction of a statute which is plain and unambiguous, the court in *Grier vs. Railway Company*, 523 l. c. 534, et. seq., 228 S. W. 454, says:

" * * * The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained

by means of the words it has used. All other rules are incidental and mere aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no office to fill. In such case there is no room for construction. * * *

" * * * It is elementary that in construing a writing, whether it be a statute or a contract, the clear meaning of unequivocal language cannot be controlled, or overthrown by a construction in respect to that which is obscure or incomplete. * * * 'When the words admit of but one meaning, a court is not at liberty to speculate on the intention of the Legislature, or to construe an act according to its own notions of what ought to have been enacted.' * * * "

The wording of said Section is clear and unambiguous. The only transaction referred to is that of a seller of a business or stock of goods and the purchaser or successor of said stock. There is not mentioned in said statute any purchaser or successor of the first purchaser or successor and if the legislature had intended to include all subsequent purchasers and successors to the first purchaser and successor, said section would have so stated and by virtue of the fact that such subsequent purchasers or successors to the first purchaser or successor were not mentioned therein, it is clear that it was the intent of the legislature not to include them.

If said section would be construed as to include any successor or purchaser subsequent to the first purchaser or successor, it would necessarily extend to all subsequent purchasers or successors ad infinitum and extend liability under said statute until limited by the statute of limitations.

CONCLUSION

Therefore, it is the conclusion of this department that a party operating a business until December, 1935,

Honorable John W. Hoffman, Jr.

-4-

August 9, 1938

upon failure to pay sales tax, becomes liable under the 1934 Extra Session Acts and 1935 Session Acts of Missouri; that when a party purchases the business, against which said tax is due, he becomes liable under said Section 23 and 28, supra, as a successor or purchaser of said business, but that the words "successor" and "purchaser" refer to the first purchaser and not to subsequent purchasers and successors thereof.

Respectfully submitted

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

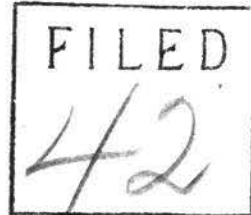
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COLLECTOR * TOWNSHIP: Income taxes collected by said officer should be included with other state and county taxes collected by him, and this total sum used as a basis for arriving at compensation.

April 4, 1938

4/5

Mr. Charles J. Hoover
Prosecuting Attorney, Grundy County
Trenton, Missouri



Dear Sir:

This department is in receipt of your letter of March 8, 1938, in which you request an opinion as follows:

"A question has arisen in Grundy County concerning the commission to be deducted by the Township Collector as compensation for taxes collected.

"Briefly, the facts are as follows: In 1933, the Trenton Township Collector included some income tax collections in the settlement made by the County Court, and took as her commission, the average commission for that year, which was .017694%. In 1934, the Township Collector, upon the advice of the State Auditor, who came to Grundy County at that time to audit books of the County, instructed the Clerk not to include income taxes in the final settlement of State and County taxes, but for the Township Collector to charge the regular $2\frac{1}{2}\%$ commission. The Township collector in 1934, 1935, and 1936, did not include the income taxes in final settlement of taxes, and took $2\frac{1}{2}\%$ of income tax collections as commission.

"The books of the county are now being audited, and the auditors have advised the collector that the income taxes should have been included in the final settlement, and that she should have taken as her commission, the average commission. It is obvious that if the Township Collector was mistaken in her method of procedure, that she will owe

April 4, 1938

the difference between the $2\frac{1}{2}\%$ commission and the average commission.

"May I please have your opinion as to whether or not income taxes should be included in the final settlement of State and County taxes, or should the income taxes be considered as a separate item? Will you please give an opinion as to the proper method of calculating the Collector's commission on income tax collections that have been made by her?"

Before proceeding to the question presented here, we desire to eliminate some preliminary matters.

The state income taxes are properly collected by the township collector in counties under township organization, Sections 10128 and 10132, R.S. Missouri, 1929. His compensation is to be paid in the same manner and in like amounts as is paid for the assessment and collection of other state and county taxes, Section 10133, R.S. Missouri, 1929. The amount of said compensation is fixed by Section 12337, R.S. Missouri, 1929, which provides that "he shall receive a commission of two and one-half percent on the first forty thousand dollars collected; one percent on the next forty thousand dollars collected; and three-fourths percent on the remainder of all moneys collected by him".

The question before us, as we understand it, is whether or not the collector, in calculating his compensation, should include the state income taxes collected along with other state and county taxes collected by him, and figure his compensation on the total amount under the scale provided in Section 12337, supra, - or whether he should keep said income tax collection separate from other state and county taxes and take the percent provided in Section 12337, supra, on this amount as a separate item, and also take the percent provided for on other state and county taxes as a separate item.

For example, we will assume the collector in one year collects \$40,000.00 other state and county taxes and \$40,000.00 income taxes. If the compensation is to be paid on the total of these sums, we see that the collector will receive \$1400.00. On the other hand, if each is to be used as a separate item in arriving at the compensation, we see that he will receive \$2000.00. Thus, it is apparent that in reaching a conclusion if the one or the other of these methods is decided to be

April 4, 1938

correct, it will make a decided change in the collector's compensation - either an increase or a decrease.

In Section 12337, supra, we have underlined a certain phrase. This section provides the collector is to have a certain percent of "all moneys collected by him", and is made broad and comprehensive in its meaning by the word "all". In State ex rel. v. McQuillan, 246 Mo., 1.c. 534, it is said that when a statute is so worded it "should receive a construction in aid of the broad intendments of the lawmaker". What did the legislature mean here by "all moneys collected by him"?

We are constrained to think that they meant by this the inclusion of income taxes along with other state and county taxes collected in arriving at a sum from which the statutory commission could be taken to afford the collector his compensation. This, we think, because, as we have stated at the outset: The collector, for collecting income taxes, is paid in the same manner and in like amounts as is paid for the assessment and collection of other state and county taxes. Section 10133, R.S. Missouri, 1929, thus refers the collector to Section 12337, supra, for his commission and this section provides the commission shall be arrived at by taking a certain percent of all moneys collected by him on state and county taxes, which of course, includes the income taxes.

In further support of this opinion we refer you to Sanderson v. Pike Co., 195 Mo., 1.c. 605, in which it is said:

"It is a well settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and the statute which is claimed to confer that right must be strictly construed."

A strict construction of the terms of Sections 10133 and 12337, R.S. Missouri, 1929, will not permit, under any circumstances, a township collector to take his commission on the income taxes collected as a separate item but the same must be included along with other state and county taxes collected and the statutory commission must be based upon this total.

Mr. Charles J. Hoover

- 4 -

April 4, 1938

CONCLUSION

Therefore, it is the opinion of this department that state income taxes collected by a township collector should be included in with other state and county taxes collected by said officer and the percent commission provided for in Section 12337, R.S. Missouri, 1929, taken on this total sum.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

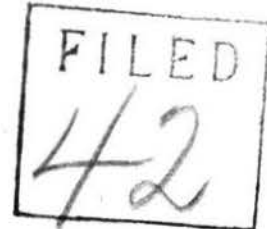
J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

MUNICIPALITIES: Mayor may cast deciding vote, in cases of tie vote
of council in cities of Third Class.

May 19, 1938

Hon. Oscar T. Honey
Mayor
Chaffee, Missouri



Dear Mr. Honey:

This Department acknowledges your request for an
opinion under date of May 17, 1938, as follows:

"At our last Council meeting, a
peculiar situation arose that I would
like to have a ruling on from your
office.

Our Council consists of two alderman
from each of four wards, or a total of
eight alderman. An ordinance was voted
on by the Council in regular session and
three voted for the bill to become an
ordinance, three against, and the other
two, who were present, answered 'not
voting'.

The vote being a tie, as Mayor, and
under authority of Section 6820 of the
Missouri Statutes, as I understand it,
I voted 'yes' to untie the vote. After
this vote, I found under Section 6725,
pertaining to third class cities, that
the Mayor has no right to vote, but in
looking up several cases referred to,
it would seem I would have a right.

I am asking your office if you will
kindly give me your opinion on this
matter?"

Section 6800 R. S. Missouri 1929, relates to cities of the third class and provides that no bill shall become an ordinance unless on its final passage it receives a majority of the votes of the members elected to the council:

"The style of the ordinances of the city shall be: 'Be it ordained by the council of the city of _____, as follows.' No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the council shall vote therefor, and the ayes and nays shall be entered on the journal; and all bills shall be read three times before their passage. No ordinance shall be revived or reenacted by mere reference to the title thereof, but the same shall be set forth at length, as if it were an original ordinance. No bill shall become an ordinance until it shall have been signed by the officer presiding at the meeting of the council at which it shall have been passed. When so signed, it shall be delivered to the mayor for his approval and signature, or his veto."

You state that there was a tie vote, and that you voted "yes" to untie the vote. Your question is whether you had such authority.

Section 6725 R. S. Missouri 1929, relates also to cities of the third class and provides that the mayor presides over the council as president, and may cast the deciding vote in case of a tie when he is not an interested party:

"The mayor shall be president of the council and shall preside over same, but shall not vote except in case of a tie in said council, when he shall cast the deciding vote; but provided, however, that he shall have no such power to vote in

cases when he is an interested party. He shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and the state laws relating to such city are complied with."

It is a familiar rule of statutory construction that statutes relating to the same subject matter, or in pari materia, must be read and construed together, thus in the case of State vs. McCracken, 95 S.W. (2) 1239, 1. c. 1241, we find the following statement by the St. Louis Court of Appeals:

"Statutes which are in pari materia should be read and construed together in order to keep all the provisions of the law on the same subject in harmony, so as to work out and accomplish the central idea and intent of the lawmaking branch of our state government, * * * *".

And in State vs. Brown, 105 S.W. (2) 909, 1. c. 911, we find the further statement by the Supreme Court of Missouri En Banc, that in construing statutes in pari materia endeavor should be made, by tracing history of the legislation on the subject, to ascertain the intention of the legislature as follows:

"In construing statutes in pari materia, 'endeavor should be made, by tracing history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature or to discover how the policy of the Legislature with reference to the subject matter has been changed or modified from time to time."

Tracing the history of the statutes in question we discover that Section 6800 R. S. Missouri 1929, appears verbatim in the R. S. of Missouri 1899 as Section 5832. Section 6725 R. S. Missouri 1929, appears in the R. S. of Missouri 1899, as Section 5757 and provides as follows:

May 19, 1938

"The mayor shall be president of the council, but shall not vote; he shall have the superintending control of all the officers and affairs of the city; and shall take care that the ordinances of the city, and the state laws relating to such city, are complied with."

It is not until 1909 (Laws of Missouri 1909, page 289) that we find the statute as it is in its present form. It is interesting to note that it was passed with an emergency clause as follows:

"There being now no provision of law whereby the mayor may cast the deciding vote in cases where the council is evenly divided, and there now being a number of cities of the third class in this state in which the business of such cities is being seriously retarded and hindered by reason of the inability of the councilmen thereof to agree, and of the lack of power of the mayor to cast the deciding vote, creates an emergency within the meaning of the Constitution; therefore, this act shall (will) take effect and be in force from and after the date of its passage."

The above statement is clear evidence of the legislative intent, and hence we are of the opinion that in cases of a tie vote in the council of cities of the third class, the mayor may cast the deciding vote, provided he is not an interested party.

Respectfully submitted,

APPROVED:

MAX WASSERMAN,
Assistant Attorney General

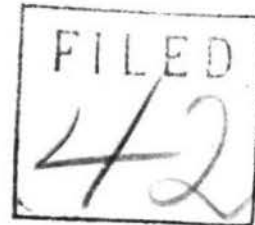
J. E. TAYLOR
(Acting) Attorney General

MW:MM

TAXATION: Certificate of purchase from county superior to
certificate from city under Jones-Munger Act.

September 28, 1938

Honorable Oscar T. Honey,
Mayor, City of Chaffee,
Chaffee, Missouri



Dear Sir:

This is to acknowledge receipt of your request
for an opinion from this department under date of
September 23, 1938, which is as follows:

"It is requested that your office
furnish the City of Chaffee an opinion
based on the following situation:

"Under the Jones Munger Law, Scott
County sold a certain piece of property
(Real estate) within the corporate
limits of the City of Chaffee for taxes,
this tax sale was made on the third year
advertising, the first year no bid,
second year no bid, third year it went
to the highest bidder and was sold.
That refers to the years 1934, 1935,
1936.

"As the city of Chaffee had back taxes
on the same property that were not paid,
the property was advertised first year
1935, no bid, second year 1936 no bid,
1937 sold to the highest bidder but this
bidder was not the same person that bid
the property in at the county sale.

"It must be noted that the county sale
was one year before the city sale.

"According to the interpretation of the law that we have, the two years that the property could be redeemed expires in November 1938, for the county, and November 1939 for the City.

"In case the property is not redeemed, who will the property belong to at the end of the two year period, the person that bid the property in at the County sale, or the person that bid in the property at the city sale?"

Section 6093, R. S. Mo. 1929, reads as follows:

"All cities and towns in this state containing five hundred and less than three thousand inhabitants, and all towns existing under any special law, and having less than five hundred inhabitants, which shall elect to be cities of the fourth class, shall be cities of the fourth class."

According to the 1930 census, the population of the City of Chaffee is shown as 28,902. Under the above section, the City of Chaffee should be considered a city of the fourth class.

Collection of delinquent taxes in cities of the fourth class is governed by Section 6995, R. S. Mo. 1929, which reads as follows:

"Upon the first day of January of each year all unpaid city taxes shall become delinquent, and the taxes upon real property are hereby made a lien thereon. The enforcement of all taxes authorized by this article shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of

Sept. 28, 1938

the payment of state and county taxes, including the seizure and sale of goods and chattels, both before and after said taxes shall become delinquent: Provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector.

It will be noticed that according to the above section, the enforcement of the collection of delinquent taxes shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection of the payment of state and county taxes.

In answering your request, we are assuming that both the third sale made by the county for the years 1934, 1935 and 1936, and the third sale made by the city for the years 1935, 1936, and 1937 were properly conducted and in the manner prescribed by law.

Section 9956a, Session Laws of 1933, page 437, reads as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner:
By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of

the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last post-office address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

Under this section, the purchaser at the third sale by the city could redeem the property from the purchaser at the third sale by the county. It was so held in the case of Little River Drainage Dist. v. Sheppard, 7 S. W. (2d) 1013, 1. c. 1014, where the court said:

"The lien for state and county tax shall be paramount. The statute does not say that it shall necessarily destroy the district lien for special taxes. The plaintiff district, according to the stipulation and the finding of the trial court, was not made a party to this proceeding. No person or corporation can be affected by a proceeding to which he or it is not made a party, and that applies to tax suits. For instance, the state's lien for taxes is superior to a prior mortgage lien, and a sale under such tax lien conveys title to the purchaser but does not affect the mortgagee's right to redeem. * * * *

"The purchaser at the tax sale holds such title subject to the right of the plaintiff

to redeem. If the district had been made a party to the proceeding with an opportunity to meet and pay the general taxes at the time, a different question would be presented for consideration."

Also, in the case of Dyer v. Harper, 77 S. W. (2d) 106, 1. c. 107, the court said:

"The lien created by the judgment for state, county, and school taxes was superior to the lien for drainage taxes. In the suit to enforce the collection of state, county, and school taxes, the Big Creek drainage district No. 2 was not made party, and therefore its lien was not destroyed by a sale under such a judgment. At a sale under a judgment for drainage taxes, the purchaser would acquire the right to redeem in an action against the holder of the tax title, by making a proper tender of the amount due the holder of the tax title. Little River Drainage District v. Sheppard, 320 Mo. 341, 7 S. W. (2d) 1013."

Under the holding in the two cases cited above, the holder of the certificate of purchase given by the city would be entitled to redeem as to his interest in the property in accordance with Section 9956a, supra, and also according to the decisions in the above cited cases, the certificate of purchase on a sale for delinquent state and county taxes is paramount to any other inferior lien, and so applies to a lien created or certificate of purchase issued by a city for city taxes.

Section 9957, Session Laws of 1933, page 438, reads as follows:

"If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production

of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however, to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold. In making such conveyance, when two or more parcels, tracts, or lots of land are sold for the non-payment of taxes to the same purchaser or purchasers, or the same person or persons shall in anywise become the owner of the certificates thereof, all of such parcels shall be included in one deed."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the person who bid the property in at the third county sale received a certificate of purchase which is paramount and superior to the certificate of purchase issued at the third city sale. It is further the opinion of this department that if the property is not redeemed within two years from the time of the purchase, at which time the certificate of purchase was issued, then the holder of the certificate of purchase issued at the county sale has a good and sufficient title in fee simple

Sept. 28, 1938

in accordance with Section 9957, supra, but under the foregoing authorities the holder of the certificate of purchase issued by the city at the third sale has sufficient interest in the property so that he may, by complying with Section 9956a, supra, make his certificate of purchase superior to the certificate of purchase issued by the county at the third sale on the same property.

Respectfully submitted,

W. J. BURKE,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

COUNTY BUDGET ACT: County court may pay additional salary of deputy circuit clerks if there remains a surplus at the close of the fiscal year.

January 11, 1938



Honorable Henry B. Hunt
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of January 1st, wherein you make a request for an opinion on the facts as contained in your letter, which is as follows:

"The office of Circuit Clerk in Atchison county is a consolidated office, the said officer being Circuit Clerk and ex-officio Recorder of Deeds.

"The Legislature of 1937 enacted legislation governing the salaries of deputies and assistants to the Circuit Clerk, the same being found in Laws of Missouri, 1937, at pages 445-448.

"Our said Circuit Clerk and his deputies, are subject to the Budget Law of this state, and under which they were operating when the salary act aforesaid, purported to go into effect on June 21, 1937.

"Pursuant to said act, and on June 24, 1937, the Judge of the Circuit Court of Atchison county fixed the salaries of two deputies in the office of our Circuit Clerk at \$100.00 per month each.

By reason of the fact that the purported emergency clause appended to said salary act was called in question, the said Circuit Judge on September 27, 1937, re-affirmed its said order fixing said salaries, said date being more than ninety days after the adjournment of said 1937 Legislature.

"By reason of the budget relative to the office of Circuit Clerk having been set long prior to the taking effect of said act, our County Court is doubtful of the propriety of paying the salary of said two deputies, as fixed by our Circuit Judge.

"Query: Is it the duty of the County Court of Atchison county to pay the said salaries of said two deputies as ordered and fixed by the Circuit Judge, notwithstanding said budget law, in view of the fact that said act, Laws Mo., 1937, page 447, Section 11813, provides:

"The Clerk and his deputies and assistants shall present their accounts to the County Court, and said Court shall draw its warrant therefor upon the county treasurer, to be paid out of any money available in the treasury;" and in view of the fact that under the budget as fixed for said office of Circuit Clerk for the year 1937, there remains unexpended, after satisfying all purposes of the budget, sufficient funds to pay said salaries from the time of said order fixing the same.

"We have two opinions from your office that are well considered, touching said salary act, but the same do not relate to deputies only, and we much desire a ruling directly on the point."

The opinions from our Department, to which you refer in your letter, we assume bear on the point involved. Hence, we are not enclosing any copy of same.

By the provisions of the Budget Act, and especially Section 3, page 342, Laws of Missouri, 1933, it is the duty of the various officers of the county to prepare and furnish an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service during the current year. The circuit clerk of your county evidently complied with the provisions of the statutes but the Legislature altered and changed the manner of selecting and approving the deputies and fixing the compensation during the current year of 1937. Once the estimate of the various officers is filed and accepted and approved by the county court, and such estimate is placed in Class 4 of the Act, it then becomes the duty of the county court and the other officers whose duties are prescribed by the Act to sacredly preserve all priorities of all the classes.

This Department formerly ruled that no transfers of surplus funds in any class could be transferred to any other class to supplant the deficit until the close of the fiscal year. In 1937 the Legislature repealed and reenacted Sections 2 and 5 of the original County Budget Act. The new section provides for transfer of surplus funds, if any exists, from Classes 1, 2, 3 and 4 to Class 5, but there is no provision for transferring funds during the fiscal year in any other class to Class 4.

By the situation as heretofore outlined, and taking into consideration the facts which you present, we are of the opinion that this being the close of the fiscal year, if there remain under the 1937 Budget sufficient funds in the budget of the circuit clerk to pay the additional salary of the deputies, that said funds may be used for that purpose

Hon. Henry B. Hunt

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Jan. 11, 1938

providing that there does not exist a deficit, that is, the priorities have been sacredly preserved in the preceding classes. If there exists a surplus in any class at the close of the fiscal year, as has heretofore been held in other opinions, the same may likewise be used to pay the additional salaries of the deputies.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

SCHOOLS: Directors of school district are not liable criminally for transferring funds indirectly from the **teachers'** fund to the building fund. The action is irregular but in the absence of any embezzlement or other crime directors are not liable.

May 6, 1938.

Honorable Harold S. Hutchison
Prosecuting Attorney
Maries County
Vienna, Missouri



Dear Sir:

This Department acknowledges receipt of your letter of May 4th, wherein you request an official opinion on certain facts relating to Lacy School District; which letter is as follows:

"I would like for your department to give me an opinion on the criminal liability of certain school directors of the Lacy School in Maries County. The facts in the case as appears from my investigation are as follows:

"John Bell was employed to teach the Lacy school for Eighty Dollars (\$80.00) a month by a verbal contract. On the opening day of school, the school house was in such condition that the said John Bell informed the directors that it was unsafe for the children because of falling plaster. At that time Lacy school district had something over Five Hundred Dollars (\$500.00) in their teachers fund and only had about Fifty Dollars (\$50.00) in the incidental fund. The directors had been advised by the County Superintendent of Schools to raise their teachers salary that year so on the opening day of school, they entered into an agreement with Bell giving him One Hundred Dollars (\$100.00) a month, Fifteen Dollars (\$15.00) of which was to be returned to the directors for the purpose of repairing the

May 6, 1938

school building. Material was ordered from Powell Lumber Company in the amount of One Hundred Sixteen Dollars and Forty Four Cents (\$116.44) and Bell at the end of each month made out a check to C. R. Moreland for Fifteen Dollars (\$15.00) which amount was mainly taken to St. James by C. R. Moreland and turned over to the lumber company, indorsed by them, and for which they issued a receipt to the Lacy School District. My investigation is that every dollar of the money so transferred went into the school building.

From the facts as you present it is manifest that the action of the members of the board in pursuing the course outlined in your letter has been irregular, contrary to the spirit of the law and doing indirectly what could not, under the statute, have been done directly. In support of this statement we herewith quote the pertinent part of Section 9312, R. S. Mo. 1929, as follows:

"* * * * * The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from the taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers' fund;' the money derived from taxation for incidental expenses shall be credited to the 'incidental fund;' all money derived from taxation for building purposes, from the sale of school site, schoolhouse or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the 'building fund;' and all moneys not herein specified that now belong to any school district, or that may hereafter be received by such school district,

shall be placed to the credit of the 'teachers' fund' of such school district. No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant: Provided, that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided further, that in the event of a balance remaining in the building fund after the purpose for which said fund was levied is accomplished, the said board shall have the power to transfer such unexpended balance to the incidental fund: Provided further, that by a majority vote of the school board tuition fees may be used to liquidate indebtedness accrued in the building fund.

It was held to the effect in the decision of Consolidated School District No. 6 v. Shawhan, 273 S. W. 182, that the powers of the board of directors of a school district are limited to those specifically delegated to them in the statute and that moneys in the teachers' fund cannot be appropriated for any other purpose, notwithstanding that the directors may act in good faith and without willful intent.

Reference is herewith made to Section 9233, R. S. Mo. 1929, which is as follows:

"All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; but the income from state, county and township funds shall be applied only to the payment of teachers' warrants, issued by order of the board to legally qualified teachers for services rendered according to law.

No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such funds in accordance with section 9257, and no school warrant shall bear interest."

To clarify our ultimate conclusion it is well to bear in mind the terms of Section 9209, R. S. Mo. 1929, as follows:

"The board shall have power, at a regular or special meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made. The board shall not employ one of its members as teacher, nor shall the teacher serve as clerk of the district. All transactions of the

May 6, 1938

board under this section must be recorded by and filed with the district clerk."

By admitting all the facts to be true, as stated in your letter, the ultimate question is, what, if any, criminal liability has been incurred by the directors in the transactions?

Section 9235, R. S. Mo. 1929, contains provisions wherein the actions of the teacher and the directors may be deemed a misdemeanor. Said section provides as follows:

"Any teacher who shall enter a public school in this state to teach, govern or discipline the same, before complying with the provisions of sections 9209 and 9234, shall forfeit all right, title and claim to any compensation therefor, and shall be deemed guilty of a misdemeanor and punished by a fine not to exceed one hundred dollars; and any director who shall indorse or encourage said teacher in such unlawful conduct shall in like manner be deemed guilty of a misdemeanor and punishable by a like fine."

We note that the original contract between the teacher and the directors was in the amount of \$80.00 and was a verbal contract. Later, you state that on the opening day of school another agreement with the teacher was made giving him \$100.00 a month. You do not state whether or not the last agreement was in writing in compliance with Section 9209, supra. However, it was held in the case of *Edwards v. School District No. 73*, 297 S. W. 1001 that a contract was valid between a teacher and a district by the application and acceptance thereof by the president and each director of the school district. Likewise, in the case of

McShane v. School District, 70 Mo. App. 624, it was held that the failure of the clerk to attest the contract, or failure to deposit same with the clerk, did not render it void.

We assume that the teacher possessed the qualifications as contained in Section 9234, R. S. Mo. 1929, which is mentioned in the misdemeanor section heretofore quoted, namely, 9235. Hence, it would appear that by the provisions of Sections 9209, 9234 and 9235, supra, that neither the directors nor the teacher would be guilty of a misdemeanor; therefore, they are not liable criminally.

Referring again to Section 9312, supra, there is no provision in its terms which makes it a misdemeanor for the violation of the same or for the failure of the directors of the district to follow its provisions. While it is true the acts of the directors in failing to follow the provisions of the section are illegal, yet, does that necessarily constitute a criminal offense?

The general rule relating to the situation is offered in 16 Corpus Juris, page 64, Par. 22, as follows:

"An act that is not prohibited and made punishable either by the common law or by statute or ordinance, both at the time of its commission and at the time it is sought to punish therefor, cannot be punished as a crime, and the court cannot by construction make that a crime which is not so prohibited. The prohibition must be by the laws of the state in which it is sought to punish. An act may be prohibited and made punishable either by the common law, or by statute."

There appears to be no statute which denounces the actions of the board as a crime, under the circumstances and facts which you present. Therefore, in the absence of any

May 6, 1938

statute which denounces the actions of the board as a crime, and especially Section 9312, supra, which does not contain any expression which could be construed as a penal statute, we are of the opinion that no criminal action will lie against the directors of the school district. In view of the fact that you state in your letter that the directors did not receive personally any of the misapplied or misappropriated funds, there does not appear any evidence which would constitute a charge of embezzlement, obtaining money under false pretenses or any other crime denounced by statute or the common law.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

FISH AND GAME:
TRAMMEL NETS:

Session of trammel nets in
violation of the game and fish laws.

May 7, 1938 47



Mr. M. J. Huffman,
Prosecuting Attorney,
Wright County,
Hartville, Missouri. .

Dear Sir:

This is in reply to yours of May 3, 1938, requesting an official opinion from this department based upon the following letter:

"On April 23, 1938, in this county, Mr. Jack Frost, a conservation agent of the fish and game department, apprehended two men with an one and one-half inch trammel net. These two men, at the time, were going up the Gasconade river in a boat. They had no fish in the boat at the time of arrest. The net was in a sack and both sack and net were dripping wet. There was no appreciable amount of water in the boat, at least not enough to have got the sack and net very wet. Both men were wearing hip boots and both pairs of boots were wet above the knee. The men refused to tell the agent their purpose in having the net in the boat.

The agent is very anxious to have the case prosecuted. I feel that there is some question about the soundness of the case. However, I have always stood with the fish and game department and intend to as long as I am in this office.

Mr. M. J. Huffman

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May 7, 1938

Inasmuch as the statutes only mention 2-inch mesh nets, I am wondering if the men had a right to possess the smaller mesh net, or if, in the event they did have a right to possess such a net, the above state of facts would constitute use of the net under the statute.

I would be very glad to have your opinion in regard to this matter."

In our research on this question, we find that the following sections of the statutes apply: Section 8270, R.S. Mo. 1929, provides in part as follows:

"It shall be unlawful for any person or persons to take, catch, or kill, any fish in any of the waters of this state, by means of any trammel net, gill net, fish trap, firearm, rifle or gun or any other kind of net, trap, firearm, device or any other means other than by ordinary hook and line, gig, spear, trot line, artificial bait, or seine, of the kind and at the time, and in the manner permitted by law."
* * * * *

Section 8273, R.S. Mo. 1929, provides in part as follows:

"The use of seines, hoop nets and trammel nets, is hereby permitted, in the Mississippi, Missouri and Osage rivers, during the months of January, February, March, June, July, August, September, October, November and December of each year, with seines and nets, the mesh of which shall not be less than two inches square; and provided further,

that any person or persons owning land along any of the inland rivers or streams of the state, known as unnavigable streams, or anyone by permission of the said landowner may take fish from such streams during the months of June, July, August, September and October of each year for his or their own consumption or table use, with a two-inch mesh net or seine: Provided, however, that such seines and nets shall not be operated on any of the above named streams within three miles down stream from any dam which has been constructed or may be constructed across the above named streams, or within three hundred yards of the mouth of any stream or slough emptying into such waters, and that the placing of a net, trap, seine, or such device, within that area shall constitute an offense against the laws of the state:" * * * * *

And Section 8274, R.S. Mo. 1929, provides as follows:

"Any person may use a glass or wire minnow trap, or small seine not more than twenty feet in length, and four feet in width, known as a minnow seine, and to be used in catching bait:" * * * * *

These three sections are the only provisions of the statutes in which we find regulations relating to the seining of fish. All of these sections contain provisions against the use of seine or net, but none of them prohibit the possession of such articles, regardless of the size of the mesh of a seine or net. Said Section 8273, supra, permits the use of seines and nets under certain circumstances

May 7, 1938

and at certain times, which have a mesh of not less than two inches square. This section prescribes the minimum dimensions which any seine or net may have for fishing, therefore, the seine or trammel net suggested in your letter, if it is used for the purpose of catching fish, the user would be violating the provisions of the statute and subject to the penalties prescribed therein.

It is a general rule of statutory construction in this state that penal statutes must be strictly construed and nothing can be taken into statutes by intendment or implication.

In the case of State v. Lloyd, 7 S.W. (2d) 344, 346, the court in speaking of construction of criminal statutes, said:

"* * * It is to be construed strictly against the state and liberally in favor of the accused. State v. Krueger, 134 Mo. 262, 35 S.W. 604. Such statutes may not be extended or enlarged by judicial interpretation so as to embrace persons not specifically brought within their terms. No one may be made subject to its provisions by implication."
* * * * *

The foregoing sections of the statutes cited relating to fish and game, come within the classification of the criminal statutes. If these statutes are so construed that possession of a trammel net is a violation of the law, such a construction would have to be made by implication, and this would be against the foregoing rules of statutory construction.

CONCLUSION

Therefore, it is the opinion of this department that the possession of a trammel net of any dimensions is not a violation of the game and fish laws of this state, and that under the set of facts you have submitted

Mr. M. J. Huffman

-5-

May 7, 1938

in your request, we do not think that the defendants have committed such an act as would constitute the use of a trammel net mentioned in your letter.

We are further of the opinion that the use of the trammel net, the mesh of which is less than two inches, is a violation of said Section 8273, supra.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SHERIFFS FEES: Mileage--how determined.

June 8, 1938

Mr. W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri



Dear Sir:

We have your request of May 21st, for an opinion,
which in part is as follows:

"When the audit of County Officials was made here lately, the final report showed that the former sheriff was charged with something like \$300.00 for mileage in excess of what the auditors determined was the proper mileage charge for serving warrants and other criminal process. The amount found by the auditors to be due from the sheriff appears on their report as a lump sum; no particular instances of overcharge are pointed out. The former sheriff, John W. Harris, tells me that he is absolutely unable to ferret out the particular warrants he is supposed to have overcharged on.

* * * * *

I do know that the sheriff puts many extra miles on his speedometer that would not appear there if the men he goes after accommodately stay at home and wait to be arrested; in this county, the sheriff seldom is able to arrest the first time he goes to the home of the

June 8, 1938

man charged, and is generally led a merry chase through the woods before he finally lands his man: there should be a way that the sheriff can, legitimately, bill all mileage actually travelled in making the arrest.

* * * * *

I am, of course, for the sake of securing this opinion, assuming that what Harris has told me about the matter is the exact truth. It will perhaps soon become my duty to examine the matter particularly. Before doing so, I should like an opinion from your office on the following points; (a) has the sheriff a right to charge up all mileage actually travelled in making a chase, (b) may he charge all mileage if more than one trip is necessitated in making the arrest, (c) if he is so entitled as above, how should his return read, (d) is the finding of the State Auditor, based only on measurement of distances between one spot in the county and another, to be accepted as prima facie evidence of the sheriff's malfeasance?"

We shall take these requests up in the order in which they appear.

I.

The sheriff is entitled to mileage for all miles actually traveled in pursuit of a fugitive.

Section 11792 R. S. Missouri 1929, provides in part as follows:

"Sheriffs* * *shall be allowed for their services in criminal cases* * *ten cents for each mile actually travelled in serving* * * any writ* * *when served more than five miles from the place where the Court is held* * *."

The fees of a sheriff are set out in Section 11791 R.S. Missouri 1929, as follows:

"The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove the prisoner from one county to another for any cause authorized by law, * * *shall be allowed* * *One dollar and twenty-five cents per day for every day he may have such prisoner under his charge* * *and five cents for every mile necessarily travelled in going to and returning from one county to another* * *."

It is therefore the opinion of this office that the sheriff is entitled to mileage for miles actually traveled in serving any writ or warrant. The sheriff is not entitled to fees for an unsuccessful chase of the prisoner.

II.

The sheriff is entitled to mileage for only one trip made in serving the warrant.

We find no statute which authorizes the payment of mileage fees to a sheriff for an unsuccessful attempt to serve a writ. The general rule is stated in Section 1195, 57 C.J. p. 1130, as follows:

June 8, 1938

"In a majority of jurisdictions a sheriff is not entitled to, as a matter of right, and cannot recover, mileage for travel in attempting to serve process or make an arrest which was not actually or lawfully served or made, and even though he ultimately served the process or made the arrest, he cannot charge mileage for previous unsuccessful attempts; * * *"

This appears to be the generally established rule with reference to the compensation of sheriffs as established by the following cases: Yavapai County vs. O'Neal, 29 Pac. 430; Braughton vs. Santa Barbara County, 65 Cal. 257, 3 Pac. 877.

It is now well settled in this state that the right to compensation in a public office must be derived from some statute. State ex rel. vs. Brown, 146 Mo. 401, 1. c. 406.

It is therefore the opinion of this office that a sheriff is entitled to charge only mileage for one trip in which the warrant or capias is served, and that he is not entitled to charge mileage for previous unsuccessful attempts to serve the warrant.

III.

Fees for mileage not determined by measurement of distances between points involved.

There is no hard and fast rule by which to determine the proper mileage of an officer in serving a writ. The statutes covering such fees and mileage were never intended to be interpreted so as to pay fees for a given distance "as the crow flies".

Section 11791 R.S. Missouri 1929, provides that the sheriff is entitled to mileage for every mile necessarily traveled. Section 11792 allows the sheriff mileage for each mile actually traveled in serving the writ. We think it is within the meaning of both statutes that the sheriff shall be paid mileage for all miles actually and necessarily traveled in serving the writ.

June 8, 1938

If a sheriff, upon going to the usual place of residence to serve a writ, finds that the defendant has fled, it then becomes the duty of the sheriff to pursue the defendant under Section 3492 R. S. Missouri 1929. If the pursuit of such defendant is continuous and there be an extension of the original trip made by the sheriff in order to serve the warrant, as distinguished from a new trip, the sheriff is entitled to mileage for the miles actually traveled in pursuit of the defendant when such pursuit results in the arrest of the defendant. The return of the sheriff on the warrant should show the total mileage and between what points, traveled by the sheriff in pursuit of the defendant, and should show that such pursuit terminated in serving the writ.

It is therefore the opinion of this office that the sheriff is entitled to mileage for miles actually and necessarily traveled in serving a warrant or other duly authorized writ.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM.

SALARIES AND FEES: 1. Township trustee's commissions based on total amount received and disbursed during each year.
TOWNSHIP TRUSTEE: 2. Township trustee only entitled to commissions on disbursements made for expenses of the township as set out in Sec. 12303, R. S. Mo. 1929.

August 10, 1938



Honorable Glen W. Huddleston
Prosecuting Attorney
Carrollton, Missouri

Dear Sir:

This is in reply to your request of July 16th for an opinion from this department based upon the following questions:

"1 - Under the Laws of Missouri, 1931, page 377, the trustee of a township board is allowed, as part of his compensation: 'two per cent for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of one thousand dollars and one per cent of all sums over said amount'. The trustee of Wakenda township, Carroll County, Missouri, receives and disburses about three thousand dollars each year, but he never pays out more than one thousand dollars at one time. Would he be entitled to charge two per cent commission on the three thousand dollars disbursed, or would all of his disbursements for the entire year be added at the end of the year and he only be allowed two per cent on the first one thousand dollars and one per cent on all sums over that?

"2 - The trustee of Carrollton township, Carroll County, Missouri, wrote a check for \$51,000.00 against a fund that had been raised by the sale of township bonds,

and gave said check to a custodian of said funds that had been selected by the township board of Carrollton township. The trustee made no other disbursement of this money except to write this check to the township's custodian, and said trustee charged a one per cent commission on said money as a disbursement. Is this one per cent commission charged by said trustee a legal charge under the laws of the State of Missouri?"

I.

Your first question involves the question of how a township trustee may compute his commissions, whether upon each disbursement or upon the total disbursements for any one year.

On the question of the amount of salary any officer in this state may retain during any one year, we find that Section 13 of Article IX of the Constitution provides as follows:

"The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

August 10, 1938

And in the case of State ex rel. v. Pohlman, 60 Mo. App. 1. c. 449, the court in discussing an opinion of the Supreme Court in Harrington v. City of St. Louis, 107 Mo. 327, said:

" * * * It was also held that the receipts for a year are composed of the fees and emoluments earned and collected during that year."

Section 12310, Laws of Missouri, 1931, page 377, provides in part as follows:

"And provided further, that the township trustee as ex officio treasurer shall receive a compensation of two per cent for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of one thousand dollars and one per cent of all sums over said amount."

Section 12292, R. S. Mo. 1929, provides in part as follows:

"The township treasurer shall, annually, between the first day and the tenth day of July of each year, settle with the township board and account for all school moneys received, from whom and on what account, and the amount paid out for school purposes and for building purposes to the various school districts of the township."

While this section is not very pertinent to the question, yet it does appear that the lawmakers intended that the township treasurer should conduct his office on an annual basis.

Section 12290, R. S. Mo. 1929, further evidences this intention by the following language:

"He (township trustee) shall make settlement annually between the twentieth day of March and the fifteenth day of April with the county clerk of all moneys received by him on account of schools, * * *."

We further find that the rule as it applies to officers is stated in Vol. 46 C. J., page 1019, Section 250, which is as follows:

"Statutes relating to the fees and compensation of public officers must be strictly construed in favor of the government, and such officers are entitled only to what is clearly given by law."

This rule is applicable in Missouri. In the case of Holman v. City of Macon, 155 Mo. App. 1. c. 402, the court said:

"A recognized rule of statutory construction is that a public officer cannot demand any compensation for his services not specifically allowed by statute and that statutes fixing such compensation must be strictly construed."

We think that said Section 12310, as amended by Laws of Missouri, 1931, at page 377, should be construed together with said Section 13 of Article IX of the Constitution, and that the trustee's compensation should be based upon his disbursements for any one year.

CONCLUSION

It is, therefore, the opinion of this department that the township trustee as ex officio treasurer shall receive a compensation of two per cent for receiving and disbursing all moneys coming into his hands as such officer in any one year when the total disbursements and receipts for such year shall not exceed the sum of one thousand dollars and one per cent of all sums over one thousand dollars received and disbursed during such year.

August 10, 1938

II.

On the second question of your request, we find that the duties of the township trustee as ex officio treasurer as to paying out of township funds in payment of claims against the township are set out in Section 12306, R. S. Mo. 1929, which is as follows:

"When any claim or account, or any part thereof, shall be allowed by the township board of directors, they shall draw an order upon the township trustee in favor of the claimant for the amount so allowed--said order to be signed by the president of said board, and attested by the township clerk and delivered to said claimant."

Section 12303, R. S. Mo. 1929, sets out what shall be charges against the township, which section is as follows:

"The following shall be deemed township charges: First, the compensation of township officers for their services rendered in their respective townships; second, contingent expenses necessarily incurred for the use and benefit of the township; third, the moneys authorized to be raised by the township board of directors for any purpose, for the use of the township."

This section fixes the things which are charges against the township. The paying of moneys by the township trustee to a custodian does not come within the class of payments authorized by said section, and as the trustee's duties are purely statutory, he would not be authorized to collect a commission for making a disbursement which he was not authorized to make.

The proper answer to your question, we think, depends upon the meaning to be placed upon the word "disbursing" as it is used in this section. Does this word as used here mean the payment of township charges as they are defined in Section

August 10, 1938

12303, R. S. Mo. 1929, or does it mean the disbursing of said money for township charges and the turning over of township funds to a custodian appointed by the board? If the section means disbursing the township charges and turning over township funds to a custodian, then we can not understand why the Legislature made disbursing one of the elements which the commission is based upon. It could have said a commission on all moneys received by the trustee, which would have had the same effect, because by receiving commissions on the moneys paid for township charges and those turned over to a custodian, he would be receiving a commission on all moneys received.

To so construe this section would not give effect to the word "disbursing." As said in State v. Daues, 14 S. W. (2d) 1. c. 1002:

"It is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another. * * *"

In the case of Wright, Admr. v. Wilkerson, 41 Ala. 1. c. 272, the court, when it had before it the interpretation of the phrase "receipts and disbursements" in determining what compensation should be allowed an administrator, said:

"The word 'disbursement' in the same section evidently means money or currency paid out in extinguishment of the liabilities of the decedent or the expenses of the administrator."

August 10, 1938

The foregoing provisions of the statute are general as to the township organizations and the duties of the officers. From your letter dated August 17, 1938, which was written in response to our letter inquiring how the township board came into possession of the \$51,000.00, we have learned that this money came from the sale of road bonds for the township. That being the case, Sections 7960, 7961, 7962, and 7963, R. S. Mo. 1929, control the township officers and the county court in their duties pertaining to such fund. These are special statutes as to road funds for township organizations and they take precedence over the general statutes.

On these particular sections, we find that this office by an opinion dated August 10, 1937, written by Mr. Max Wasserman, Assistant Attorney General, to Mr. Mark W. Wilson, Prosecuting Attorney of Clinton County, Missouri, construed these sections as they apply to the township trustee and the county court. We are enclosing a copy of this opinion for your information.

CONCLUSION

This office is therefore of the opinion that the only moneys which the trustee is permitted to collect a commission on are those for disbursements which are set out in Section 12303, and for the disbursements which he makes under the order of the county court by authority of Section 7963, R. S. Mo. 1929. The disbursements which he makes under Section 12303 are (1) compensation of township officers for their services rendered in their respective townships, (2) contingent expenses necessarily incurred for the use and benefit of the township, and (3) the moneys authorized to be raised by the township board of directors for any purpose, and under Section 7963, the proceeds from the bonds which are sold by the county court and turned over to the treasurer and disbursed by him under order of said court. We are further of the opinion that the moneys which the township trustee turns over to a custodian do not come within the class of disbursements listed above, and for that reason the township treasurer is not authorized to collect a commission on such moneys.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

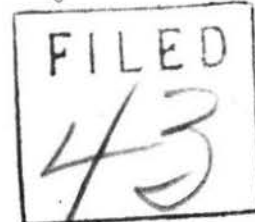
J. E. TAYLOR
(Acting) Attorney General

TWB:HR

SCHOOLS: County Court cannot discount or compromise a loan made out of the school funds.

August 24, 1938

Honorable Glen W. Huddleston
Prosecuting Attorney
Carroll County
Carrollton, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of August 5th, wherein you request an opinion from this department on the following questions:

"1 - Several years ago the Carroll County Court made a school funds loan on a farm belonging to a resident of Carroll County. About a year ago this mortgagor filed her petition in bankruptcy in the Federal Court of Kansas City, Missouri, under the Frazier-Lemke Act. One of her sureties on her school loan bond agrees to pay a part of the loan that is due and owing the County, if the County will scale down the amount of its claim. Can the County Court legally scale down its claim under the Frazier-Lemke Act, in order to effect a compromise? Or, can the County Court legally accept the amount offered by the mortgagor's surety to get the case dismissed from the Bankruptcy Court? As a matter of information, the surety on this loan is worth more than the amount of the loan above his statutory exemptions.

"2 - Can the County Court legally compromise any school fund loan and accept less than

the amount of the interest and principal of the loan, even though in their judgment they could collect more money by the compromise than if they foreclosed their mortgage and obtained a judgment against the surety on said loan?"

The county courts of this state are organized and granted privileges and authority under Section 36, Article VI, of the State Constitution, and Sections 9243 and 9245, R. S. Mo. 1929, to make orders in compliance with the investment of school funds.

Section 9243, R. S. Mo. 1929, reads as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent. per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; * * *"

Section 9245, R. S. Mo. 1929, reads as follows:

"Whenever any county in this state may have, separate and apart from the township funds, any public school fund arising from any source whatever, the same shall be under the jurisdiction of the county court of said county, who shall be governed in its care and investment by the same rules and regulations as govern its actions in the township funds--the proceeds of said funds to be collected annually and distributed as provided in section 9257."

County courts are not the general agents of the county or the state, and their powers are limited to the statutes and the State Constitution and they have only such authority as is expressly granted them by the statutes and Constitution. This was so held in the case of King v. Maries County, 249 S. W. 418, 1. c. 420, where the court said:

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. Butler v. Sullivan County, 108 Mo. 630, 18 S. W. 1142; Sturgeon v. Hampton, 88 Mo. 203; Bayless v. Gibbs, 251 Mo. 492, 158 S. W. 590; Steines v. Franklin County, 48 Mo. 167, 8 Am. Rep. 87. This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. Sheidley v. Lynch, 95 Mo. 487, 8 S. W. 434; Walker v. Linn County, 72 Mo. 650; State ex rel. Bybee v. Hackmann, 276 Mo. 110, 207 S. W. 64."

Article VI, Section 36, of the Missouri Constitution reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

In construing that section, the Supreme Court in the case of State ex rel. v. Patterson, 229 Mo. 273, 1. c. 391, held:

"The county courts are denied any rights except those expressly conferred."

Under the above statutes and authorities, the county courts are clothed with limited and specifically delegated powers.

Section 9256, R. S. Mo. 1929, authorizes the county courts to bid in property sold under school fund mortgages. Other sections provide other actions to be taken in protecting school fund mortgages, but no provisions are set out to allow the county court to discount a mortgage, even where it will be a greater loss if not discounted.

In the case of Montgomery County v. Auchley, 103 Mo. 492, 1. c. 503, the court said in quoting from Veal v. County Court, 15 Mo. 412:

"In Veal v. County Court, 15 Mo. 412, the county court had loaned school funds at ten-per-cent. interest, and afterwards, on the petition of the inhabitants of the township to which the funds loaned belonged, the court reduced the rate of interest to six per cent. This court held that this order reducing the interest was illegal, and Judge Scott, in referring to these funds and the nature of the trust assumed by the county courts, in regard to them, said: 'In relation to these funds the county courts are trustees. They have no authority to dispose of the principal intrusted, or any of its interest, otherwise than is prescribed by law. There is no difference in this respect between the principal and interest of these funds. If they can give away the one, they can give away the other. * * * The welfare of the state is concerned in the education of the children. She has provided and is providing means for that purpose, not only for those now in existence, but for those who may come after them. The fund, as has been

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said, is a permanent one, and, if every man, woman and child in a township should petition the county court to give away, that which is by law intrusted to it, for the education of its children, it should without hesitation reject their prayer.'"

Section 7103 of 1879, above referred to, is now Section 9243, R. S. Mo. 1929.

Title 11, Section 203, of the United States Code Annotated sets out the procedure for a mortgagee to protect his interests in regard to mortgages secured by real estate, and is too lengthy to set out in this opinion. This section is also commonly called the Farm Loan Moratorium and the Frazier-Lemke Act. However, it does not in any way give the county court any permission or license to violate the state laws. The county courts are purely creatures of solely statutory origin and have no common law or equitable jurisdiction. This was so held in the case of Lafayette County v. Hixon, 69 Mo. 561.

CONCLUSION

In view of the above authorities, it is the opinion of this department that even though the property securing a school fund mortgage would bring less on foreclosure or would depreciate on account of excusable delay in foreclosure, under the Frazier-Lemke Act, the county court has no authority to compromise with a surety on the loan or discount the loan in any manner. It is the duty of the county court to foreclose, according to law, upon investments made by the county court out of the school fund in accordance with Sections 9243 and 9245, supra.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

TAXATION:

**SALL FOR TAXES EXTINGUISHES
ALL PRIOR LIENS:**

Deed issued by Collector for lands
sold for delinquent taxes supersedes
and extinguishes lien of a deed of
trust which was on such lands prior
to such sale.

September 1, 1938

Honorable W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri



Dear Sir:

This is in reply to yours on the question of whether or not the lien of a deed of trust on real estate is superseded and extinguished by a deed issued by the Collector of Revenue for lands which are sold for taxes by authority of the provisions of the Jones-Munger Law, Laws of Missouri, 1933, page 425.

Because of the fact that a mortgagee or trustee of a deed of trust on lands which are sold for taxes is not included in the notice of sale of such lands, your question is whether or not such mortgagee or trustee is deprived of his constitutional rights of due process by the provisions of the Jones-Munger Act.

The section of the Constitution which pertains to the due process of law is Section 30, Article II, which provides as follows:

"That no person shall be deprived
of life, liberty or property without
due process of law."

Section 9747, R. S. Mo. 1929, provides in part as follows:

" * * * real property shall in all
cases be liable for the taxes thereon,
and a lien is hereby vested in favor
of the state in all real property for
all taxes thereon, which lien shall

be enforced as hereinafter provided in this chapter; said lien shall continue and be in force until all taxes, forfeitures, back taxes and costs shall be fully paid or the land sold or released, as provided in this chapter."

Section 9952a, Laws of Missouri, 1933, page 430, provides as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale; provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor. The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

By this section it will be noted that in the notice of sale of lands for delinquent taxes it is not necessary for the collector to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of the lands which are so sold.

The lien for state taxes is prior to any liens which may be on real estate at the time such taxes are due. In the case of Commerce Trust Co. v. Syndicate Lot Co., 235 S. W. 150, 152, the court in speaking of such lien, said:

"The statute gives the state a lien for all taxes, which shall continue and be enforced until they are fully paid or the land sold therefor."

The mortgagee, as well as the person who has the record title to such land, must take notice of the provisions of Section 9747, supra, and Section 9952a, supra. While Section 9952a does not require the collector to list the owner, mortgagee, etc., in the notice of delinquent lands, and we do not find where this statute has been attacked on that ground, yet we do find that the Missouri courts have passed on a question similar to this in some drainage district cases, in which it was held that the owners of the lands were not deprived of their lands without due process because they were not named in the publication of such proceedings.

In the case of State ex rel. v. Blair, 245 Mo. 680, 1. c. 695-6, the court said:

"When a statute has required notice to be given in a certain form to absent land owners, such statute has almost universally been held to constitute due process of law.

"Huling v. Kaw Valley Railway and Improvement Company, 130 U. S. 559, was a suit under a statute of Kansas governing the condemnation and appropriation of lands for railroad purposes. That statute did not provide that the notice to absent land owners should designate them by name, but only required that such notice should give the numbers of the sections, townships and ranges through which the railroad would be constructed. The Supreme Court of the United States, in upholding the constitutionality of the above mentioned statute, said:

"The owner of real estate, who is a non-resident of the State within which the

property lies, cannot evade the duties and obligations which the law imposes upon him in regard to such property, by his absence from the State. Because he cannot be reached by some process of the courts of the State, which, of course, have no efficacy beyond their own borders, he cannot therefore hold his property exempt from the liabilities, duties, and obligations which the State has a right to impose upon such property; and in such cases some substituted form of notice has always been held to be a sufficient warning to the owner, of the proceedings which are being taken under the authority of the State to subject his property to those demands and obligations. Otherwise, the burdens of taxation, and the liability of such property to be taken under the power of eminent domain, would be useless in regard to a very large amount of property in every State of the Union. It is, therefore, the duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences. Such publication is "due process of law" as applied to this class of cases."

The Supreme Court of Missouri in discussing the Blair case, *supra*, in the case of *Troeger v. Roberts*, 284 Mo. 363, 1. c. 370, said:

"In the case of *State ex rel. Coleman v. Blair*, recently decided by this court (245 Mo. 680), it was held not necessary in the notice to landowners of the assessment of benefits and awarding of damages arising out of the construction of a proposed drainage ditch to designate every

person appearing by the deed records to own lands within the district. The names to be inserted in the aforesaid notice are usually obtained by the viewers while inspecting and locating the right of way for the ditch, and such notice should, in addition to the names returned by the viewers, also designate generally all other persons whose lands will be affected by the proposed improvements. Such notice, when duly published, is due process of law."

In the case of Barnes v. Construction Co., 257 Mo. l. c. 193-194, the court said:

"First, it is contended that the county court acquired no jurisdiction over the owners of a certain tract of land in the drainage district reported by the viewers as belonging to one D. W. Hutson, because said Hutson was dead long prior to the filing of the petition to organize the drainage district. Granting that a suit begun and prosecuted against a dead man is void as to him, yet under the facts hereinafter recited we think appellants' contention is unsound. The defendants have introduced deeds establishing the fact that the title of D. W. Hutson in and to lands in the drainage district was divested out of him during his lifetime, and invested in other parties, some of them plaintiffs in this action. The notice issued to landowners on July 3, 1911, by the county clerk of Platte county was directed to some of the plaintiffs in this action and generally to all other persons owning lands to be affected by the proposed drainage ditch. That notice complied with section 5587, Revised Statutes 1909, and was sufficient to give the court jurisdiction over each and every person owning lands within the drainage district, and the appellants, who were then part owners of the D. W. Hutson lands, were

accorded every opportunity required by law to appear in the county court and resist the judgment condemning the right of way for the proposed ditch.

"In the case of State ex rel. Coleman v. Blair, recently decided by this court (245 Mo. 680), it was held not necessary in the notice to landowners of the assessment of benefits and awarding of damages arising out of the construction of a proposed drainage ditch to designate every person appearing by the deed records to own lands within the district. The names to be inserted in the aforesaid notice are usually obtained by the viewers while inspecting and locating the right of way for the ditch, and such notice should, in addition to the names returned by the viewers, also designate generally all other persons whose lands will be affected by the proposed improvements. Such notice, when duly published, is due process of law. (State ex rel. Coleman v. Blair, 245 Mo. 1. c. 696-7, and cases there cited.)"

Section 9956a, Laws of Missouri, 1933, page 437, provides as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner:
* * * *."

By this section the lawmakers have given the person interested in the land two years in which to redeem it after it has been sold for taxes. This section gives the mortgagee or his assignees ample time to redeem the property if they wish to exercise that right.

We fail to find where the courts have given the mortgagees or trustees of deeds of trust any more rights than the person holding title to the land has under the

Sept. 1, 1938

statutes pertaining to notice of sale of such land. The mortgagee and/or his assignees must take notice that the lands are subject to taxation and that the taxes are a lien which is prior to that of the mortgage.

CONCLUSION

From the foregoing, it is the opinion of this department that the lien of a deed of trust on real estate is superseded and extinguished by a deed issued by the collector for lands sold for taxes by authority of the provisions of the Jones-Munger Law (Laws of Missouri, 1933, page 425), even though the mortgagee and/or his assigns or the trustee of such mortgage does not have notice of the sale of such lands for taxes.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

MISSOURI SCHOOL FOR THE DEAF:)
BOND:)

) Against public policy for Board to pay
) for bond supplied by Steward for him-
) self and written by himself as agent
for the Insurance Company, unless
complete disclosure of all the facts
has been made and approved by the
Company.

February 14, 1938.

Honorable Truman L. Ingle
Superintendent
Missouri School for the Deaf
Fulton, Missouri



Dear Sir:

This Department acknowledges receipt of your
letter of February 7th, in which you make the following
inquiry:

"On March first next, Mr. William
R. Taylor will take over the posi-
tion of Steward of the Missouri
School for the Deaf.

"Our Board of Managers requires a
Five Thousand Dollar (\$5,000.00)
bond, which has been supplied by
Mr. Taylor. The premium on this
bond is to be paid by the school.
This morning, I received the bill
for the premium, and I noticed that
Mr. Taylor is named both as the
person who is bonded and as the sub-
agency which is writing the in-
surance.

"May I have an opinion from you
as to whether or not it is in
order for Mr. Taylor to act as the
insurance company's agent and for
us to make our check payable to
him for the premium on his bond?
Mr. Taylor has not yet gone to work,
and, therefore, is not in our employ
at the present time. His appoint-
ment takes effect March 1, 1938.

Our Board meets on Monday, February 21, and I am sure they will appreciate an opinion at that time, so they may be guided in their actions as to whether or not bill for this bond should be approved."

In 1937 the Legislature made an appropriation which included "insurance and premium on bonds." Laws of 1937, page 71, The authority for paying premium on the bond of Mr. Taylor by the Missouri School for the Deaf, if it so elects, instead of Mr. Taylor paying the premium himself, is found in the Laws of Missouri, 1937, page 190, which is as follows:

"Whenever any officer of this state or of any department, board, bureau or commission of this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any county of this state, or any deputy, appointee, agent or employee of any such officer, or any officer of any incorporated city, town, or village in this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any department, bureau or commission of any county, city, town or village, or any deputy, appointee, agent or employee of any such officer; or any officer of any district, or other subdivision of any county, or any incorporated city, town or village, of this state, or any deputy, appointee, agent or employee of any such officer, shall be required by law of this State, or by charter, ordinance or resolution, or by any order of any court in this State, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, city, town, village, or other

political subdivision, to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the State of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

It becomes the duty of the Steward to furnish bond under Section 9695, R. S. Mo. 1929, wherein it is provided:

"Before entering upon the duties of his office, he shall give bond for the faithful performance of his trust, in such form and with such securities as the board may approve, such bond to be not less than three thousand dollars."

It therefore appearing that all the procedure is legal, the question arises as to whether or not Mr. Taylor can act as the agent for the bonding company in securing his own bond and whether the same is valid. The usual procedure, in order to avoid the least taint of serving two masters or the agent in anywise subjecting himself to embarrassment when such a situation arises, is for the agent to obtain a bond for himself from some other agent. However, Mr. Taylor has not seen fit to follow such procedure and the matter must be determined as a cold proposition of law.

The question of a person acting in a dual capacity, or having an individual interest, is discussed in 3 C. J. S. Par. 253, page 252, as follows:

"As a principal is not bound by the contract of his agent beyond the scope of his actual or apparent authority, it is a fortiori conclusion that contracts made by his agent in his name without authority and for the agent's benefit and to his individual interest have no greater capacity for creating

liability for the principal. In addition to this obvious application of the general doctrine of agency, the principal is not bound by contracts made by his agent within the scope of the agent's authority but in the furtherance of the agent's individual interests to the knowledge of the other party to the contract, particularly where the contract was made without the principal's knowledge and consent. The rule applies equally whether the notice that the agent is acting for his own benefit rather than that of his principal appears from the face of the contract itself, or from the nature of the transaction, or from the constructive notice of the record books."

The facts, although somewhat dissimilar but unquestionably involving the principals of law and placing parties in the same relation, are decided in the case of *Central West Casualty Co. v. Stewart*, 58 S. W. (2d) 366, as follows:

"The ground on which the contract is assailed is that it is contrary to public policy. In a general way the public policy of a state is its attitude toward certain acts, transactions, and practices, as declared in its Constitution and statutes, and in its common law found in the opinions of its court of last resort. If the Constitution or statutes speak upon a subject, the policy of the state is necessarily fixed to that extent. Whatever they authorize or approve is sanctioned by public policy, and whatever they prohibit is against public policy. *Gathright v. Byllesby & Co.*, 154 Ky. 106, 157 S. W. 45. However, there are innumerable subjects not

specifically treated in either the Constitution or statutes, and as to these the public policy of the state is declared by the court of last resort. In a more narrow sense public policy is usually understood to be the principles under which freedom of contract and private dealing are restricted by law for the good of the community. *Ballard County Bank's Assignee v. U. S. Fidelity & Guaranty Co.*, 150 Ky. 236, 150 S. W. 1, Ann. Cas. 1914C, 1208. Thus certain classes of contracts, though not prohibited by the Constitution or statutes, are held by the courts to be against public policy on the ground that they promote unfairness and injustice, and are therefore mischievous in their tendency, and detrimental to the public good. Pursuant to this principle it may be laid down as a general rule that, in the absence of express authority or subsequent ratification with full knowledge of the facts, an agent cannot act for his principal in any matter in which the private interests of such agent are involved. The reason for the rule is that the agent owes his principal the utmost good faith, and on account of the weakness of human nature cannot be expected to be faithful to his principal when impelled by selfishness to look out for himself. Following this rule we held in *Bank of Louisville v. Gray*, 84 Ky. 565, 2 S. W. 168, 8 Ky. Law Rep. 664, that a sale by an agent to himself of the property of the principal was void at the option of the principal, and that one who purchases from the agent with notice of the facts holds as trustee for the principal. In *Johns v. Parsons*, 185

Ky. 513, 215 S. W. 194, we approved of the rule announced in 21 R. C. L. p. 910, that every agency is subject to the legal limitation that it cannot be used for the benefit of the agent himself, or of any person other than the principal, in the absence of an agreement that it may be so used, and, as this is a matter of law, and not of fact, all persons must take notice of it. In *Johnson v. Mitchell*, 192 Ky. 444, 233 S. W. 884, we held that an agent employed to sell property could not become the purchaser thereof without fully and completely acquainting his principal with all the facts. In the more recent case of *Weatherholt v. National Liberty Insurance Co.*, 204 Ky. 824, 265 S. W. 311, we held that public policy forbids one to enter into a contract with himself as agent for another without the acquiescence or ratification of the principal, and that an insurance policy written by the agent on his own property could not be enforced. A case more nearly in point is *Salene v. Queen City Fire Ins. Co.*, 59 Or. 297, 116 P. 1114, 35 L. R. A. (N. S.) 438, Ann. Cas. 1916D, 1276. There a fire insurance agent had a general authority from his company to write and issue fire insurance policies. There was no express restriction on his issuing a policy against his own house. He mortgaged one of his houses to plaintiff for a loan to him personally, and issued on behalf of his company a fire policy with loss clause payable to plaintiff. He reported the transaction to the company and remitted the customary premium. Before the company could repudiate the act of the agent, the fire occurred.

In denying a recovery on the policy, the court pointed out that plaintiff knew that the agent was providing a security for the possible payment of his debt out of the funds of the company, and therefore dealt with him at her peril, and that, before she could recover, it was necessary for her to bring home to the company knowledge of the whole transaction before any liability arose on the policy, and to further show that the company with such knowledge approved or ratified the transaction.

"Here Stewart accepted the bond knowing that it was executed by Culbertson as principal, and on behalf of the casualty company as surety, for the purpose of securing the rent, which Culbertson agreed to pay. Authority to execute 'any bond or undertaking' was not sufficiently broad or specific to bind the company on Culbertson's own debt. The facts pleaded in the answer negative the theory of knowledge, acquiescence, or ratification. As Stewart accepted the bond knowing that the interest of Culbertson and those of the casualty company were necessarily antagonistic, he was charged with notice of Culbertson's want of authority to bind his principal by his acts. 21 R. C. L. p. 910; Langlois v. Gragnon, 123 La. 453, 49 So. 18, 22 L. R. A. (N. S.) 414. While the result is a harsh one, a contrary holding is not possible in view of the settled law of this state that such a contract is against public policy. It follows that the demurrer to the answer should have been overruled."

Feb. 14, 1938

We quote from the case extensively realizing that it is a decision from a sister state, but unquestionably the same law should be applicable to the facts in Missouri.

Conclusion.

We are of the opinion that unless Mr. Taylor has made a complete disclosure of the situation and the same has been sanctioned and approved by the Company and the Company so accepts the same and acknowledges that a full disclosure of the facts and situation has been made to it, the bond would not be legal. We think it is against public policy and that it involves a risk which the officials should not in good conscience assume, and therefore should not pay the premium for the bond.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

COMPTROLLER OF THE CITY OF
SAINT LOUIS:

Acts in the capacity of county
court in receiving application to
enter the school as set out in
Section 9697 R.S. Mo. 1929.

March 4, 1938



Mr. Truman L. Ingle,
Superintendent
Missouri School for the Deaf,
Fulton, Missouri.

Dear Sir:

This will acknowledge your request dated March 2, 1938
for an official opinion from this office, which request reads
as follows:

"The enclosed letter brings up a
question about which I have some
doubt.

We have in the past requested a
certificate of admission signed
by the Circuit Judge or Judge of
the Juvenile Court of the City of
St. Louis. The fact that the City
of St. Louis is not in any county
is unique, and I am at a loss as
to what I should do after having
received the letter from Mr. Cunning-
ham, the Deputy Comptroller.

May I ask that you give me an opin-
ion as to what course I should take
in this matter? I received in
plenty of time the opinion regard-
ing the payment on bond for our new
steward, and have abided by it."

The Section 9697 R.S. Mo. 1929 referred to in the letter
of the Deputy Comptroller of the City of St. Louis to you, reads
as follows:

"Whenever, upon petition of any
person, and satisfactory evidence
adduced to the county court of this

state that there is a blind or deaf person residing in any county, and such person is entitled to the advantages of the Missouri school for the blind or the Missouri school for the deaf, and the parents or guardians of such persons are unable to pay the expenses of such person at his proper school, the county court shall order him or her sent to the proper school, at the expense of the county for his clothing and traveling expenses."

In connection with this section, your department must also be governed by Section 9696 R.S. Mo. 1929, which reads as follows:

"All blind and deaf persons under twenty-one (21) years of age, of suitable mental and physical capacity, who are residents of this state, shall be entitled to admission to the school for the blind and the school for the deaf, respectively. All admissions and discharges, and the length of the period of instruction of each pupil, shall be determined by the board of managers."

As you notice in Section 9696, supra, the age is set out as being under twenty-one (21) years of age and in view of that age I am referring you to Section 1, page 454 of the Session Laws of 1937, which is a new penal section requiring the compulsory education of deaf children between the ages of six (6) and seventeen (17) years. In this section it specifically sets out that this section shall not detract from the powers of the board of managers of the Missouri School for the Deaf as outlined in Section 9696 R.S. Mo. 1929.

Under Section 9697 as above set out, any person may make application to the county court of this state before the county court in which the person resides. This section was passed in 1921, and for some unknown reason neglected to name the Comptroller of the City of St. Louis to which application may be made for admission to the Missouri School for the Deaf. In other statutes in relation to the relief of the poor, such as admission to the State Sanatorium at Mount Vernon, the statutes

specifically says application to the county court or to the Comptroller of the City of St. Louis. In construing statutes it has always been the ruling to read other similar statutes and they should be read together.

Under the general law of counties other than the City of St. Louis, the county court is the governing power and has charge of all the financial dealings of the county and handles all of the business of the county. In the Scheme of Separation, page 1418, Section 2 as set out in the Revised Code of St. Louis 1926, is provided:

"The city of St. Louis as described in the preceding section (which is now the City of St. Louis) and the residue of St. Louis county as said county is now constituted by law are hereby declared to be distinct and separate municipalities, and all authority heretofore exercised by the county court of St. Louis county or any officer of said county is hereby forever abrogated and annulled except for the purposes and in cases as hereinafter provided."

In the schedule of the charter of the City of St. Louis, Section 7 provided:

"It shall be the duty of all boards, commissions, and officers whose powers or duties are vested in others by this charter to turn over all books, records, property, and funds to such others, and if any board, commission, or office be abolished without the duties thereof being vested in others the incumbents thereof shall turn over all books, records, property, and funds to the comptroller."

Under this section of the charter of the City of St. Louis which has been adopted, the comptroller assumed the duties of the county court of the former St. Louis county and as such is acting under the charter the same as the county court.

Under the charter of St. Louis, Article XV, Section 2, it provided:

"* * * * The comptroller shall be the head of the department of finance and exercise a general supervision over its divisions, over all the fiscal affairs of the city and over all its property, assets, and claims, and the disposition thereof." * * * * *

Under this section, the comptroller assumed the same position as the governing body as to finances that the county court held with the county and now holds with counties that have not been divided under a charter.

In granting the charter to the City of St. Louis, the city was empowered in the charter by Article I, Section 1, paragraphs 31 and 32 to pass the necessary ordinances to care for the poor. Paragraphs 31 and 32 reads as follows:

"(31) To provide for the support, maintenance, and care of children and sick, aged, or insane poor persons and paupers."

"(32) To provide and maintain charitable, educational, recreative, curative, corrective, detentive, or penal institutions, departments, functions, facilities, instrumentalities, conveniences, and services."

In the case of Jennings v. The City of St. Louis, 58 S.W. (2d) 979, the court, in paragraph 5 of its opinion, said:

"As a municipal purpose, poor relief is recognized by our Legislature in the creation of social welfare boards and in express grants of authority to all of our cities to care for the poor. In paragraphs 31 and 32 of article I, section 1 of its Charter, this power is expressly conferred upon the city of St. Louis. Poor relief being a municipal purpose, under section 11, article 10, of the Constitution of Missouri, the city of St. Louis has the power to levy taxes so that its poor may be fed, clothed, and sheltered."

This case was a case wherein a taxpayer sought to restrain the comptroller and other officers from issuing bonds for relief purposes. The same opinion was rendered by the same court and judge in the case of State ex rel. Gilpin v. Smith, 96 S.W. (2d) 40, paragraph 2.

In the case of State ex rel. Conway v. Nolte, City Comptroller of St. Louis, 218 S.W. 862, a mandamus suit was brought by the plaintiff to compel the city comptroller to investigate and send the plaintiff to the Missouri State Sanatorium at Mount Vernon, Missouri. The court granted the writ and said in its opinion in paragraph 1:

"In support of its first contention, respondent argues that since he, as comptroller, is charged with the responsibility of 'conserving the financial interests of the city, and is especially charged with the duty of preventing the expenditure of any public money except as authorized by law or ordinance,' he 'is entitled to a reasonable opportunity to make an investigation before certifying to a condition which will result in a substantial outlay of public money.' The language of the section is peremptory. It names the comptroller of the city of St. Louis and in terms provides that he 'shall at once certify the said name of said applicant to the superintendent of said sanitarium for admission and treatment of such persons' whenever a proper verified application is made to him. The sufficiency of the application is not questioned. It was the comptroller's duty to certify relator's name 'at once.'" * * * * *

In view of the charter of St. Louis which empowers the comptroller to control all of the financial duties of the city and since under the two decisions set out above, it is an act held constitutional, the comptroller should be the one to approve applications to the school for the deaf and not the juvenile court or circuit court, which has no control over the finances or funds of the City of St. Louis.

Mr. Truman L. Ingle

-6-

March 4, 1938

In view of these authorities, it is the opinion of this office that the proper course for the Missouri School for the Deaf to take in this matter would be to notify the comptroller of the City of St. Louis that you regard his position as the same as that held by the county court of the county as set out in Section 9697 R.S. Mo. 1929.

It is further the opinion of this office that it would be advisable for you to notify the clerk of the circuit court of the City of St. Louis regarding this opinion furnished by this office.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

TAXATION: Incorporated villages can levy and
POLL TAXES: collect a poll tax.

TAXATION: Incorporated villages may, by ordinance,
MUNICIPALITIES: levy and collect automobile license tax.
AUTOMOBILE TAXES:

July 20, 1938

Mr. Frank J. Iffrig
St. Charles County
St. Peters, Missouri



Dear Mr. Iffrig:

We received your letter of July 14th containing requests for two opinions. Your first request reads as follows:

"The town Board of St. Peters an incorporated village would like to know if they can continue to levie and collect poll tax. In repeating the various sections by which the county courts levied a poll tax I find that the section giving authority to towns and villages were not repealed, though this may be covered in some other act."

The legislature in 1937 passed the following bill which is found in the Laws of Missouri 1937, page 440:

"That Sections 7879, 7880, 7881, 7882, 7883, 7884, 7885, 7886, 7887 and 7888 of Article Three (3), Chapter Forty-two (42) of the Revised Statutes of the State of Missouri for the year 1929 and Sections 8157, 8158, 8159 and 8160 of Article Fifteen (15), Chapter Forty-two (42) of the Revised Statutes of the State of Missouri for the year 1929, be and the same are hereby repealed."

Sections 8157 to 8160 inclusive related to the levying and collection of poll taxes in counties under township organization. Sections 7879 to 7888 inclusive related to the levying and collection of poll taxes in counties without township organization. Persons residing in incorporated cities were specifically exempted from the provisions of the above appealed acts.

Cities of all classes, namely, classes 1, 2, 3 and 4 and incorporated towns and villages are specifically authorized by special statutes to levy such taxes. You state that

St. Peters is an incorporated village. Article 9, Chapter 38, L. S. Mo. 1929 deals specifically with towns and villages. Section 7110 contained in said Article 9, Chapter 38 reads as follows:

"The board of trustees shall also, from time to time, provide, by ordinance, for the levy and collection of all other taxes and licenses, including poll taxes, wharfage and other dues, and to fix the penalties for neglect or refusal to pay same, which now or hereafter may be authorized by law or ordinance. All able-bodied male persons, between the age of twenty-one and fifty years, who may have resided within the corporate limits of such village thirty days next preceding the levy of any poll tax for any given year, shall be liable to work on the streets and alleys of such village not to exceed three days, or to pay such sum in lieu thereof as may be provided by ordinance, not in any case, however, to exceed the sum of three dollars; and upon failure to pay such poll tax, either in cash or by labor, when notified so to do, according to law and the ordinance of such village, it shall be the duty of the town marshal, when ordered so to do by the board of trustees of such village, to bring suit before some justice of the peace, if there be any in such village, and if not, then before some justice of the peace nearest such village, and proceedings shall be had thereon the same as in other civil cases; and no property shall be exempt from seizure and sale upon any execution issued upon any judgment rendered for such poll tax."

The above Section 7110 was not repealed either directly or by implication, by the 1937 Act of the legislature. The 1937 Act repealed only those statutes providing for the levying and collection of poll taxes by counties both with and without township organization in this state. It did not repeal the laws permitting cities of all classes and villages from levying and collecting such a tax.

CONCLUSION

It is our conclusion, therefore, that incorporated villages can levy and collect a poll tax.

II.

The second question you ask, reads as follows:

"Also can an incorporated village levy a license tax on automobiles and trucks?"

Section 7759 R. S. Mo. 1929 defines the term "Municipality" as follows:

"Municipality. Includes cities, towns and villages, whether incorporated or not."

Section 7780 R. S. Mo. 1929, as reenacted by the legislature in the year 1935, Laws of Missouri 1935, page 295, provides, in part, that:

"Municipalities may, by ordinance, levy and collect license taxes from the owners of and dealers in motor vehicles and trailers, residing in such municipalities,
* * * ."

CONCLUSION

It follows, therefore, that since the term "Municipality" includes "cities, towns and villages, whether incorporated or not", and since the legislature has given the direct right to municipalities to levy and collect license taxes from the owners of and dealers in motor vehicles and trailers, residing in such municipalities, that incorporated villages can, by ordinance, levy and collect such taxes.

Respectfully submitted

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney-General

J. F. ALLEBACH
Assistant Attorney General

JFA:LB

ELEEMOSYNARY BOARD:
INSPECTION OF CITY HOSPITALS:
RESPONSIBILITY OF ELEEMOSYNARY
FOR PATIENTS IN ST. LOUIS
CITY HOSPITAL:

Board of Managers of
Eleemosynary Institutions,
or the President of the
Board, may inspect St.
Louis City Sanitarium

when it deems advisable for verifying claim
of such institutions for state aid. The
Board has no legal responsibility either
for the conduct of patients in such institu-
tion or for inspection and investigation
of the sanitarium as a subsidiary

January 21, 1938

Honorable W. Ed Jameson
President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Sir:

This office acknowledges your request dated
January 15, 1938, for an official opinion, which is as
follows:

"I inclose you herewith a resolu-
tion or suggestion made at the
last meeting of the Eleemosynary
Board with reference to a ap-
propriation of \$600.00, shown by
Sec. 71-B, page 140, Laws of Mo.
1937, on the basis of \$8.00 per
month. Would also like to make
reference to page 221, Laws of
Mo. 1931, Sec. 1, 2 and 3.

"Will you kindly have your office
furnish me with an opinion with
reference to Sec. 2, where it
reads: 'The State Eleemosynary
Board shall have authority to
examine, by proper medical authori-
ty, any or all such institutions
for the insane.' What I would like
to know is if this is optional
upon the part of the Eleemosynary
Board or is it mandatory?

"Also, referring to Sec. 71-B,
page 140, Laws of Mo. 1937 which

reads, 'Provided that the State Auditor shall not audit and the State Treasurer shall not pay any claims out of this appropriation unless such claim has been approved by the Board of Managers of the State Eleemosynary Institutions.' Will you also advise me whether it is mandatory or optional whether I shall personally visit this institution at least once each quarter, as I have to do with reference to the Jasper County Hospital in Webb City?

"If I have not made myself clear or intelligible in conveying to you what I want, please remember I am not a lawyer and, therefore, would be glad to discuss it with you personally if this inquiry does not give you sufficient data upon which to furnish me with this opinion. "

"The St. Louis City Sanitarium's operative accounts are approved by the State Eleemosynary Board for the 1937-1938 biennium is \$600,000. It was suggested by Mr. Griffin that the Chairman ask for an opinion from the Attorney General as to whether the Eleemosynary Board has any legal responsibility for the conduct of patients in this institution, and also as to the inspection and investigation of this institution as a subsidiary."

I

The St. Louis City Sanitarium is one of the institutions belonging to and operated by said city by authority of subsection (b) of Section 14 of Article XIII of the charter of the city of St. Louis, Missouri, which is as follows:

"There shall be a division of hospitals which shall include and have under the charge and supervision the operation and maintenance of all hospitals, infirmaries, medical laboratories, dispensaries and other charitable institutions in the city. The head of such division shall be known as the hospital commissioner."

The Legislature, in 1931, passed an act providing for partial state support for inmates of hospitals maintained by cities or counties, which act is as follows (Section 1, page 221, Laws of Missouri 1931):

"Any county or city in this state which shall maintain from public funds a hospital for the care, detention or treatment of the insane, which hospital is properly equipped as to facilities, staff and personnel, shall be entitled to \$8.00 per month per patient, upon proper report filed and sworn to by superintendent or surgeon in chief of such hospital for the insane, when such proper report is filed with the eleemosynary board. Such reports shall be filed quarterly and shall show name,

address and other necessary data so as to properly identify and authenticate the patients of such insane institution."

Section 2 of said Act is as follows:

"The state eleemosynary board of Missouri shall have authority to examine by proper medical authorities any and all such institutions for the insane, so as to determine if said hospital is efficiently equipped and if said list as filed by the superintendent is correct and authentic and shall have power to make suggestions where they find conditions which need correction or improvement."

Section 3 of said Act is as follows:

"Upon receipt of sworn statement of the superintendent or surgeon chief of such hospitals for the insane, state treasurer shall pay over to the county treasurer or city treasurer or any county or city containing such hospital for the insane, the sum of \$8.00 per month per patient out of the general revenue funds of the state or any other funds which may be provided or set aside for this purpose."

Section 287, page 1031, Volume 46, of Corpus

Juris, states the rule as to public officers as follows:

"The powers and authority of public officers are fixed and determined by the law. * * *"

When the Legislature made the appropriation in 1937 for the biennium period for partial support by the State of counties or cities maintaining approved hospitals for insane, it placed the following proviso in Section 71-B, page 140, Laws of Missouri 1937, of the Appropriation Act:

"Provided that the State Auditor shall not audit, and the State Treasurer shall not pay any claim out of this appropriation unless such claim has first been approved by the President of the Board of Managers of State Eleemosynary Institutions."

But Section 2 of the Act of 1931 cited above, for the purpose of determining that the hospital claiming state funds for partial support is efficiently equipped and if the list of insane persons in such hospitals is correct and authentic, gave the eleemosynary board authority to make examination of such hospitals as the Appropriation Act required the approval of the President of the Board of Managers of the Eleemosynary Institutions on all claims of such hospitals for State aid before being audited and paid, and it would be necessary for the President of the Board of Managers or some member thereof to make an inspection of such hospital for determining the correctness of the report unless the President of the Board of Managers was willing to take the report as correct without an inspection.

CONCLUSION

It is, therefore, the opinion of this department

that unless the President of the Board of Managers of the Eleemosynary Institutions is willing to accept as correct the claims of the St. Louis City Sanitarium, or any other hospital maintained by cities or counties in the State, it is mandatory upon him or some member of the Board of Managers of Eleemosynary Institutions to make an examination of such institutions to determine whether they are efficiently equipped and if the list of insane persons filed by such hospital is correct and authentic, and to determine that the hospital is complying with the suggestions the Board may make for correction or improvement of the conditions of such hospital.

II

On the question of whether the Board of Managers of Eleemosynary Institutions has any legal responsibility for the conduct of the patients in the St. Louis City Sanitarium and also as to the inspection and investigation of that institution as a subsidiary, we find that Section 226, page 145, 59 Corpus Juris, provides as follows:

"In accordance with general rules, state officers acting in good faith and within the scope of their authority are not liable individually for the official acts of omissions, as in connection with performance of discretionary or ministerial duties; but state officers may be held personally liable for their unauthorized acts, as for misfeasance or positive wrong to third persons in the discharge of their official functions, or for culpable negligence."

Reviewing the act authorizing such hospitals as the St. Louis City Sanitarium to receive aid from the State for their support, it appears that the only jurisdiction the Board of Managers of the Eleemosynary Institutions exercises over such institutions as the St. Louis City Sanitarium is that which it acquires for the purpose of determining whether such hospitals are qualified to participate in the State funds for their support. This act does not give the eleemosynary board any authority or jurisdiction over the insane patients except to determine that on account of their mental condition they may be held in the institution, for each of whom the State pays eight dollars per month for their support.

Section 2 of the act does give the eleemosynary board power to make suggestions where they find conditions which need correction or improvement, but merely making a suggestion for the correction or improvement of the conditions would not impose a personal responsibility on the board for such condition even though the suggestions of the board were not carried out.

The City of St. Louis, by authority of its charter, maintains and operates the City Sanitarium and whatever liability there may be for the conduct of the patients and the way the institution is maintained is upon the City of St. Louis.

CONCLUSION

It is, therefore, the opinion of this department that the Board of Managers of the Eleemosynary Institutions has no legal personal responsibility either for the conduct of the patients in

Honorable W. Ed Jameson

-8-

January 21, 1938

the St. Louis City Sanitarium or for the maintenance
of that institution.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED

ROY McKITTRICK
Attorney General

TWB LC

INSANE PERSONS:

Should be committed by county court if paupers; by guardian or relatives if pay patient; -and eleven other questions. A

January 27, 1938



Honorable W. Ed Jameson
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of January 19, relative to a number of questions concerning civil liability of superintendents of the hospitals of eleemosynary institutions and particularly the hospitals for the insane.

In order to avoid repetition and duplicity we shall attempt to separate your questions and answer them individually.

I

The first question is as follows:

"First, there has always been some contention on how patients should be committed to the hospital where they are public patients, whether they should be committed by county courts or probate courts."

Section 448, Revised Statutes Missouri 1929, relates to the procedure to be followed in the probate court with respect to insane persons. Said section reads as follows:

"If information in writing,
verified by the informant on

his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

Originally, the above section contained the provision as follows:

"Provided that the probate court shall not have jurisdiction to inquire into the sanity of any person who is the owner of no property."

But the Legislature, in 1913, in Laws of Missouri, 1913, page 94, amended the section by striking that sentence and inserting in lieu thereof the words contained in the statute quoted, after the proviso.

Section 8636, Laws of Missouri 1935, page 388, relates to the power of the county court to send poor patients to the various eleemosynary hospitals:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. * * * * *

Section 8664, Revised Statutes Missouri 1929, defines the terms "insane poor" or "indigent insane." The pertinent part is as follows:

"* * * 'insane poor' or 'indigent insane,' when applied to a person without a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by any person other than the head of a family; and the same words, when applied to a person having a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by the head of a family: Provided, that when the said words are applied to a married woman, her separate estate, if any, and that of her husband shall be estimated as aforesaid, and the total amount of both estates shall determine the question aforesaid, whether she be a 'poor' person or not, within the meaning of this chapter. A person with a family is one who has a wife and child, or either; county patients are those supported in a state hospital at the expense of the counties sending them; pay or private patients are those supported in the hospital by their family or friends, or from the proceeds of their own property * * *."

We assume that "public patients" are those patients which are supported in the various hospitals by public funds, county and state. The question as to whether or not sole jurisdiction to investigate sanity of citizens of Missouri is vested in the probate

court, is discussed in the case of Painter v. Painter, 206 Mo. 1. c. 321:

"Appellant relies principally upon the argument that the case of Redmond v. Railroad, 225 Mo. 721, 126 S. W. 159, holds that the exclusive and sole jurisdiction to investigate the sanity of citizens of Missouri is vested in the probate courts under the Constitution. However, on reading that case we conclude that on this question the Supreme Court merely held that the legislature could not deprive the probate courts of Missouri of the jurisdiction to try insanity cases. This case, or no cases cited by appellant go to the extent of holding that exclusive jurisdiction if this particular is given by the Constitution to the probate courts.

"On turning to the Constitution again, to ascertain the authority given the county courts under Section 1411, as amended, to Section 1423, Revised Statutes of 1909, we find that the Constitution in Article 6, Section 36, has vested county courts with the jurisdiction to transact all county 'and such other business as may be prescribed by law.'

"It is held that implied limitation to the legislative powers to enact statutes must be so clear and unmistakable as to make possible no other reasonable construction of the language used than that the power to enact the statute does not exist.

(See State ex rel. v. Burton, 266 Mo. 1. c. 717, 182 S. W. 746; State ex rel. v. Locker, 266 Mo. 1. c. 393, 181 S. W. 1001; State ex rel. v. Tincher, 258 Mo. 1, 166 S. W. 1028.)

"We therefore hold that the Constitution did not confer exclusive jurisdiction to try insanity cases in the probate courts of Missouri, and that the Legislature has conferred such jurisdiction in certain cases on county courts under Section 36, Article 6 of the Constitution. It will be observed on reading the act conferring this jurisdiction upon county courts that they are, in the main, making an investigation as to whether certain people are entitled to be sent to the State hospital at public expense."

The decision of Ex parte Zorn, 241 Mo. 1. c. 270, indicates very strongly that the county court has exclusive jurisdiction of insane persons who have no property:

"We have no hesitation in holding that Jackson county was the proper place to conduct the inquiry into the alleged insanity of petitioner, because that county was the place of his residence. One of the objects of article 19, chapter 2, Revised Statutes 1909, is to protect and preserve the property of persons of unsound mind. This

is evidenced by the fact that the proceeding cannot be instituted in the probate court if the insane person has no property. It is apparent that the Legislature intended that the guardians of insane persons should be appointed and their estates administered in the county of their residence where their property is located, and where their friends and acquaintances are likely to reside. (State ex rel. v. Wurdeman, 129 Mo. App. 263.) It is true that article 19, chapter 2, Revised Statutes 1909, does not expressly authorize probate courts to send their notices or writs to other counties to be served upon parties sought to be declared insane. Probate courts are part of the judicial system of our State, being created by the Constitution, and empowered by that document to pass upon the sanity of individuals; therefore, the instrumentalities for invoking their jurisdiction in that class of cases may be prescribed by general law."

Section 448, quoted supra, relates to the procedure for declaring persons insane and incapable of managing their own affairs when said person has property or an estate. If, after a legal hearing, the person is declared to be of unsound mind and incapable

of managing his or her own affairs, then a guardian may be appointed of the person and the property of such insane person, as provided in Section 452, Revised Statutes Missouri 1929. The probate court may immediately commit the patient to the insane asylum or the patient may remain under the care of the guardian and if necessary may be committed according to the provisions of Section 498. If the person has no property or is declared to be a person who is defined by Section 8664 as insane poor or indigent insane, then the procedure is to be followed as contained in Sections 8636 to 8651, inclusive, as amended by the Laws of 1937, page 509.

We are, therefore, of the opinion that the probate court has exclusive jurisdiction of insane persons who have property or an estate, but if the estate of the insane person becomes exhausted after the patient is incarcerated in the asylum the patient may become a county patient and subject to the supervision of the county, according to the provisions of Section 8653, Revised Statutes Missouri 1929; that the county court has exclusive jurisdiction in committing patients who have no property or estate, or, in other words, public patients.

II

The second question is as follows:

"Second, should we at any institution, at any time, take a public patient from a peace officer without a commitment?"

Under the provisions of Section 8649, Revised Statutes Missouri 1929, it is the duty of the clerk of the county court to transmit to the superintendent of the state hospital a copy of the order of the county court with application for the admission of a person to the hospital. The form of warrant is also contained in this section; likewise, the form of endorsement by the superintendent to be placed on the warrant when the patient is received.

Section 8650, Revised Statutes Missouri 1929, is as follows:

"The relatives of the insane person shall have the right, if they choose, to convey him to the hospital. In such case, the warrant shall be directed to one of them; and the person to whom it is directed and his assistant shall, if demanded, receive the same compensation allowed for the like services to the sheriff."

In view of these sections, we are of the opinion that the public patients should not be received from a peace officer without a commitment or a warrant.

This conclusion is further fortified by the provisions of Section 8639, R. S. Mo., 1929, which is as follows:

"Whenever a patient is sent to a state hospital, by order of any court or officer having authority to make such order, the warrant, or copy of such order, properly authenticated, by which such patient is sent, shall be lodged with the superintendent."

III.

"Should we have public patients properly committed for whom the county or city or the responsible public authorities do not make regular payments? Have we the right to take such patients from the hospital and deliver them back to the county or city from which they have been committed, and, if so, to whom shall we deliver the patient? This question often arises on account of non-payment of bills and, as you know, unless we collect the money owed the institutions we cannot spend it."

The power of the county courts to send patients to the various State hospitals is contained in Section 8636, Laws of Missouri, 1935, p. 388, as follows:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not

exceeding six dollars (\$6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers (managers) of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

We know of no provision wherein a city has the authority to send patients to the various State hospitals but we assume that you refer to the City of St. Louis, which for all purposes is treated as a county. Under Section 8636, quoted supra, the county is empowered to discount and sell its warrants when it becomes necessary to raise money to provide for the payments therein specified. In addition, the County Budget Act, Laws of Missouri, 1933, p. 340 et seq., has, in classifying expenditures of the counties, created Class 1 relating to patients in State hospitals as a priority over all succeeding classes. Thus, it would appear that there should be no occasion for returning patients to the various counties or city from which they were committed.

We are of the opinion that the Board of Managers can return patients to the counties or city provided that the counties or city will accept them, and if patients are returned they should be returned to the custody of the

county court. We think it the duty of the Board of Managers to collect from the various counties, by proper action if necessary, any delinquent accounts, and not return the unfortunate patient to the county. State ex rel. v. County, 80 Mo. 80; Thomas v. County, 175 Mo. 68. We are impressed by an opinion given by the Attorney-General of Pennsylvania, 29 Pa. County Court Rep. 123, as follows:

"You ask whether the asylum should return the patients whose maintenance now remains unpaid by the poor districts, to the county from which they came, or whether suits should be brought to collect the amounts due.

"I do not deem it necessary at the present writing to determine whether or not you can legally return these patients. In my judgment it is unnecessary to resort to so harsh a measure, particularly as it would involve great suffering to the helpless and unfortunate beings who are now the subject of your care, and I advise that you continue to protect them, and to instruct your counsel forthwith to bring suits against the delinquent counties for the amounts unpaid, under the act of May 8, 1889, P. L. 127."

Therefore, we reiterate, the patient should not be returned to the county, except by the consent of the county itself, but rather suit should be brought against the delinquent counties for the amounts unpaid.

IV.

"Private Patients - On the admission of private patients to our mental

hospitals we have attached hereto the form used. Are we free of all civil responsibility when we accept a private patient on the statement of two physicians and, if so, to what extent should we go in regard to the checking up of the relationship liability of the one delivering the patient to our institution?"

Section 8630, R. S. Mo. 1929, is as follows:

"Pay patients, or those not sent to the hospital by order of the court, may be admitted on such terms as shall be by this article and the by-laws of the hospital prescribed and regulated."

Section 8631, R. S. Mo. 1929, contains the provisions as to the application preparatory to the admission of pay or private patients, and further contains the following pertinent provision:

"Each person signing such request or certificate shall annex to his name his profession or occupation, and the township, county and state of his residence, unless these appear on the face of the document."

Section 8632, R. S. Mo. 1929, contains the form of the request for admission. Section 8633 contains the form of the certificate of two physicians. Section 8634 contains the provisions and the conditions of bond to be executed. The last provision of Section 8634 is as follows:

"Those that take private patients to any state hospital must be prepared to give such bond, and, if strangers, evidence must be taken of their responsibility."

We have examined the enclosed blank designated "Private Patient - Certificate of Insanity" and the forms therein contained appear to comply with the provisions of the sections heretofore referred to and we think if properly executed, and no fraud appearing on the face of the forms, it relieves the hospital of civil liability. As to what investigation or what efforts should be made to ascertain the genuineness of the application or the relation, we suggest that if the parties are strangers and the Superintendent of the hospital is not satisfied, that he make some investigation of the same and ascertain whether they be responsible parties.

V.

"If a private patient is delivered to our institutions in accordance with this form, and the patient makes complaint and wishes to leave the institution and insists upon leaving, to what extent should we go to restrain such patient from leaving?

"Some of our superintendents have been advised that having the patients sign the typewritten statement on this attached application relieves us of responsibility. Will you please advise as to this?"

If the private patient has been adjudged insane, that is, in the opinion of the hospital superintendent and the authorities, such a person is mentally unfit to run at large, and if in the opinion of the hospital authorities should not be permitted to leave the hospital, the hospital should restrain and prevent such patient from leaving. In any event, relatives of the person who made the application should be notified before the patient is discharged or released. The fact that the insane person signed a waiver

or acknowledgment that such person is in need of treatment and submits voluntary to incarceration, has some probative weight but is not conclusive. The patient has acknowledged in the signing of the same that he or she is demented, deranged or insane as the physician's certificate so states, and this renders the patient incompetent to make contracts and agreements.

The general liability of public institutions is discussed in 13 R. C. L., Par. 8, p. 944, as follows:

"Strictly public institutions created, owned, and controlled by the state or its subdivisions, such as state asylums for the insane, city hospitals, reformatories, etc., are not liable for the negligence of their agents. The doctrine of respondeat superior does not apply. They are held to be governmental agencies brought into being to aid in the performance of the public duty of protecting society from the individual unfortunate or incompetent in mind, body, or morals, and the rules applicable to municipal corporations and public officers generally are applied."

And again, Par. 9, p. 945:

"The theory on which those cases holding hospitals immune from liability to patients on the ground of public policy proceed, is that as such institutions are inspired and supported by benevolence and devote their assets and energies to the relief of the destitute, sick and needy, the common welfare requires that they should be encouraged in every way and held exempt from liability for tort; that to do otherwise would operate to discourage the

charitably inclined, dissipate the assets of such institutions in damage suits, and ultimately, perhaps, destroy them."

VI.

"Should private patients, who are being committed to our mental hospitals for restraint, or any other reason, be held by us as prisoners contrary to their wishes, merely upon the statement of the physicians in the certificate and request of relatives who placed them therein?"

Much of what has been said in answer to your fifth question is also applicable to this question. It must be borne in mind that the Superintendent by the statute and by his title has complete charge of the asylum, subject to the rules and supervision of the Board of Managers. He has the power to parole or discharge a patient by statute. When private patients are placed under his charge and supervision it becomes his duty to determine what shall be the best interest of the patient. If the patient has been admitted and has complied with the rules and law relating to the admission of patients, then it becomes the duty of the Superintendent to restrain the patient contrary to the patient's wishes, but merely because two physicians and the relatives of the patient have certified that said patient is insane does not mean that the Superintendent shall restrain the patient contrary to his wishes, if in the judgment of the Superintendent said patient is not in reality insane.

In other words, the patient does not and should not be confined in an asylum irrespective of what physicians or relatives may desire, if in the opinion of the Superintendent the patient has been restored or no longer should remain in the institution.

VII.

"Should we go to the extent of requesting that private patients placed in our mental hospitals be committed to us by a duly authorized court order? This question we realize full well carries with it the thought that in declaring a person insane by court order you place a stigma upon them, when the condition may be only a temporary one, which with proper treatment can be remedied."

As stated heretofore the statutes set forth the manner in which private or pay patients shall be admitted to the various hospitals and the manner in which public patients may be admitted to the hospital on a duly authorized court order.

If a person is a private or pay patient and the provisions of Sections 8631, 8632, 8633, 8634 and 8635, R. S. Mo., 1929, have been complied with, the terms of which have been set forth in answer to other questions, we are of the opinion that it is not necessary nor should you go to the extent of requesting that private patients be committed by duly authorized court order.

VIII.

"Where a private patient is placed with us under a contractual agreement, where the relatives or other responsible parties, guardians, etc., agree to pay a stipulated amount each month for their upkeep, in the event that payments are defaulted what course should we follow in discharging said patients from the hospital, delivering them back to their relatives or guardians, and what liability results to us therefrom?"

"Bearing in mind our position in regard to some of these questions, where there comes before us the question of a person who is mentally deficient and possibly violent, or with homicidal inclinations, to what extent would our liability be if such a patient were turned back upon the community from whom we received them?

"Suppose that a private patient was being discharged from one of our mental hospitals on account of non-payment of his bill by his relatives or guardians, and that we were to deliver such patient back to relatives or guardian and they refuse to accept such patient what course of action should we pursue and what would our either personal or public liability be?"

Section 8634, supra, provides for the giving of bond for private patients, and in the case of guardians placing patients in the institution it is assumed that the patient has some estate, subject to execution. However, if the guardian or relatives or other parties who have contracted for the support of the patient refuse to adhere to the terms of the contract, we think you have two courses: one being a suit at law for the amount in default; and the other to return the patient to the parties responsible for the payment and support of the patient. Of course, the relatives, guardians, or persons bound by the contract, should be notified and the patient actually delivered to them, either at the institution or at the place of residence, and the provisions of Section 8672 should be followed.

If the patient has no mentality, is violent, and it is dangerous to the patient and to the public for the patient to run at large, we think the Superintendent and the Board of Managers should use their own judgment in the matter, but should not release the patient upon the community, and if the guardian or other person responsible for the patient refuses to accept the patient, then, under such circumstances, the

Jan. 27, 1938

patient should be delivered to the sheriff of the county and the sheriff informed of the situation and that said patient is mentally unfit to be released upon the public. But again, we are of the opinion that no patient should be delivered, released or discharged only as a last resort due to the fact of non-payment of his or her support, but all remedies should be exhausted to obtain delinquent accounts or a satisfactory adjustment and agreement for future accounts.

If the patient's estate has been exhausted or if the relatives are unable to support or refuse to support the patient, then the matter should be reported to the county court of the county in which the patient is a legal resident and the patient can then be committed by the procedure as prescribed for the commitment of public patients.

In short, we think no legal resident of the State of Missouri in need of treatment, or who is insane, should be denied that treatment because of poverty or dereliction of duties on the part of relatives or others.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

X

ELEEMOSYNARY INSTITUTIONS: Appropriation for Mt. Vernon Sanatorium
: for personal services only for those
APPROPRIATIONS : specifically mentioned.

February 14, 1938

Mr. W. Ed Jameson
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"Please refer to the appropriation for Personal Service in the four mental hospitals, which reads as follows: 'For salaries of superintendent, assistant physicians, dentist, steward, and other employees.'"

"Also refer to the appropriation for Personal Service to the Missouri State Sanatorium, Mt. Vernon, which reads as follows: 'For salaries of superintendent, assistant physicians, dentist and steward.'"

"I think the wording 'for other employees' for the Sanatorium was inadvertently left out.

"I am writing to ask if there could not be a construction placed on this appropriation to include other employees."

In Laws of 1937, pages 50 to 55, the appropriations for the eleemosynary institutions of the state are set forth. For Hospital No. 1, Hospital No. 2, Hospital No. 3 and

Hospital No. 4, there are separate appropriations for personal services, but all provide as follows:

"For salaries of the superintendent, assistant physicians, dentist, steward, and other employees."

However, on page 55, the appropriation for personal services for the Missouri State Sanatorium at Mt. Vernon reads as follows:

"Salaries, wages and per diem of the superintendent, assistant physicians, dentist and steward."

The question presented is whether in view of the first four appropriations for personal services which include the words "and other employees" that these words may be included in the appropriation for personal services for the Missouri State Sanatorium at Mt. Vernon. 59 C.J. 262 states:

"The appropriation law is to be construed under and by the same rules as other legislation. Where the intention of the legislature is plain and obvious, there is no room for judicial construction of an appropriation." State ex rel. McKinley Pub. Co. v. Hackmann, 314 Mo. 83, 282 S.W. 1007."

In Dworkin v. Caledonian Insurance Co., 285 Mo. 342, 226 S.W. 846, the court said:

"The legislative purpose in passing a law is not to be conjectured, but must be ascertained from the act itself. The agreements the legislators meant to strike at must be determined by what they said, and is not to be surmised, as a probable intention. The courts cannot supply words which, they feel sure, were intended to be included, but by oversight were omitted."

In State ex rel. Cobb v. Thompson, 319 Mo. 492, 5 S.W. 2nd 57, the court en banc through Judge Gantt said:

"Even though we suspect the Legislature intended to create a permanent commission (which we do not), we would not be authorized to so hold contrary to the meaning of the language of the act, which is free from ambiguity and doubt."

In view of the above authorities, since the wording of the appropriation for the Missouri State Sanatorium at Mt. Vernon is plain and unambiguous, we cannot supply the words "and other employees", although it is probable that the legislature meant to include such persons and inadvertently omitted them.

CONCLUSION

It is, therefore, the opinion of this department that out of the appropriation of \$48,900.00 for personal services at the Missouri State Sanatorium at Mt. Vernon, found at page 55 of the Laws of Missouri, 1937, only those persons specifically mentioned therein may be paid, to-wit, the superintendent, assistant physicians, dentist and steward.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED BY:

J.E. TAYLOR
(Acting) Attorney General

AO'K:VAL

TAXATION: Personal property used exclusively for charitable purposes not exempt from taxation.

May 6, 1938

Honorable Lamkin James
Prosecuting Attorney
Saline County
Marshall, Missouri



Dear Mr. James:

This department has received your letter of April 22nd which reads, in part, as follows:

"The County Board of Equalization has requested me to ask your opinion as to the exemptions applicable to religious, educational and charitable organizations and institutions.

"The particular matter in controversy grows out of a charitable trust created by a will in about the year 1850, by the terms of which a sum of money was devised to certain trustees to be invested by said trustees for the purposes of educating poor and needy children. The corpus of this fund now consists of approximately \$80,000. in real estate notes, and is known as the Sappington School Fund. The income is distributed to worthy pupils throughout the county by persons designated by the Board of Trustees. These men, together with the trustees, receive no compensation for their services. In other words, the entire fund is used for worthy charitable and educational purposes. * * * * *

"I would very much appreciate your opinion as to the right of the State, County and City to tax the personal property belonging to above institutions."

May 6, 1938

It is well established that notes and deeds of trust and mortgages are personal property. As stated in 50 C. J. 760, personal property:

" * * * in its broad and general sense it includes everything which is the subject of ownership not coming under the denomination of real estate; and all subjects of property not of a freehold nature, nor descendible to the heir at law, are personal property. * * * The term has been held to include * * * notes, promissory notes, * * * a mortgage * * * ."

In 61 C. J. 197, we find the following statement:

"A debt secured by a mortgage is personal property subject to taxation, and is to be assessed and taxed to the owner at his domicile, * * * "

In the case of State ex rel. Dowell, County Collector vs. Renshaw, 66 S. W. 953, the Supreme Court of Missouri recognized that notes and deeds of trust are personal property. The court said:

"The evidence shows that the defendant carried the notes secured by said mortgages with him, wherever he went, and that when the interest or principal was to be paid he deposited or sent them for collection to the Mexico Savings Bank. This is sufficient to show that the personal property was physically in Mexico on June 1, 1895, and, as that was found to be the defendants residence at that date, that established the situs of the property for the purpose of taxation."

Article 10, Section 6 of the Missouri Constitution exempts certain property from taxation. This Section reads as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

It is to be noted that property, both real and personal of the State, counties and other municipal corporations are exempt; cemeteries are exempt; lots to the extent of one acre in an incorporated city or town or within one mile thereof, and lots to the extent of five acres with the buildings thereon may be exempt from taxation when the same are used exclusively for religious worship, for schools, or for purposes purely charitable. Also such property, real and personal used exclusively for agricultural or horticultural societies are exempt, if such exemptions are so provided by statutory law. The statutory law, Section 9743 R. S. Mo. 1929, does so provide, in practically the same wording as the constitutional provision. Part six of said statute, reads as follows:

" * * * sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

Attention should also be called to Section 7, Article 10 of the Constitution, which provides as follows:

"All laws exempting property from taxation other than the property above enumerated, shall be void."

Nowhere in either the Constitution or Statutes can any exemptions be found in this connection as to personal property, even though such property is used exclusively for schools or for purposes charitable. Both the Constitution and Statutes refer to "lots" and "one acre" and "five acres" and presumably such terms refer to real property and not to personal property. This is particularly true in light of the well established principle of law that constitutional provisions or statutes, exempting property from taxation, must be strictly construed against those claiming exemptions. This rule has been announced often by the courts of this state and it is well expressed in the case of St. Louis Young Men's Christian Association vs. Gehner, 47 S. W. (2nd) 776. In this case, the court said:

"In this connection it may be stated that we are committed to a strict construction of statutes exempting property from taxation. State ex rel. v. Gehner, supra. The rule is stated by a standard text as follows: 'An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intation must be expressed in clear and unmistakable terms or must appear by necessary implication from the language used, for it is a well settled principle that, when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of

exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be intended beyond what was meant.' Cooley Taxation, vol. 2 (4th Ed.) pp. 1403-1408."

The case of the City of Kansas vs. The Kansas City Medical College, 111 Mo. 141, 20 S. W. 35, however is directly in point and decisive in the matter. The court conceded in this case, that the real property of the defendant, Medical School, was exempt, under Section 6 Article 10 of the Constitution, but refused to exempt the furniture and fixtures used by the school, because the same were personal rather than real property. The court said:

"As will be readily seen, the only question arising upon this record is whether the furniture and appliances used by the defendant in its medical college are subject to taxation. The question is restricted to the personal property of the defendant so used.

"It is conceded that the lot and buildings used for the college are exempt

by the general law of the state, but the contention of the city is that the constitution and statute alike limit the exemption to 'the lot with the buildings thereon,' and does not extend to the personal property. Whereas, the defendant claims that the exemption extends to, and was intended to extend to, 'whatever property is proper and necessary for said school and to the enjoyment and management of said college.'

"By section 6 of article 10 of the constitution, the legislature is authorized to pass a general law exempting from taxation 'lots in incorporated cities or towns * * * to the extent of one acre, and lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon * * * when the same are used * * * for schools.' The legislature, in pursuance of this grant, by section 7504, Revised Statutes, 1889, has made the exemption just as broad as the constitution has empowered it to do.

"Section 7 of article 10 of the constitution provides that 'all laws exempting property from taxation other than the property enumerated in section 6 of the same article shall be void.' So that it only remains for us to determine whether the words, 'the lot with the buildings thereon,' can be construed to include the personal property used in the building and not a part of the realty in law. We are very clear that they do not.

"The evident purpose was to exempt a certain amount of real estate. This is obvious from the immediate context. In the next succeeding

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clause the exemption of agricultural and horticultural property is extended to both real and personal property. Neither the language of the exemption, nor the provisions in pari materia will, in our opinion, admit of any other construction than that we have given it. The purpose is clear to limit the exemption to real estate and to a definite amount.

"The language of the constitution and the statute excludes any other conclusion. Omaha Medical College v. Rush, 22 Neb. 449, does not conflict with this view. There the exemption was of the property used for school. The word property there was broad enough to include real and personal, or either. It was not limited as ours is. It is not our province to add to these constitutional exemptions, however deserving they may be, or however loth we may be to reach this conclusion. Under the agreed statement of facts, the plaintiff was entitled to recover."

CONCLUSION

We conclude, therefore, that since the corpus of the fund you have described is invested in real estate notes, which is personal property, that the same is not exempt from taxation even though it is used exclusively for charitable or scholastic purposes.

Respectfully submitted,

APPROVED:

HARRY H. KAY
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

JFA:LB

CRIMINAL COSTS

- Fees of sheriff in summoning a standing jury is audited by the county, but fees for summoning a special venire is audited by the State Auditor and not by county.

June 22, 1938

Hon. F. T. Jared
Associate Judge, First Dist.
Springfield, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion from this department under date of June 17th, which reads as follows:

"We have been having difficulty in our county in the matter of auditing the sheriff's accounts, with especial reference to summoning juries and boarding juries when retained in his custody over night.

"Since these fees or accounts are incident to the attendance of Circuit Court, and the judge of said court makes the orders for summoning juries and for retaining a jury and fixes the amount of compensation (not to exceed \$2.00 per day) that the sheriff may receive (Sec. 3826 and 3827 R. S. 1929). I am inclined to believe that said accounts should be audited and certified to the county court for payment in accordance with Sec. 1871 R. S. 29.

"The question as to whether the summoning a jury would be construed as a part of the 'Fee Bill' in the case is not entirely clear to me, but if it is, then Sec. 3841, 3842 and 3845 R. S. 1929

June 22, 1938

would apply. If not, it seems that Sec. 1871 might apply any way.

"Sec. 1840 makes it the duty of a judge to superintend the keeping of records of his court. I do not know just how the 'Summons Records' of our county are kept, but it appears that they might be so kept that the return on each summon of venire would show the name, address and actual miles traveled in summoning each juror supported by the affidavit of summoning officer. This it seems to me might be sufficient proof on which the Pros. Atty. and judge might base their audit and certification. At any rate it appears to me that the County Court should have some justifiable proof of service rendered on which to base payment. (We may not really know, otherwise, that a jury was ordered.)

"I am writing to ask that you please give me an opinion on this matter at your earliest convenience. * * * "

There are two theories upon which an opinion may be rendered in compliance with your request. The taxing of costs and fees in the summoning of a regular panel of jurors is governed by different sections of the statute other than the costs and fees in the summoning of a special venire. I am also presuming that your request is only as to fees and costs in criminal cases.

For summoning a regular panel or standing jury, the sheriff is allowed Eight Dollars and Forty Cents (\$8.40) and mileage as set out in Section 11789, R. S. Mo. 1929. Also, under the same section, the sheriff is allowed only Two Dollars (\$2.00) for executing and returning a special venire facias. By the term "standing jury", we think the law means that which is drawn by the county court and summoned by the circuit clerk on the certification of such list by the county clerk. This is the jury which, in ordinary terms, is standing, when the term of court opens and re-

gardless of the number summoned, the statute provides for a fee of only Eight Dollars and Forty Cents (\$8.40).

The payment for summoning a regular panel or standing panel is chargeable to and must be audited solely by the county. The payment for summoning a special venire is chargeable as provided in cost in all criminal cases. Section 3826 R. S. Mo. 1929 reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each jurymen and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Section 3827 R. S. Mo. 1929 reads as follows:

"When the defendant is sentenced to

imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Section 3828 R. S. Mo. 1929 reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

As stated before, the fees for summoning a special venire follow the case and under the above sections may be charged to and audited either by the state or county. The state is liable for the costs in cases of conviction and sentence to the penitentiary or acquittal where the offense is solely punishable by imprisonment in the penitentiary and the costs are certified to the State Auditor and not the county court. In other cases where the defendant is sentenced to the county jail or assessed a fine, the costs must be paid by the county and audited by the county. All of the sections as set out providing payment of costs make the exception that if the defendant can pay the costs, neither the state nor the county shall pay them. There is also an exception as to the payment of costs accrued by the defendant. Section 3844 R. S. Mo. 1929 reads as follows:

"When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have

strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be; that the services were rendered for which charges are made, and that the fees charged are expressly authorized by law, and that they are properly taxed against the proper party, and that the fees of no more than three witnesses to prove any one fact are allowed. In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

Section 3845 R. S. Mo. 1929 reads as follows:

"Each and every bill of costs presented to any county court for allowance shall be examined and certified to by the judge and prosecuting attorney in the same manner, all necessary charges excepted, as provided for certifying bills of costs to the state auditor for payment; and any county judge who shall pay, or vote to pay, any cost incurred in any criminal case or proceeding, unless the same is so certified to, shall be adjudged guilty of a misdemeanor."

The certification of costs by the judge and prosecuting attorney is conclusive upon the county court and payment of same

can be compelled by mandamus, if properly certified. It was so held in *The State ex rel. Vaughan et al. v. Appleby* 136 Mo. 408, 1.c. 411 where the court said:

"Certain criminal costs are payable by the county, and, when bills of such costs, duly certified, are presented to the county court, a warrant for the payment of the amount thereof should be drawn upon the treasurer. R. S., secs. 4397, 4400 and 4415."

Also in the case of *The State ex rel. Jacobi & Bennett v. Heege* 40 Mo. App. 650, 1.c. 652:

"The defendants' first position is that they, as county judges, in auditing fee bills for criminal costs, exercise judicial powers, and that their judgment in such matters can only be reviewed on appeal or writ of error. All of the authorities in this state are opposed to this idea, and favor the remedy by mandamus. When a bill of costs is properly certified by the judge of the circuit court and the prosecuting attorney, the duty of the county court in reference to its payment is purely ministerial, and, if the county court for any cause declines to act, the circuit court of the county has authority to compel the performance of the duty by mandamus. *Boone County v. Todd*, 3 Mo. 140; *St. Louis County v. Ruland*, 5 Mo. 268; *State ex rel. v. County Court*, 41 Mo. 254; *State ex rel. v. Smith*, 15 Mo. App. 412; *State ex rel. v. Hill*, 72 Mo. 512; *Sheridan v. Fleming*, 93 Mo. 321."

It was also held in the case of *State ex rel. Baker v. Fraker et al.*, 166 Mo. 130.

According to the United States census of 1930, Greene County had a population of 22,929 and the summoning of a special venire is governed by Section 8785, R. S. Mo. 1929. This section was held to apply in Greene County under the ruling of State vs. Perno 23 S. W. (2nd) 87. This Section 8785 supra applied to counties with a population of not less than 60,000 nor more than 200,000. Section 8785 supra reads as follows:

"When a jury for the trial of a cause cannot be made up from the regular panel, the judge of the court, before whom the cause is pending, may make out and deliver to the proper officers a list of jurors, sufficient to complete the panel, but such extra jurors shall be summoned only for the trial of that particular cause."

In that event, the sheriff is only entitled to Two Dollars (\$2.00) for summoning a special venire and mileage as set out in Section 11789 supra and the fees should be audited as set out in Sections 3826, 3827 and 3828 supra. Where the costs under these three sections are to be paid by the county, Section 1871 R. S. Mo. 1929 would apply but only as to accounts payable by the county. Section 1871 supra reads as follows:

"The court shall audit and adjust the accounts of the officer attending it, made pursuant to this chapter, and certify the same for payment."

In reference to the "Summons Record" as set out in your request, the certification by the Judge and prosecuting attorney is sufficient as a record as same must be filed with the county clerk where the county is liable for the costs after approval by the county court. As said before, the fees of summoning a special venire would be assessed in each individual case and the fee of the sheriff would include the mileage and service. This is governed by Section 3842, which reads as follows:

"It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

As to the payment and auditing of allowance for payment of board and lodging of jurors during the time they are required by the court to be kept together, the same sections would apply as governs the fees of a sheriff when assessed in a particular and certain case. This is governed by the latter part of Section 3826 supra, wherein it says:

" * * * And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for

which a reasonable compensation may be allowed, not to exceed two dollars per day for each jurymen and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the fees allowed the sheriff for summoning a standing jury or regular panel are payable by the county and should be audited by the county, but the fees payable to the sheriff for the summoning and returning of execution of a special venire facias must follow the case for which the special venire was summoned and the costs should be assessed against each individual case. Where, under the authorities above set out, the county is liable for the costs in the case, it is then the duty of the county to audit and pay the costs, but where the conviction results in a verdict of a penitentiary sentence, the state must pay the costs and the State Auditor is the proper party to audit the fee of cost bill. This also applies where an acquittal has been obtained where the sole punishment in the case would be imprisonment in the state penitentiary.

It is also the opinion of this department that Section 1871 only applies to the auditing of accounts payable by the county and not to accounts payable by the state for the reason that where the costs are payable by the state, the circuit clerk or criminal clerk certifies the cost bill to the State Auditor's office and not to the office of the county clerk.

It is further the opinion of this department that the board and lodging of the jury who are required by the court to be kept together are costs that follow the certain or particular case and are paid according to the authorities

Judge F. T. Jared

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June 22, 1938

above set out.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RT

PUBLIC SERVICE COMMISSION: Hauler under irregular route permit may pick up property at a point on a regular route and discharge property along a regular route so long as it is not a point described in a regular route permit.

August 31, 1938

Honorable Lamkin James
Prosecuting Attorney
Saline County
Marshall, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of August 11, 1938, requesting an opinion from this department, which is as follows:

"This is written to ask your opinion concerning Section 5267, Sub-Section E, as amended by Laws 1935.

"Upon affidavit of Missouri State Highway Patrolman we have charged a trucker with violation of this section in that he hauled property for hire from Marshall, Missouri, over an irregular route. The Brooks Truck Company has a Public Service Commission certificate authorizing transportation of property over a regular route from Marshall, Missouri, to Concordia, Missouri. The person charged with hauling over the Brooks Truck Company regular route on his irregular permit did not haul into the city limits of Concordia, but hauled a skating rink from Marshall and unloaded it a short distance outside the city limits of Concordia. We are confronted with the question as to whether or not he has violated the above section by reason of the fact that he did not actually haul the property into the corporate limits of the city which constitutes the termination of the above regular route.

"This case is being continued pending your construction of the above section, and I would appreciate it if you would advise me of your opinion at your earliest opportunity."

Paragraph (d) of Section 5267, Session Laws 1935, page 322, reads as follows:

"A motor carrier not operating over a regular route may, within the territory permitted to be served by him, receive persons or property at a point located on a regular route and destined to a point not located on a regular route, and receive persons or property at a point not located on a regular route and destined to points on a regular route."

Paragraph (e) of the same section reads as follows:

"It shall be unlawful for any motor carrier, except one having a certificate of convenience and necessity authorizing such service, to accept persons or property for transportation from a point on a regular route destined to a point on a regular route, or where through or joint service is being operated between such points, and any motor carrier so offending shall be guilty of a misdemeanor and punished as provided by section 5275 of this act."

The Legislature, in Session Laws 1931, Section 5264, p. 305, paragraph (g), defined "regular route" as follows:

"The term 'regular route,' when used in this act, means that portion of the public highway over which a motor carrier usually or ordinarily operates or provides motor transportation service."

Paragraph (h) of the same section defined "irregular route" as follows:

"The term 'irregular route,' when used in this act, means that portion of the public highways over which a regular route has not been established."

As described in your request, I am presuming that a regular route has not been granted to any carrier between Marshall and a point near the city limits of Concordia. The Certificate of Convenience and Necessity No. T1365 which was granted to the Brooks Truck Company does not show a special permit to pick up or discharge property along the route between Marshall and Concordia. Some certificates give this special permit and in some cases require this service. The Public Service Commission, through its attorney, Daniel C. Rogers, states that it is permissible to haul, as stated in your request, where the hauler did not complete the haul from point to point.

In construing statutes, one must seek and enforce the intention of the Legislature and the purpose of its enactment. This was so held in the case of Fischbach Brewing Co. v. City of St. Louis, 95 S. W. (2d) 335, 1. c. 338, where the court said:

"In determining the meaning and intent of a statute it is proper to consider the time of its enactment, the surrounding facts and circumstances, the purpose for which the law was enacted, the cause or necessity which induced its enactment, the prior condition of the law, the mischief sought to be remedied, contemporaneous and prior historical events which may have influenced the enactment; in other words, the judicial interpreters of the law should put themselves as near in the position of the makers of the law as possible in order to more correctly ascertain their intent in its enactment. Sutherland on Statutory Construction (2d Ed.) sec. 456, p. 864, sec. 471, p. 883."

Aug. 31, 1938

It will be noticed that paragraph (e) of Section 5267, supra, specifically says, "or where through or joint service is being operated between such points." It clearly was the intention of the Legislature that holders of irregular permits should be permitted to haul on routes that are not serviced by the holder of a regular route permit. The paragraph does not state "any place along said route", but specifically states "between such points", meaning between such towns or locations set out in the certificate of convenience and necessity.

The defendant in your case has complied with all the rules and regulations as set out in paragraph (d) of Section 5267, Laws of 1935, page 322. He has delivered a skating rink from Marshall to a point not located on a regular route. He could also have loaded the skating rink at the place where he discharged it and hauled it to Marshall if the point near Concordia is not a point on a regular route. The Brooks Truck Company, under their certificate of convenience and necessity, could not have been compelled by the Public Service Commission to accept the skating rink if it had been located at a point near Concordia, for the reason that their permit describes the point as from the town of Marshall to the town of Concordia.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the defendant in your case has not violated paragraph (e) of Section 5267, Session Laws 1935, page 322, but has complied with paragraph (d) of the same section.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

ROADS: Road overseers can only be appointed in February after the convening of the new county court.

December 16, 1938

Honorable F. T. Jared
Associate Judge, 1st District
Springfield, Missouri



Dear Sir:

We have your letter of December 14, 1938, which reads as follows:

"Since the political complexion of our County Court in this (Greene) County changes on the first of the year, and since our county has been divided into only four Common Road Districts, and since the Road Overseers of these districts receive the statutory limit of \$3.00 for each and every week day of the year and sufficient travel expense to make their monthly remuneration total \$125.00 per month, and since there seems to be rumor that the new County Court may attempt to discharge them on Jan. 1st and put in new overseers, already selected, I have been importuned to write to your office for a ruling on the matter.

"Sec. 7870, R. S. 1929 provides that 'All road overseers shall be appointed by the county court of the county at the February term of said court. This was done last February by the present court, as it has been done in this county for a great many years. These appointments were made for a term of one year (were made last Feb.).

"Sec. 7875 R.S. 1929 requires that the overseer 'shall, in February of each year,

make to the court his final report and settlement, etc.'

"Sec. 2083 R.S. 1929 provides that 'the County Courts may alter the times for holding their stated terms,' etc. This has been done in this county prior to the present court's election, changing the regular terms to correspond with the calendar quarters. This court has followed this custom in opening our court and keeping the county court records. But have each year named our road overseers in February, also all other road employes, about 40 besides the overseers.

"Are the overseers entitled to hold their places until the 1st of February, and, if so, would the other road employes, which in all prior years have been so elected, take the same status?

"I should appreciate your opinion on this matter so soon as your convenience will permit."

Section 7870, R. S. Mo. 1929, reads as follows:

"All road overseers shall be appointed by the county court of the county at the February term of said court. No person shall be eligible to the office of road overseer, except he be a citizen of the road district for which he may be appointed, or of an incorporated town or village within the bounds of such district and be a practical road builder, or possessed of technical or scientific knowledge of such work (shall be over twenty-one and under sixty years of age and moreover be able to read and write.) Such officers shall receive a compensation of not less than two nor more than three dollars per day for each day actually and necessarily employed as such overseer, to

be fixed by the county court annually
in the month of March, by order of record."

Section 7875, R. S. Mo. 1929, reads as follows:

"It shall be the duty of every road overseer to make a detailed report, under oath, to the county court at each regular term thereof, and he shall, in February of each year, make to the court his final report and settlement, under oath, of all moneys received and expended by him, from what source received and on what account expended, but the county court shall not approve the final settlement on account of services or otherwise, or allow him any credit therefor, until said overseer has filed a poll tax list as provided in section 7879."

In Section 7875, Section 7879 was mentioned but said section was repealed by the Laws of 1937, page 440. The part repealed by the Laws of 1937, page 440, was in reference to the filing of the poll tax list as provided in Section 7879. The Legislature in repealing Section 7879, which refers to the filing of the list for collection of the poll tax, did not specifically or by implication repeal all of Section 7875, supra. It only repealed by implication that part of Section 7875 which required road overseers to file a poll tax list. That part of Section 7875 requiring a final report, under oath, in February of each year, is still in effect. It was so held in the case of *Kristanik v. Chevrolet Motor Co.*, 70 S. W. (2d) 890, Par. 2, where the court said:

"The law is well settled that whether the part challenged be a whole section or a part of a section, the remainder of the act or section will stand if after eliminating the bad part 'enough remains which is good to clearly show the legislative intent, and to furnish sufficient details of a working plan by which that intention may be made effectual.' *State ex inf. v. Duncan*, 265 Mo. 26, 45, 175 S. W. 940, 945, Ann. Cas. 1916D, 1; *State v. Fenley*, 309 Mo. 520, 528, 275 S. W. 36. The legislative intent

as to separability of the provisions of the Workmen's Compensation Act is found in section 3375, R. S. 1929 (Mo. St. Ann. sec. 3375, p. 8293)."

All parts of an act should be read together. The fact that the county court shall make the appointment of all road overseers at the February term of said court, and the fact that the road overseers shall make their final report in February, shows it was the intention of the Legislature that the appointments be made in February and expire in February, and not when the county court convenes on January 1st.

In the case of Holder v. Elms Hotel Co., 92 S. W. 620, Par. 1, the court said:

"In construing a statute the legislative intent must be kept in mind, if it may be ascertained, and the whole act, or such portions thereof as are in pari materia, should be construed, together. Keeney v. McVoy, 206 Mo. 42, 103 S. W. 946. * * *"

Section 7870, supra, specifically and unambiguously sets out the time that the appointment of road overseers is to be made, and further fixes the time of fixing the compensation, which would be in March.

In the case of Maltz v. Jackoway-Katz Cap Co., 82 S. W. (2d) 909, Par. 2, the court said:

"It is a familiar rule of construction that where a statute uses words which have a definite and well known meaning at common law it will be presumed that the terms are used in the sense in which they were understood at common law, and they will be so construed unless it clearly appears that it was not so intended." 24 R. C. L. p. 994, sec. 236, and Perm. Supp., pp. 1641, 1642; State v. Murlin, 137 Mo. 297, 38 S. W. 923."

Section 2083, R. S. Mo. 1929, does not apply to the appointment of road overseers, but only applies to the time of holding county court. As stated in your request, the time for the meeting of the county court has been properly changed to the calendar quarters set out in Section 2083, and the county court taking office January 1st may discharge, for cause, road overseers, but cannot make any appointments until February.

CONCLUSION

In view of the above authorities, it is the opinion of this department that road overseers can only be appointed or reappointed in February, which, under ordinary circumstances, would be the first meeting of the county court in any specific year, and also taking into consideration the changing of the time of the meeting of the county court, it is further the opinion of this department that appointments of road overseers can only be made in February and their final report must be made in February.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

COLLECTOR: Deputies may not be reimbursed for costs expended in procuring bond to protect collector, under provisions of Section 1, Laws of Missouri, 1937, page 190.

December 21, 1938

Hon. F.T. Jared
Associate Judge
County of Greene
Springfield, Missouri



Dear Judge:

This is to acknowledge receipt of your request for an opinion reading as follows:

"When our County Collector gave bond one year ago, he required that one of his deputies give bond, which he did and paid for. Now he presents (the deputy) a statement to the County Court asking that the court refund him the amount (\$50) which he paid for the \$10,000 bond made to the Collector at that time, claiming under Sec. 1, P. 190 Session Acts 1937.

"It appears to me that that paragraph in this section which says, 'Shall be required by law of this state, or by charter, ordinance or resolution, or by any order of any court of this state, to enter into any official bond and ect. would not allow bond to any one to be paid for but of public funds, unless the law, ordinance or court order required that such one was required to give bond. We felt that the state and county are fully protected in the bond given by the principal, the collector, which bond is required by law. Are we right in this contention? If the bonding company making collector's bond would require of the collector that he have certain of his deputies bonded, would that have any bearing in the case?"

Attention is directed to Section 1, Laws of Missouri, 1937, at page 190, which provides in part as follows:

"Whenever * * * * * any officer of any county of this state, or any deputy, appointee, agent or employee of any such officer * * * * * shall be required by law of this State, or by charter, ordinance or resolution, or by any order of any court in this State, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, city, town, village, or other political subdivision, to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the State of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

You will notice from the above quoted section of the statute that if any officer or deputy shall be required by law of this state to enter into official bond or other bond, he may elect, with those designated, to enter into a surety bond, the cost of which shall be borne by the public body protected. As we construe this section of the statute, it is believed that unless the law of this state requires a bond, or a bond being required as set out in the statute to be given, that the costs cannot be borne by the public body protected.

We have made a diligent search to ascertain whether a deputy collector is required by law to enter into any bond and have found no such law. We have assumed, however, that the county court has made no such order requiring the bond. In that event, the statute above quoted, would apply.

The only section we have found which might bear on this subject under consideration is Section 9896, R.S. Missouri, 1929, which reads as follows:

"Collectors may appoint deputies, by an instrument in writing, duly signed, and may also revoke any such appointment at their pleasure, and may require bonds or other securities from such deputies to secure themselves; and each such deputy shall have like authority, in every respect, to collect the taxes levied or assessed within the portion of the county, town, district or city assigned to him, which, by this chapter, is vested in the collector himself; but each collector shall, in every respect, be responsible to the state, county, towns, cities, districts and individuals, companies, corporations, as the case may be, for all moneys collected, and for every act done by any of his deputies whilst acting as such, and for any omission of duty of such deputy. Any bond or security taken from a deputy by a collector, pursuant to this chapter, shall be available to such collector, his representatives and sureties, to indemnify them for any loss or damage accruing from any act of such deputy."

This section, you will have noticed, was only enacted for the purpose of indemnifying the collector in the event of default by one of his deputies, so as to obviate any loss which the collector may suffer. You will have further observed that it is discretionary with the collector as to whether or not such a bond is to be given. In this instance, the collector has exercised such discretion permitted under the statute by requiring a bond of his deputy. Therefore, since the county court has made no order requiring bond and the law imposes no requirement as to a bond, then it follows that a deputy collector of revenue may not be reimbursed for the costs of such bond obtained under the provisions of Section 1, supra. This is because the bond given was only made for the purpose of protecting the collector and not for the purpose of protecting a public body. Had the county court made an order requiring such a bond be given in order to protect the county, probably the county deputy collector would be entitled to be reimbursed for the costs of such bond.

CONCLUSION

It is the opinion of this department that a deputy collector may not be reimbursed out of public funds for costs of bond given to indemnify or protect the collector when such a bond is not required by law and the county court has made no order requiring such bond.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED By:

(Acting) Attorney General

RCS:VAC

ELEEMOSYNARY BOARD

- Purchase of real estate should
be made through the purchasing
agent

December 22, 1938

Honorable W. Ed Jameson
President
Board of Managers
Eleemosynary Institutions
Jefferson City, Missouri



Dear Mr. Jameson:

This will acknowledge receipt of your letter
of December 10, requesting an opinion from this of-
fice and which letter reads as follows:

"We have an option on two
pieces of property at St.
Joseph that the Eleemosynary
Board is very anxious to ac-
quire because of the loca-
tion and the very great ad-
vantage that would accrue to
our Hospital plant if these
two pieces of property can
be purchased.

"One piece of property is
known as the Berry property
and is optioned to us for
\$10,000, and contains 20
acres. It is now occupied
by the superintendent's dwell-
ing, for which we are paying
\$100.00 per month.

"The other piece of property
is known as the Guthrie prop-
erty and contains 30 acres and
is optioned to us at \$9000.00.
This is less than one-half the
amount this property could have
been bought for several years
ago. They fit into the needs

December 22, 1938

of the institution at St. Joseph perfectly.

"We have the money in our appropriation for Additions to purchase these properties. What I would like to ask of you is whether or not the Purchasing Agent, upon the recommendation of our Board, can purchase these properties for us under Section 2 of the State Purchasing Agent's Act on page 411 of the 1933 Statutes. If either of these options expire, in my opinion we would never be able to get them renewed. The titles have already been passed upon in your office."

Assuming that your Board has authority to purchase the above mentioned property, which question, however, we are not passing on as same is not presented in your request, we pass on to the question asked, namely, should the contemplated purchase, if made, be handled by or through the State Purchasing Agent.

In this connection we refer you to the pertinent part of Section 2, Laws of 1933, page 411, of the Purchasing Agent Act, which reads as follows:

"The purchasing agent * * * *
shall * * * * purchase all lands,
except for such departments as
derive their power to acquire
lands from the Constitution of
the State. "

We are unable to find any provision in the Constitution of the State whereby the eleemosynary board is authorized to acquire lands, hence, such exception as made in Section 2 does not apply here.

We note that the Berry property mentioned is land with a dwelling thereon. Whether or not the Guthrie property is bare acreage or contains improvements is not stated. Section 2 mentioned authorizes the Purchasing Agent to purchase lands and says nothing with reference to improvements thereon. However, it is a general principle of law that a transfer of land carries with it all the improvements thereon unless expressly reserved by the deeds of transfer. Consequently, we do not believe it was the intention of the Legislature to limit the purchase to bare land, if, perchance, such interpretation should be sought to be placed upon the wording of such section.

CONCLUSION

It is our opinion that if the contemplated purchases mentioned are to be made same should be handled by or through the State Purchasing Agent.

Yours very truly

J. W. BUFFINGTON
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

JWB LC

APPROPRIATIONS: Construction of Appropriation Act, Laws of
Missouri 1937, page 52. *

December 30, 1938

Colonel W. Ed Jameson
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Colonel:

We hasten to acknowledge your request for an opinion
under date of December 29th, as follows:

"With reference to the enclosed
correspondence I would like to ask
if, in the opinion of your office,
the Purchasing Agent upon advice
of the Eleemosynary Board would
be within his legal right to pur-
chase the two pieces of property
adjoining State Hospital #2, St.
Joseph from the appropriation of
our own funds of \$92,450.00 as
shown on page 52 of the 1937 Laws.

"The institution is in great need
of these properties and they are
optioned to the State at an unusual
bargain, and we would like to ac-
quire them if it is within our
rights to do so through the Pur-
chasing Agent. If it is possible
to get a favorable opinion from
your office, the State would be
many thousands of dollars ahead
and the opportunity will probably
not present itself again."

The Appropriation Act to which you refer in your letter provides:

"B. and C. Additions, Repairs
and Replacements:

Building equipment, operative
equipment and structures other
than buildings, and labor, mater-
ial and supplies for repairing
or replacing buildings and con-
struction or installation there-
of 92,450.00"

No mention is made of land and although the word "Additions" might be construed to include the same (Neblett vs. R. S. Sterling Investment Company Tex. Civil App. 233 S. W. 604, 1.c. 609) yet the Legislature by specifically enumerating the character of additions intended to come within the terms of the Act, it is readily apparent that land was not intended to be included.

It is a familiar rule of statutory construction that the legislative intent must, if possible, be obtained from all available sources, (Kling vs. Kansas City 61 S. W. (2nd) 411, 227 Mo. App. 1248) and evidence of such intention is found on page 51 of the same Act relating to funds for State Hospital No. 1, wherein the purchase of land is specifically authorized:

"B. and C. Additions, Repairs and
Replacements:

Building equipment, purchase of lands,
operative equipment and structures,
other than buildings and labor, mater-
ial and supplies for repairing or re-
placing buildings and construction
or installation thereof . . 25,065.00."

We appreciate the fact that the state might be "many thousands of dollars ahead", and that the opportunity to

Col. W. Ed Jameson

-3-

December 30, 1938

purchase the land desired may "not present itself again", but we must construe the Act as written without regard to the results (State ex rel Gorman vs. Offutt 26 S. W. (2nd) 830, 223 Mo. App. 1172).

From the foregoing, it is our opinion that land may not be purchased out of funds appropriated by the Legislature to State Hospital No. 2 under Additions, Repairs and Replacements, as same appears in Laws of Missouri 1937, page 52.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General
MW:RT

BONDS:

Premium of surety bonds of circuit clerk if consented to by the governing body in accordance with Section 1, page 190, Session Laws of 1937, must be paid by the county court direct and not allowed under the County Budget Act of 1933.

February 16, 1938

Mr. W. O. Justice,
Clerk of Circuit Court,
Newton County,
Neosho, Missouri.



Dear Sir:

This will acknowledge the receipt of your request dated January 29, 1938 for an official opinion from this office, which request is as follows:

"I will appreciate very much if I could have an opinion of the following: Is the County Court liable for payment of a Circuit Clerk's surety bond?

A Circuit Clerk's bond is not approved by the County Court and they have nothing whatsoever to do in regard to it. The Circuit Clerk's bond in this county is set and approved by the Circuit Judge, is recorded in the Recorder's Office and filed in the State Auditor's Office.

I have just read the opinion on the subject in reference to the County Court paying or disallowing the payment for the bonds approved by the County Court.

This question arises is the County Court the governing body or the Circuit Court in this case? If the Circuit Court be the governing body would it not be proper to include the cost for the bond in the yearly budget under class two?"

Section 1, page 190, Session Laws of 1937, applying to county officers is as follows:

"Whenever any officer **** of any county of this state*****shall be required by law of this state*****or by any order of any court in this state, to enter into

any official bond, or other bond, he may elect, with the consent and approval of the governing body of such *****county *****to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the State of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

This section is a new statute regarding surety bonds and is the first time that such an act has been created by the legislature. In your request you inquire if the circuit court be the governing body, would it not be proper to include the cost for the bond in the yearly budget under class two. I am presuming that you referred to Section 5, page 344, Session Laws of 1933, of the County Budget Act. In construing statutes, all sections should be read together and as the County Budget Act does not specifically set out the payment of surety bonds, it would be unlawful for the county court to allocate money to the department for the payment of the premium on surety bonds where the special Section 1, page 190 of the Session Laws of 1937, specifically state that the premium on the bond must be paid by the public body protected thereby.

Section 11786 R.S. Mo. 1929, was amended by page 446 of the Session Laws of 1937 bearing the same section number and among other things, provides:

"***** It shall be the duty of such Circuit Clerk and ex-officio Recorder of Deeds, upon the filing of said report, to forthwith pay over to the County Treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the County Clerk, and every such Circuit Clerk and ex-officio Recorder of Deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County treasury as herein provided: *****."

Under this section as amended, it is the duty of the circuit court to pay over to the county treasury moneys collected by him monthly. In view of this section, the circuit clerk does not pay over moneys

collected by him to the circuit judges, but to the county treasury which is the collecting body of the county court. The surety bond given by the circuit clerk is to protect the county court and the county treasury and not the circuit judge or judges.

To insure the payment of the money collected by the circuit clerk to the county treasury, a bond is required as set out in Section 11666 R.S. Mo. 1929:

"Every clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Missouri with good and sufficient securities, who shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such court, in vacation. The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hand by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office."

All that this section requires from the circuit judges is that they must approve the bond and in case of a personal bond, approve the surety on the bond.

Section 11668 R.S. Mo. 1929 provides:

"The certificate of the election of any clerk, signed by the presiding judge of the county court, and the bond of every clerk, shall be deposited in the office of the secretary of state, with the approval of the court or judges indorsed thereon."

Under Section 11671 R.S. Mo. 1929, the bond of the circuit clerk shall be recorded in the recorder's office in the county,

and then be deposited in the office of the secretary of state.

In construing a statute, the court will first determine the purpose of the statute. In the case of *Betz v. Columbia Telephone Company* (App.) 24 S.W. (2d) 224, the court said:

"To get at the true meaning of the language of the statute the court must look into the whole purpose of the act, the law as it was before the enactment and the change in the law intended to be made."

As before stated, Section 1, page 446, Session Laws of 1937, provided the payment of fees collected monthly into the county treasury and although the circuit judge or judges approve the bond of the circuit clerk, he is not responsible to them for fees collected. The purpose of the act was to protect the county against defalcation and not the circuit court.

Section 36, article VI of the Constitution of Missouri provides:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

This section must be strictly construed and the county court only can contract for the payment of premiums on surety bonds described under Section 1, page 190 of the Session Laws of 1937.

The powers and duties of the county court under Section 36, article VI of the constitution was upheld in *State ex rel. Bucker v. McElroy*, 274 S.W. 749, where the court said:

"The gist of this case hovers around section 36 of article 6 of the Missouri Constitution for 1875. This section reads:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not

exceeding three, of whom the probate judge may be one, as may be provided by law.'

By law these courts have been established so as to consist of a presiding judge (to be elected by the whole county) and two associate or district judges to be chosen by the electorate of their respective districts. But what we want to emphasize is the fact that the court is of constitutional origin, and its jurisdiction fixed by the Constitution. In the language of the organic law, such court 'shall have jurisdiction to transact all county * * * business.' Other business may be added to its jurisdiction by law, but no law can take from it that which the Constitution expressly gives; i.e., that it shall transact all county business. *****"

County Budget Act, Section 5, page 344, Session Laws of 1933, must be strictly construed and does not provide for the furnishing of surety bonds, and in no event can the premium for the bond be allocated to the yearly budget of the office of the circuit clerk.

CONCLUSION

In conclusion, will say that it is the opinion of this office that the governing body of a county to be protected by a surety bond is the county court and not the circuit court. The fees and other money to be protected by the surety bond are to be paid into the county treasury for the use of the county and under the orders of the county court and not the circuit court.

Therefore, the only procedure for a circuit clerk to obtain a surety bond as provided in Section 1, page 190 of the Session Laws of 1937, is by consent and approval of the county court.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
WJB:DA

SALARIES AND FEES:
CONSTABLES:
INQUESTS:

Constables may charge a fee of one dollar for summoning a jury for a coroner's inquest.

June 23, 1938



Mr. Alvin H. Juergensmeyer,
Prosecuting Attorney,
Warren County,
Warrenton, Missouri.

Dear Sir:

This is in reply to yours of June 20 requesting an official opinion from this department based upon the following letter:

"The law provides that a coroner shall have the constable or sheriff to summon a jury in case of an inquest. The regular fee for the sheriff for summoning jury in a case and calling same for trial as per Section 11789 R.S. M. 1929 is \$1.00. The Statute does not provide how the constable shall be paid for summoning the jury.

It is a service rendered and I should like to know whether your Department has made any ruling as to whether a constable or sheriff is entitled to pay for summoning a jury for a coroner's inquest."

By your letter you state that you do not find that the statutes directly provide how the constable shall be paid for the summoning of the jury for a coroner's inquest. In our research on this question we find that Section 11612, R.S. Mo. 1929 provides as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

Section 11613, R.S. Mo. 1929 provides as follows:

"Every such constable to whom such warrant shall be directed shall forthwith execute the same, and shall repair to the place where the dead body is, at the time mentioned, and make return of the warrant, with his proceedings thereon, to the coroner who granted the same."

Section 11624, R.S. Mo. 1929 provides as follows:

"If the coroner is unable to take the inquest, any justice of the peace, or any judge or justice of some court of record of the proper county, may take the inquest and perform all the duties hereby enjoined on the coroner."

From your letter it appears that you are under the

impression that the statute which refers to fees of the sheriff would apply, however, in the case of Hagener v. Publishing Company, 172 Mo. App. 442, the court held that it was not the duty of the sheriff to attend the coroner's inquest and for that reason I do not think the sheriff's statute on salaries and fees would be applicable to your question. Section 11625, R.S. Mo. 1929 provides as follows:

"If the constable of the proper township is unable to execute the duties required by this chapter, the officer taking the inquest may direct his warrant to any householder of the county, who shall perform the duties of constable, be subject to the same penalties, and entitled to the same fees."

By this section if the constable is unable to serve the warrant for the jury the coroner may direct it to any householder in the county. This section provides that such householder may receive the same fees for this service as the constable.

By Section 11632, R.S. Mo. 1929 it provides in part as follows:

"The coroner or other officer holding an inquest, as provided for by this chapter, shall present to the county court a certified statement of all the costs and expenses of said inquest, including his own fees, the fees of jurors, witnesses, constables and others entitled to fees for which the county is liable;" * * * * *

Section 11777, R.S. Mo. 1929 which provides for the

fees of the constable is in part as follows:

"Constables shall be allowed fees for their services as follows:

For summoning each jury before a justice of the peace \$1.00."

We recognize the rule laid down by the court in the case of State ex rel. v. Brown, 146 Mo. 401, wherein it is held that an officer is not entitled to a fee or compensation unless allowed by statute.

Said Section 11777, allowed the constable a fee for calling a jury before a justice of the peace but makes no provisions for such fee in case the jury is called before the coroner.

Section 11624, supra, provides that a justice under certain circumstances may hold an inquest. In such a case there is no doubt that the constable would be entitled to the fees for summoning such a jury before a justice of the peace who is holding the inquest. It would seem to be unfair to the officer to prohibit him from collecting a fee for summoning a jury for an inquest before a coroner or any other officer except the justice of the peace whereby the statute referred to above he would be entitled to the fee if the justice of the peace holds the inquest. There is no doubt that the lawmakers have intended that the officers be paid for this service for in said Section 11625 they reasserted themselves as to this fee when they stated that the householder who serves the process for the constable shall be allowed the same fees as the constable.

Said Section 11632 contemplates that the constable shall receive fees for serving the warrant for the jury, for it directs the coroner to include the fees of the constable in his fee bill to the county court.

CONCLUSION

While there is not a direct provision for paying a constable for summoning a jury for an inquest held by any officer except a justice of the peace, yet by reading all of the foregoing statutes together, we are of the opinion that the lawmakers intend that the person who summons a jury for an inquest whether held by a justice of the peace, coroner, or any other officer authorized to hold such inquest shall be entitled to a fee of one dollar for such service and for mileage as is provided by the statute.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB DA

TAXATION AND
REVENUE:

Property sold for general taxes under Senate Bill No. 94 vest title in the certificate holder upon the delivery of a deed unless parties in interest have exercised their right of redemption within the statutory period. Certificate holder must pay all subsequent and prior unpaid taxes.

November 28, 1938

Mr. R. L. Jones
Clerk of County Court
New Madrid County
New Madrid, Missouri



Dear Mr. Jones:

We desire to acknowledge your request for an opinion on November 18th, which is as follows:

"Questions have arisen in this county as to several features of what is commonly known as the Jones-Munger law. Under Section 9956a, found in Laws of Missouri, 1933, at page 437, relative to the redemption of lands sold for taxes, is it your opinion that when the lands have no bid the first and second offerings but are sold for less than the amount of delinquent taxes at the third offering, that the original owner can come in and redeem this land for the amount bid by the purchaser, plus the customary interest, or must he pay the taxes in full, that was due or shown to be due at the time of sale? This question brings up another question that the land stands good for the taxes, and if the original owner redeemed it at a figure less than the full amount of taxes, the land would then stand good for the balance of the taxes, and this is one question we would like to get straight on.

November 28, 1938

"Also when sold for state and county taxes, does this eliminate any mortgage, city taxes, drainage taxes or any other improvement taxes for the same years sold for, providing these other sub-divisions do not come in and redeem?"

"Also under Section 9957c, Laws of Missouri 1933, found at page 440, do you hold that the holder of purchase certificate must pay all taxes due at the time of being entitled to a deed, including drainage, city, special improvement taxes, or just state and county taxes?"

I.

Lands sold at a third sale for less than the amount of delinquent taxes may be redeemed by the original owner by paying the amount of the certificate and interest thereon, plus subsequent taxes paid.

This question was passed on by this department in an opinion to Mr. Mark W. Wilson, Prosecuting Attorney of Henry County, on January 4, 1937, a copy of which is enclosed.

II.

If the original owner redeemed land at a figure less than the full amount of the taxes, the land would then stand good for the balance of the taxes.

This inquiry is answered in an opinion rendered by this department to Mr. John G. Burkhardt, Associate City Counselor of the City of St. Louis, a copy of which is enclosed herein.

III.

When land is sold for state and county taxes, does this eliminate any mortgage, city taxes, drainage taxes or any other improvement taxes for the same years sold for, providing such subdivisions do not come in and redeem?

The lien for taxes is not changed by Senate Bill No. 94 or the Jones-Munger Act. Such act is but a procedural statute for the enforcement of liens which are of the same nature after the passage of this act as they were before. We therefore look to the statutes establishing these liens and decisions concerning them. Decisions determining the nature of state and county liens, city liens and improvement tax liens and the priority of the same would still be applicable under the Jones-Munger Act insofar as the sale proceeding itself is concerned. One of the cases determining the respective priority of drainage district assessments and state and county taxes is that of Little River Drainage District vs. Sheppard, a decision of the Supreme Court en banc, reported at 7 S. W. (2d) 1013. In this case the plaintiff brought suit to collect delinquent drainage taxes assessed for the years 1921 to 1927. The answer alleged as a complete defense that the land was sold under judgment of the circuit court for general state and county taxes due for the years 1921 to 1924, and defendant claimed under that tax title. The question of the priority of these taxes and respective rights of the parties after the sale for state and county taxes were the problems determined bearing upon the issues here considered. The Court held in effect that as the drainage district was not a party to the suit it was not bound by the decision and that its lien for drainage district taxes was not cut out by such sale but that it could redeem the property from the purchasers at such sale, or could proceed to enforce its lien for drainage taxes and the purchaser at such sale could then redeem the property by paying the state and county taxes for which the property had been sold. In the course of the opinion the Court stated, l.c. 1014:

"The lien for state and county tax shall be paramount. The statute does not say that it shall necessarily destroy the district lien for special taxes. The plaintiff district, according to the stipulation and the finding of the trial court, was not made a party to this pro-

November 28, 1938

ceeding. No person or corporation can be affected by a proceeding to which he or it is not made a party, and that applies to tax suits. For instance, the state's lien for taxes is superior to a prior mortgage lien, and a sale under such tax lien conveys title to the purchaser but does not affect the mortgagee's right to redeem. * * *

The foregoing decision is in respect to taxes levied by a drainage district organized by the Circuit Court. In *Williams vs. Hudson* 93 Mo. 524, in the course of the opinion the court says:

"Tax liens, whether prior in point of time or not are superior to the lien of the deed of trust."

In *Allen vs. McCabe* 93 Mo. 138, the court says:

"It must be remembered that, although the statute makes it necessary that the owner of the property should be made a party, and this is necessary to call into activity the jurisdiction of the court over the subject-matter, yet, when this is done, the proceeding is in rem against the property to enforce the lien of the State on that property, subordinate to which the owner holds his title; the judgment is in rem. The execution goes against, and the sheriff sells, the property, and not the interest of any particular person in it."

In *Meriwether vs. Overly*, 228 Mo. 218, the court says:

"A tax against real estate is a tax against

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the property, and not against the owner. If the taxes have been legally assessed they become a lien on the property prior to any other liens."

We shall now turn to the Jones-Munger Act to determine what provision is there made for the redemption of property after the sale of the tax certificate. Section 9956A, page 437, Laws of Missouri 1933, provides in part as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight percentum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. * * * "

By the foregoing provisions any person having an interest in the land is privileged to redeem within two years after the sale by complying with the provisions therein set out. This section should be construed liberally so as to encompass within its terms all persons or parties having an interest in the land. It must be construed as permitting the redemption from such sale by the drainage district or by the purchaser under the drainage district sale.

While the foregoing covers the matter of your inquiry, we direct further attention to Section 9957, page 438, Laws of

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Missouri, 1933. This section provides:

"If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, * * * * * the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold. * * *"

The purchaser of a tax certificate at a sale held pursuant to the Jones-Munger Act is authorized to obtain a clear title to the land described in the certificate at the expiration of two years of the date of sale if by that date the land has not been redeemed by the provisions of this section. The title which he obtains is to be free and clear of all encumbrances, charges or taxes except a lien which was superior to the lien of the taxes for which the land was sold. Therefore, in the event that redemption is to be made under the provisions of this act, it should be made within two years of the date of sale, for if the purchaser of the certificate obtains a deed therefore it appears that he takes the property free and clear of all encumbrances and taxes existing at the time, and which were inferior to the taxes for which the land was sold.

CONCLUSION

Therefore, it is the conclusion of this department that if general taxes have been legally assessed they become

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a lien on the property prior to all other liens, and that under the provisions of Senate Bill No. 94 any parties in interest may, within the two year period, redeem, but in event such parties in interest do not exercise such right of redemption within such period and the certificate holder performs the duties enjoined upon him by the statute and receives his deed, such deedholder receives a title to the property free from any and all rights of such parties in interest.

IV.

Under Section 9957c, Laws of Missouri 1933, at page 440, do you hold that the holder of a purchase certificate must pay all taxes due at the time of being entitled to a deed, including drainage, city, special improvement taxes, or just state and county taxes?

We presume your inquiry relates to a tax sale for general taxes. Section 9957c, Senate Bill No. 94, Laws of Missouri 1933 is in part as follows:

"Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which such holder makes demand for deed, * * *" (Underscoring ours)

The certificate holder shall before being entitled to apply for a deed pay:

(1) All taxes which have accrued on the land or lot since the issuance of said certificate. The collector must collect the taxes for towns and villages, also for levees and certain drainage districts, but such collections are made by him not as county collector, but merely because by statute the collector has been designated to make such collections for such organizations and his actions in making their collections are distinct from his actions in collecting

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general taxes. As tax collector, in making sales under Senate Bill No. 94 for general tax and issuing a certificate therefor, before issuing a deed after the expiration of two years, to such certificate holder, the collector shall require the certificate holder to pay all general taxes which have accrued on the land or lot since the issuance of the certificate.

(2) Any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which such holder makes demand for a deed.

In Little River vs. Sheppard 75 S.W. (2d) 1013, 1.c. 1014, the court en banc said:

"The lien for state and county tax shall be paramount."

In Meriwether vs. Overly 228 Mo. 218, the court says:

"A tax against real estate is a tax against the property and not against the owner. If the taxes have been legally assessed they become a lien on the property prior to any other liens." (Underscoring ours)

Therefore, general taxes are prior to drainage and other improvement taxes as well as city taxes and such taxes being inferior to general taxes, the same can not be classified as prior taxes, designated in Section 9957c, supra.

CONCLUSION

Therefore, it is the opinion of this department that:

(1) Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described in the certificate pay to the collector all general taxes that have accrued thereon since the issuance of such certificate.

(2) That the certificate holder shall before being entitled to apply for such deed pay only prior taxes that may

#9 Mr. R. L. Jones

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remain due and unpaid on said property and the lien for which was not foreclosed by sale under which such holder makes demand for a deed, and, drainage and other improvement taxes as well as city taxes, not being prior taxes, it is not incumbent upon the collector to collect the same as a prerequisite to the certificate holder being entitled to a deed.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
SVM:RT

PROBATE COURT: Probate Judge cannot require security for costs in an insanity hearing.

December 28, 1938



Hon. Elza Johnson
Assistant Prosecuting Attorney
Jasper County
Carthage, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"I shall appreciate your giving me at your earliest convenience, your opinion as to whether or not a Judge of a Probate Court may make an order, requiring Security for Costs in an insanity hearing begun under the provisions of Section 448, R.S. Mo. 1929. Sections 1237 and 1238 R.S. Mo. 1929 in providing for orders for Security for costs, do not specifically name the Probate Court, and Section 2058, R.S. Mo. 1929 provides that Probate Courts shall be governed by certain sections as to jurisdiction.

"I fail to find any decisions in our courts touching the above question, and would appreciate your opinion."

Section 448, R.S. Missouri, 1929, reads as follows:

"If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person

of unsound mind, and incapable of managing his affairs, and praying that an inquiry therein be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury: Provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

This section sets out specifically the procedure for the commencement of the hearing on insanity.

Section 2058, R.S. Missouri, 1929, reads as follows:

"Probate courts, in the exercise of their jurisdiction, shall be governed by the statutes in relation to administration, to guardians and curators of minors and persons of unsound mind, to apprentices, and such laws as may be enacted defining and limiting the practice in said courts."

It will be noticed by this section that the probate courts shall be governed by the statute in relation to administration to guardians and curators of minors, etc.. It provides further for the enactment of other laws defining and limiting the practices in said courts.

The law as enacted for the filing of securities for costs in ordinary civil procedure and in ordinary civil actions is set out in Section 1238, R.S. Missouri, 1929, and reads as follows:

"If, at any time after the commencement of any suit by a resident of this state, he shall become non-resident, or in any case the court shall be satisfied that any plaintiff is unable to pay

the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of the costs in such suit; and if such plaintiff shall fail, on or before the day in such rule named, to file the undertaking of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, or deposit with the clerk of the court in which said suit is pending a sum of money sufficient to pay all costs that have accrued or will probably accrue in the case, subject to be increased at any time whenever the court may deem proper and by its order require, the court may, on motion, dismiss the suit unless such undertaking shall be filed or sum of money be deposited before the motion is determined."

This section, 1238 supra, is not contained in any article governing probate court jurisdictions.

The statutes pertaining to the procedure in insane inquisitions must be strictly construed. In the case of Ruckert v. Moore, 295 S.W. 795, 1.c. 798, the court said:

"An insanity proceeding is in invitum, and seeks to deprive the citizen of his liberty or property, or both. Such proceeding seeks to take away from the citizen not only his right to the possession of his own property, but also his right to contract freely with respect to his property, and to dispose of and do with it as he will. Therefore it is said that:

"Where a statute prescribes a certain method of procedure to determine whether persons are insane, such inquiries must be conducted in the mode prescribed, and the statute regulating such proceedings must be followed strictly.' 14 R.C.L. 556, 557.

"Proceedings for an adjudication of insanity against an individual are required to be in strict compliance with the statutory requirements.' 32 C.J. 634."

In the case of State v. Holtcamp, 235 Mo. 232, l.c. 239, the court said:

"The insanity inquiry involves no question of public wrong. It is a proceeding to protect the private rights of the individual in his property and person. Such proceeding constitutes a civil case, and one within the constitutional amendment providing for a three-fourths verdict."

Proceedings in the probate court must be filed exactly and the statute must be strictly construed as set out in the articles concerning actions and proceedings before the probate court. It was so held in the case of State v. Guinotte, 257 Mo. 1, l.c. 11, where the court said:

"Who are the parties in interest in an inquest de lunatico under our statute? Manifestly, (a) the public at large, that it may not suffer in person or property from the dangerous vagaries or mania of the individual alleged to be of unsound mind, and for that such person by a dissipation of his property, may not become a charge upon the public purse, and (b) the person whose mind is under suspicion, the alleged crazy person, that he may not suffer from the detention of his property or person in

the custody of another. If there be others who are interested, in reason, they fall into the class of the general public, already mentioned, or they fall out of consideration because they act from sinister personal motives of self-interest, not fairly to be taken into account as producing an interest in the law to be reckoned with here."

It can readily be seen by the holding in this case that the public is the real party in interest and security for costs should not be required of the informant or plaintiff as he is only an instrument for the purpose of carrying out a public duty.

The Legislature in following Section 2058, supra, saw fit to set out another section to determine who should pay the costs by enacting Section 455, R.S. Missouri, 1929, which reads as follows:

"If the person alleged to be insane shall be discharged, the cost shall be paid by the person at whose instance the proceeding is had, unless said person be an officer, acting officially according to the provisions of this article, in which case the costs shall be paid by the county."

This section follows the law as set out in ordinary civil actions, but since Section 2058, supra, sets out the procedure of hearings on insanity, it became necessary to enact this section in reference to costs in the articles dealing with jurisdiction by the probate court of persons of unsound mind.

There is no question but that the procedure of insanity hearings is very different from the procedure in ordinary civil actions. In regard to this matter, 14 R.C.L., page 556, Article 8, states:

"Where a statute prescribes a certain method of procedure to determine

whether persons are insane, such inquiries must be conducted in the mode prescribed, and the statute regulating such proceedings must be followed strictly. As a general rule the law is set in motion by a petition or information of a more or less formal character spread before the court by some one who assumes to act in the matter. The petitioner for an inquisition of lunacy is not a party thereto in any different sense than any other person, and is not personally estopped by the findings of the jury, except as all the world is estopped. While in the majority of cases the proceeding is instituted upon the initiative of a member of the family of the lunatic, yet it frequently happens that it is set in motion by some friend or acquaintance of the lunatic, or even by a law officer of the state, and that with which the courts are mainly concerned is not who institutes the proceeding, but whether it is for the best interest of the individual alleged to be a lunatic and of the people among whom he lives. Under the statutes of some states any one, even a stranger, can petition for a commission to inquire as to the sanity of any other person within the jurisdiction of the court, and it has been said that this was the rule at common law, although a strong case was required if the application was not made by some person standing in a near relation to the supposed insane person. When, however, an inquest touching the sanity of a person is begun, the interest of the petitioner being subordinate to the interest of the public and to that of the person under inquiry the petitioner may not dismiss the inquest unless the court consent."

As said above, the statutes in regard to insanity hearings must be strictly construed, as have been enacted in the articles referring to matters of which the probate court has jurisdiction, requiring security for costs in insanity hearings.

Hon. Elza Johnson

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December 28, 1938

CONCLUSION

In view of the above authorities, it is the opinion of this department that the probate court cannot require or make an order for security for costs in proceedings brought for the determination of insanity as set out under Section 448, supra.

We have made considerable research and find no case in this state or any other state where this matter was finally passed upon and are bound to determine the question only by the statutes of this state.

Respectfully submitted,

W.J. BURKE
Assistant Attorney General

APPROVED By:

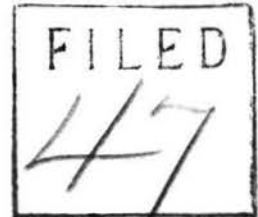
J.E. TAYLOR
(Acting) Attorney General

WJB:VAC

WEEKLY DRAWINGS: Lotteries.

January 10, 1938

1-10



Honorable O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

We have your request of January 5, 1938, for an opinion, which in part is as follows:

"I am writing your department for an opinion of the following proposition respecting drawings. The merchants of Montgomery City, Missouri, have been for some 6 or 8 years, holding a monthly drawing for cash and merchandise prizes, said drawing being conducted as follows: For every .50¢ spent for merchandise the purchaser received a ticket on which he wrote his name and placed it in boxes at the various places of business. Then on the first Wednesday of each month a drawing was held, and the person whose name was on the tenth, fifteenth and twentieth ticket drawn, would if present, be entitled to the prize awarded, if the person whose ticket was drawn was not present the drawing continued until the party whose ticket was drawn was present."

The principle underlying all lottery law is that a lottery is a scheme or device wherein anything of value, is for a consideration, allotted by chance. State vs. Emerson, 1 S.W. (2d) 109; State ex rel. vs. Hughes, 299 Mo. 529; 253 S.W. 229; 28 A.L.R. 1305; State vs. Becker, 248 Mo. 555, 154 S.W. 769.

Hon. O. A. Kamp

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January 10, 1938.

It is therefore the opinion of this office that the above procedure of conduct, weekly drawing, is a lottery in violation of the criminal code of this State.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

MOTOR VEHICLES: Exemption of the operation of a school bus from control and regulation by the Public Service Commission.

February 18, 1938

2-19

Mr. Roy L. Kay,
Prosecuting Attorney,
California, Missouri.



Dear Sir:

Your letter of February 14th, last, requesting an opinion relative to the operation of a school bus is received, and we are accordingly giving you our opinion thereon. We here set forth your letter for reference purposes:

"Mr. Clarence H. Glover of California, Moniteau county, Missouri, operates a school bus in transporting from their several homes in the County School Children to the California High School. Various school activities and contests between different schools in the state take place, and the California High School enter their School Teams in these contests, and want Mr. Glover to transport their school teams and school groups taking part in the various school contests at different schools from the High School here to other High Schools in the state. Does Mr. Glover have to take out from the Public Service Commission a Certificate of Necessity and Convenience in order to transport these school groups from The California High School to other High Schools where these contests and school activities are held? Please advise."

Section 5265, Laws of Missouri, 1937, page 439, which applies to this case, is in part as follows:

"The provisions of this act shall not apply to * * * any motor vehicle owned, controlled or operated as a school bus."

We believe there should be interpolated in or added to the above language, the words "when used for school purposes."

We believe that the use which your letter says the school bus will be put to, namely, transporting school children from the California High School to other high schools for the purpose of engaging in school contests and school activities, would be manifestly for a school purpose, and we believe such operation comes within the exemption of the statute above, especially where the bus is not to be operated on such trips for the personal profit of Mr. Glover, but the expense of such operation to be paid for out of the school funds of your district.

We find no Missouri cases dealing with the exemption allowed school buses under the above statute. However, a case of interest herein, which we believe sustains the validity of the exemption set forth in the above statute as to its constitutionality and otherwise, is Bacon Service Corporation v. Huss, 248 Pac. 235, wherein the court said, l. c. 238:

"Taking up the exemptions in the order in which they appear in the statute, it is first noted that section 1 exempts operators of motor vehicles used solely for the transportation of persons to and from the public schools. In providing for this exemption, the Legislature doubtless had in mind the motor vehicles operated by or under contract with public school authorities for the conveyance of school children to and from school. The expense of such operation is a charge on the public treasury, and the exaction of the license

2/18/38

tax thereon would naturally increase the general tax burden. The state has a special interest in the development of the public school system and in as full and regular school attendance as possible. To that end such conveyances have been provided at public expense. It is easily conceivable that the Legislature had in mind that by relieving such operators from a state license tax, cheaper transportation for a public purpose would thereby be had. An instance of a similar classification is noted in the exemption from the payment of registration fees under the California Vehicle Act of vehicles owned by the state or by any political subdivision thereof (section 78, Stats. 1923, p. 538). There would therefore seem to be no objection to the classification of motor vehicles so operated at public expense apart from those operated for hire by private individuals, associations, and corporations."

CONCLUSION

Under the facts stated in your letter hereinabove set forth, it is our opinion that when the operation of your school bus is confined to school purposes and the cost of such operation paid out of your school funds, then such bus is exempt from the control and regulations of the Public Service Commission, and is not required to procure a certificate of convenience and necessity from such Commission.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR

SPECIAL ROAD DISTRICTS)
COUNTY COURTS)

County court cannot levy different rates in different special road districts for special road and bridge tax.

April 7, 1938.

Honorable O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

FILED
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Dear Sir:

This will acknowledge your inquiry of the 5th instant, which reads as follows:

"The County Court would like for me to obtain your opinion of the following question.

"Referring to Section 7891 R. S. 1929; and Article 10, Section 22, Constitution of Missouri, authorizing the County Court to levy a special Road and Bridge Tax, for the benefit of a Special Road District, to an amount not to exceed 25 cents on the one hundred dollars valuation, which levy is in addition to the levy made for County Road and Bridge fund authorized by Sec. 11, Article 10 of the Missouri Constitution, and Sec. 7890, R. S. 1929.

"In this county there has been for the last 15 years or so a levy of 10¢ on the hundred dollars valuation, made by the County Court, for all Special Road Districts. There are now one or two Special Road Districts in the county which desire to have the levy for their districts raised to as much as 15 or 20 cents on the hundred dollars; that is the Commissioners of the district desire it to be raised.

April 7, 1938

"The question is: Has the County Court authority to raise the levy for such districts, to 15 or 20¢ on the hundred dollars valuation, on the request of the Special Road District Commissioners, if the Court in its discretion feel that it should be so raised?

"In other words, is the County Court authorized, to levy a certain amount for one special road district; and a greater amount for another district, as in their discretion they deem proper, merely upon the request of the commissioners of such special road district?"

The question presented by your letter is, "can the County Court, merely upon the request of the Commissioners of a Special Road District, levy a special road and bridge tax for that district different from the tax levied for other portions of the county"?

The suggestion of a tax in one special road district different from that in other portions of the same county directs our attention to Section 3, Article X of the Constitution of Missouri, which reads as follows:

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

Definite provision as to uniformity requires uniformity throughout the taxing district. The rule has been stated thus:

"Uniformity of taxation, as provided for by state constitutions, is required throughout the territorial limits of the taxing district. If the tax is a state tax, it must be uniform throughout the state. If the tax is a

April 7, 1938

county tax, it must be uniform throughout the county. If the tax is a town tax, it must be uniform throughout the town. If the tax is a city tax, it must be uniform throughout the city. If the tax is a school tax, it must be imposed throughout all the school district. The uniformity corresponds to the territorial limits of the taxing district."

- Cooley Taxation, Vol. I
p. 645-646.

The question which naturally follows is, "what is the authority levying the special road and bridge tax, and what are the territorial limits of that authority"? In other words, what is the taxing district, the county or the special road district?

The provision for the levying of the tax inquired about is Section 22, Article X of the Constitution of Missouri, which reads as follows:

"In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article X of the Constitution of this State, the county court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as State and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power."

April 7, 1938

It will be seen that this provision expressly grants to the county court the power to levy this additional tax for road and bridge taxes. No mention is made of road districts. The tax is a county tax. In discussing this provision of the Constitution, the Supreme Court, in the case of State ex rel vs. Pemiscot Land & Cooperage Company, 295 S. W. 78; 317 Mo. 1.c. 45, said:

"It will be noted that this section of the Constitution, in plain and simple language, provides, in addition to taxes authorized to be levied for county purposes (under Sec. 11, Art. 10, Const.), that the county court may levy and collect, as state and county taxes are collected, a special tax of not more than twenty-five cents on each one hundred dollars' valuation, to be used for roads and bridges, but for no other purpose whatever; and the power thus conferred on the county courts is declared to be discretionary. This is an express grant of power to the county courts, and is a limitation of the power of the Legislature; a power granted to the county courts to levy and collect a special tax for road and bridge purposes. The Legislature, in 1909, passed an act in almost the identical language of this section of the Constitution, purporting to enforce this section of the Constitution. (Sec. 10842, R. S. 1909; now Sec. 10683, R. S. 1919.) This section of the Constitution is self-enforcing, and the courts may fix the rate within the limitation, and levy and collect taxes under said section without the aid of legislative enactment."

The foregoing case clearly holds that this constitutional provision is an express grant of power to the

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county court and that the provision is self-enforcing. That being true, the county courts, under authority of this section, can levy this particular tax, and they are therefore the taxing authority. The tax would be a county special road and bridge tax. How the tax should be disbursed is not provided for in this section of the Constitution. The Legislature, however, has passed a law, being Section 7891, R. S. Mo. 1929, which, after providing for the levy of the tax (which provision, according to State ex rel. vs. Pemiscot Land & Cooperage Company, supra, is unnecessary) provides further as to how the money raised by the tax shall be disbursed. Said provision reads as follows:

" ** Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: Provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village;

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but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court.

The Supreme Court of this state has held that the Legislature could provide the manner of disbursement of the funds raised by this tax. In discussing the foregoing section of the statutes, in the case of State ex rel. vs. Burton, 266 Mo., l.c. 719, the court said:

"The legislative power to tax being inherent, the creation of agencies or instrumentalities for the levy, collection and disbursement of such taxes follows as a necessary consequence, and hence the right of the Legislature to enact a law delegating, in this case, the disbursement of the taxes collected to a board of commissioners of a special road district, is not an improper exercise of such power."

We gather from the foregoing authorities that the tax inquired about is a county road and bridge tax to be levied by the county court under authority of Section 22, Article X of the Constitution of Missouri, and that it is only in the disbursement of the proceeds of the tax that the Commissioners of the special road district have any say. Section 7891, supra, clearly shows that the Legislature considered the tax as a county tax, for said section provides that the proceeds of said tax arising from and paid from property not situated in any road district, special or otherwise, "shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads."

April 7, 1938

The tax is a tax upon all the taxable property in the county. That being true, the tax rate would have to be the same over the entire county, in order to meet the requirement of uniformity as set forth in Section 3, Article X of the Constitution. The taxing authority is the county court, and therefore all property subject to the tax within the entire county must be subject to the same rate, since the territorial limits of the taxing authority is the county.

It might be suggested that if the people of any special road district desire to pay a higher tax for road purposes than the tax levied by the county court for the entire county, they may, by special vote, authorize the county court to levy a special tax of not to exceed 50¢ on the \$100.00 valuation upon the property of their district.

Section 23, Article X, Constitution of Missouri, provides as follows:

"In addition to the taxes now authorized to be levied for county purposes, under and by virtue of section 11 of article 10 of the Constitution of this State, and in addition to the special levy for road and bridge purposes authorized by section 22 of Article X of the Constitution of this State, it shall be the duty of the county court of any county in this State, when authorized so to do by a majority of the qualified voters of any road district, general or special, voting thereon at an election held for such purpose to make a levy of not to exceed fifty cents on the one hundred dollars valuation on all property within such district, to be collected in the same manner as state and county taxes are collected, and placed to the credit of the road district authorizing such special levy. It shall be the duty of the county court, on petition of not less

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April 7, 1938

than ten qualified voters and taxpayers residing within any such road district, to submit the question of authorizing such special election to be held for that purpose, within twenty days after filing of such petition."

The Constitution, therefore, has made a provision whereby one special road district can raise additional revenue for road purposes by levying a higher tax than other sections of the county pay, but the authority to levy such tax must come from the qualified voters of the district and not from the Commissioners.

CONCLUSION.

It is, therefore, the opinion of this office that the county court cannot levy a higher rate for special road and bridge tax in one special road district than it does in other portions of the same county, upon the request of the Commissioners of such district.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

HHK:FE

LIQUOR CONTROL:

What may be displayed in show
windows. AND SUPPLEMENT.

August 15, 1938



Mr. Roy L. Kay,
Prosecuting Attorney,
Moniteau County,
California, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of July 28, 1938 requesting an opinion on the legality of a liquor licensee displaying the following advertising in his show windows: Two paper signs, in which no liquor of any kind was contained advertising Mr. Boston Gin; one picture on cardboard of a liquor bottle advertising Mr. Boston liquor and one electric sign made out of cardboard in which no liquor was contained, advertising Mr. Boston Gin.

Section 22-a-1, Laws of Missouri, 1935, page 276
is as follows:

"It shall be unlawful to display in any street window or show window any intoxicating liquor, or any package, bottle or container bearing the label or brand of any intoxicating liquor. Whosoever shall violate the provisions of this section shall be deemed guilty of a misdemeanor."

Under the broad powers to make rules and regulations granted the supervisor of liquor control by the laws of this state, there has been promulgated the following rule:

August 15, 1938

"Regulation 12. No person, firm or corporation engaged in the sale of intoxicating liquors, at wholesale or retail, shall display in any street window, show window or any other window, any intoxicating liquor in any package, or in any bottle commonly used for intoxicating liquors; nor shall any window display, on cardboard or placard, show any persons holding any bottles or containers in their hands or glasses containing intoxicating liquors; nor shall any facsimile of any particular brand or brands of intoxicating liquors be displayed; nor shall any display of intoxicating liquors within any building or store room be placed within such close proximity of such street window, show window or any other window as to be viewed from any sidewalk or street."

It will be noticed that this rule prohibits the display in show windows on cardboard or placards advertising which shows any persons holding bottles or containers containing intoxicating liquor and also prohibits the display of facsimile of any particular brand or brands of intoxicating liquors.

Therefore, it is the opinion of this department that a liquor licensee is not permitted to display in his show windows advertising on cardboard or placards which shows any person holding any bottles or containers in their hands or glasses containing intoxicating liquor, nor shall they be permitted to display any facsimile of any particular brand or brands of intoxicating liquor.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

LLB:DA

August 22, 1938

8-20

Mr. Roy L. Kay,
Prosecuting Attorney,
Moniteau County,
California, Missouri.

Dear Sir:

On August 15th, 1938, at your request, this department rendered an opinion relative to the kind and type of advertising which a liquor licensee may display in his show windows.

Since the opinion referred to was written, it has been called to our attention that Rule 12 has been amended by the Supervisor of Liquor Control. At the time the above referred to opinion was prepared, this department was unaware of said amendment. Rule 12, as it now stands, reads as follows:

"No person, firm or corporation engaged in the sale of intoxicating liquors, at wholesale or retail shall display in any street window, show window or any other window, any intoxicating liquor in any package, or in any bottle commonly used for intoxicating liquor or container bearing the label, or brand of intoxicating liquor; nor shall any window display on cardboard or placard, show any persons holding any bottles or containers in their hands containing intoxicating liquors; nor shall any display of intoxicating liquors within any building or store room be placed within such close proximity of such street window, show window or any other window as to be viewed from any sidewalk or street."

Mr. Roy L. Kay

-2-

August 22, 1938

In view of the above rule as it now reads, we desire to restate our conclusion in our former opinion and make this a supplement thereto.

It is to be noticed that the above rule prohibits the display on cardboard or placards, pictures showing persons holding bottles or containers in their hands containing intoxicating liquor, and that there has been eliminated therefrom the provision pertaining to the display of facsimiles of any particular brand or brands of intoxicating liquor.

Therefore, it is the opinion of this department that a liquor licensee is not permitted to display in his show windows advertising on cardboard or placards which shows any person holding any bottles or containers in their hands containing intoxicating liquor.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:DA

ELECTIONS: Timely application for absentee ballot must be made.

September 20, 1938



Honorable O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

We have received your letter of September 7, 1938, requesting an opinion of this Department, which reads as follows:

"I am writing your department for an opinion on Section 10182 R.S. 1929, Laws 1935, relative to application for absentee ballot. Said section provides 'that any elector expecting to be absent from the county of his residence on election day, may not more than thirty nor less than five days prior to the date of such election, make application in person or by mail, to the county clerk, for an official ballot for said precinct to be voted at such election.

What I would like to know, is whether or not there could be any arrangements made whereby a person who found that he had to be away from his home on election day, less than five days prior to said date, could obtain an absentee ballot to be voted at such election. It often happens that a person wishes to apply for a ballot, less than five days prior to the election, due to the fact that he was unexpectedly called away. I will thank you for your opinion on this matter."

Section 10182 as amended and contained in the Laws of Missouri 1935, page 264, provides as follows:

"Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election may, not more than thirty nor less than five days prior to the date of such election, make application in person, or by mail, to the county clerk or, where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct to be voted at such election."

This statute provides in effect that if an elector expects to be absent from the county of his residence on election day he may make application in person or by mail "not more than thirty days nor less than five days prior to the date of such election" to the proper authorities for an official ballot for said precinct. By the express wording of the statute an elector is not entitled to receive, nor are the election officials authorized to give an absentee ballot unless the application therefor is made within the designated time limits. The fact that a person is unexpectedly called away from his precinct less than five days prior to an election cannot alter the matter. In other words an application for absentee ballot made thirty-one days or four days prior to an election day does not comply with the specific provisions of the law and the election officials are without authority to provide a ballot on such an untimely application.

Honorable O.A. Kamp

-3-

September 20, 1938

CONCLUSION

An elector, in order to vote an absentee ballot, must make application therefor not more than thirty, nor less than five days prior to the date of the election. If timely application is not made the election officials are without authority to recognize the same or to provide the elector with a ballot.

Respectfully submitted,

J. F. ALLEBACH,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JEE:MM

ELECTIONS: County committee may certify nominations to fill vacancies on ticket not later than ten days before election.

September 15, 1938 9/15

Hon. Albert Kelly
Circuit Clerk
Atchison County Circuit Court
Rock Port, Missouri



Dear Sir:

This will acknowledge receipt of your letter of September 13 which reads as follows:

"There has been considerable discussion in our Official Democratic family as to the number of days required for the Republican Party to file candidates for vacancies on their ticket. Several of us were under the impression the ticket must be filled 30 days prior to the General election but some have said a new law has been enacted whereby the time for filing has been set up to 15 days prior to the General election. If such a ruling is in effect please quote us Section etc.

I might further add the particular phase in which we are interested pertains to elective officials only, and not a committeeman or committeewoman."

Section 10268, R.S. Missouri, 1929, reads as follows:

"Vacancies occurring after the holding of any primary or where no person shall offer himself as a candidate before such primary, shall be filled by the party committee of the district, county or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

Section 10245, R.S. Missouri, 1929, after designating the time when the certificates of nomination may be filed with the Secretary of State and the County Clerk or Election Commissioners, reads as follows:

"Provided, that in case of any vacancy in said nomination, by resignation, death or otherwise, the central committee, or a convention called for that purpose, of the party on whose ticket such vacancy may occur, may select and certify to the secretary of state, county clerk or board of election commissioners the name or names of candidates to fill such vacancy: Provided, that the certificates of nomination to fill vacancy shall be filed with the secretary of state not later than fifteen days before the day fixed by law for the election of the persons in nomination, and with the board of election commissioners or county clerk not later than ten days before such election."

It will be seen by the foregoing section that the county committee has until within ten days of the election to certify in nominations made by them to fill vacancies occurring on their ticket. We think this section clearly defines the time and that, therefore, the committee about which you inquire would have until ten days before election to certify to the County Clerk the names of candidates for vacancies occurring on the county ticket.

CONCLUSION

It is, therefore, the opinion of this office that the county central committee of a political party may certify to the County Clerk nominations to fill vacancies on their ticket at any time up to ten days prior to the election at which such candidates will be voted upon.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

SCHOOLS: Board of Education need not print the names of candidates for directors on the ballot, but if names are printed all known candidates should have their names on the ballots

March 18, 1938

3-25



Honorable N. A. King
Representative
Iron County
Des Arc, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of March 14th, wherein you make the following inquiry:

"We have a condition here with our school board that is embarrassing to the citizens of this district, and they have asked me to have your office render opinion on same.

"This is an approved high school having six directors, and prior to each annual election, they have a ballot printed carrying only two names on the ballot for directors. They have for the past few years deliberately refused, after having any other names on the ballot, thereby causing the inconvenience of having to write other names on the ballot other than the ones on the ballot.

"They wish to know this, that if a ballot is printed, can the board be compelled to place on the ballot any name who desires to become a candidate for director."

By virtue of the terms of Section 9341, Laws of Missouri, 1933, page 381, directors shall be elected by ballot. Said section provides in part as follows:

"The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at 7 o'clock a. m. and closing at 6 o'clock p. m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of said board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board; * * * *"

The above quoted section appears to provide for regulations governing the elections at annual meetings. The annual

meeting in a city, town or consolidated district is evidently referred to, as provided by Section 9328, R. S. Mo. 1929, which is as follows:

"The qualified voters of the district shall, annually, on the first Tuesday of April, elect two directors, who are citizens of the United States resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding their election or appointment, and who shall have resided in this state for one year next preceding their election or appointment, and shall be at least thirty years of age, who shall hold their office for three years and until their successors are duly elected and qualified; and all vacancies in the board shall be filled for the unexpired term."

Under the decision of State ex inf. Attorney-General v. Foxworthy, 301 Mo. 1. c. 382, it is definitely decided, in view of Section 3, Article VIII, of the Constitution, that the election must be by the people and by ballot. The court said the following:

"The meeting December 24, 1920, was regularly and legally called; the vote on the question of organization was submitted and returned as the first order of business, in strict accordance with the statute. It is claimed, however, that the election of six directors, required by the statute, as the second order of business, was illegal, because all of said alleged directors were 'elected

unanimously by acclamation' instead of by ballot. Section 3, Article VIII, of the Constitution requires that all elections 'by the people' shall be by ballot. In the case of State ex rel. O'Connell v. Board of St. Louis Public Schools, 112 Mo. 213, 1. c. 218, it is held that an election for school directors was an election 'by the people,' and came within the requirement of the Constitution. It is a well considered opinion, written by Judge Gantt."

There is no provision in the statutes providing for the ballot to be printed in any particular form or for the ballot to contain the names of candidates for directors, but it is clear that the statute contemplates that some kind of a printed ballot shall be furnished at the election because Section 9341, supra, provides for a vote by ballot and the last sentence of the quoted section states that "all propositions submitted in said annual meeting may be voted for upon one and the same ballot." There is no provision for a primary or selective method of choosing school board directors, no party affiliations, and, in fact, directors are selected without regard to political affiliations.

In view of these statements, in preparing the ballot, how is the Board to ascertain who are candidates for director except by rumor or statement of the candidates themselves? Assuming that no one is a candidate, or at least no one is an avowed candidate for director, then, in that event, the directors of the school would not print any names but should leave blank spaces for the voters to place the names of any person such voters may desire to be a director.

We can arrive at only one conclusion, and that is to the effect that the Board should print the names of any and all candidates who make a request to the Board to have their names printed, provided that the person or persons have duly notified the Board of their candidacies prior to

Hon. N. A. King

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March 18, 1938

the printing of the ballots; that the printing of the ballots should be withheld until it becomes necessary to have them printed in sufficient time for the election,

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:EG

**HEALTH:
COSMETOLOGY AND HAIRDRESSING:
QUALIFICATIONS FOR EXAMINATION:**

Persons who have had one year training under registered operator of business of cosmetology and hairdressing and who possess the other qualifications prescribed by the statute, may take the examination for registered operators

March 29, 1938

3-30



Miss Nellie L. Killion, Director
Division of Cosmetology and Hair-
dressing,
State Board of Health,
Jefferson City, Missouri.

Dear Madam:

This is to acknowledge yours of May 21, 1938
requesting an official opinion from this department on
the following questions:

First: What qualifications are
required of persons who have been
apprentices to an operator of a
business of cosmetology or hair-
dressing, who desire to take the
examinations held by your depart-
ment for the purpose of obtaining
a certificate to engage in the
occupation of cosmetologist, hair-
dresser or manicurist.

Second: A construction of the law
as it applies to the number of
apprentices an operator may have
in his business at the same time.

Third: Registration of apprentices
with the State Board.

9813 R.S. Mo. 1939,

The first part of Section 9092, R.S. Mo. 1929,
applies to the certificates of registration for schools
which teach hairdressing and cosmetology. The latter
part of the said section is as follows:

"No school, as provided in this
article, shall operate within

this state unless a proper certificate of registration under this article has first been obtained. Nothing contained in this article shall prohibit registered operators within a hair-dressing or cosmetologist's or manicurist's establishment from teaching any of the practices of the classified occupations in their regular course of business, provided the owner or manager thereof does not hold himself out as a school and does not hire or employ or teach regularly at any one and the same time, more than one apprentice to three or less operators regularly employed within their business, and said owner or manager does not accept any fee for instruction."

9813

The foregoing part of said Section 9092 specifically authorizes the registered operator to teach any of the practices of the occupation of hair dressing, cosmetology or manieuring provided the operator does not hold himself out as a school and provided he does not hire or employ or teach regularly at any one and the same time more, than one apprentice to three or less operators regularly employed in the business, and provided further that such operator does not accept a fee for such instruction. By Section 9095, R.S. Mo. 1929, it is provided:

9816

"No one shall be admitted to examination or registration under this article unless he or she possesses the following qualifications: (a) Apprentices or students need not be registered, but shall, while learning or acquiring any of the practices of the classified occupations, be at least sixteen years of age, of good moral character and have an education

equivalent to the completion of the eighth grade. (b) Applicants may be registered as operators in any of the practices of the classifications under this article upon the payment of examination fee, provided they are of good moral character and have an education equivalent to the completion of the eighth grade and shall have served and completed the required time and studies as determined by the state board of health to be necessarily related to any one or combination of the practices but not less than one year for the classification of hairdressing and cosmetologists and not less than three months for the classification of manicurists under the supervision of a registered operator as an apprentice," * * * * *

4823 R.S. Mo. 1939

Section 9102, R.S. Mo. 1929 makes the following provisions:

"Power to refuse a certificate.-- The state board of health shall have power to refuse a certificate to anyone guilty of fraud in passing the examination or at any time convicted of a felony or guilty of gross immorality, grossly unprofessional or dishonest conduct or to anyone addicted to the use of intoxicating liquor or drugs to such an extent as to render him or her unfit to engage in any of the practices or occupations classified under this article or to anyone advertising by means of

March 29, 1938

false or deceptive statements knowingly made or for the failure to display the certificate as provided in this article. The board shall have power to revoke or suspend certificates for any one of the foregoing causes."

From this section it seems that the Legislature has provided a means in which the board of health may have ample supervision and control over the applicants and registered operators and if an operator conducts himself in a grossly unprofessional manner, then the board may revoke his license. Therefore, if an operator is trying to evade the law in any manner, it seems that the health board would be authorized to revoke the license on account of such unprofessional conduct.

9813

It appears by said Section 9092, supra, that each three or less operators may employ or teach regularly at one and the same time only one apprentice, and by said Section 9095, supra, if such apprentices, having the other qualifications required, has served one year as an apprentice under the supervision of a registered operator, then he or she is qualified to take the examination of the board to become a registered operator.

A portion of your letter directs criticism to the law because it does not require the apprentice to be registered during the term of his or her apprenticeship. This criticism, of course, would have to be directed to the legislators as this office can only construe the law as it is.

CONCLUSION

From the foregoing, this office is of the opinion that any person who has served one year as an apprentice under a registered operator of a hairdressing or cosmetology establishment, who has paid the proper examination fee, who is of good moral character and who has an education equivalent to an eighth grade education, shall be authorized to take

Miss Nellie L. Killion

-5-

March 29, 1938

the examination for a registered operator's certificate.

We are further of the opinion that the provisions of Section 9095, supra, relieves the apprentice or student from the duty of registering with the State Board during apprenticeship or while attending school.

We are further of the opinion that for each three or less operators regularly employed within the business of cosmetology or hairdressing, there may be one apprentice.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SCHOOLS: If board members withdraw their resignations before the county superintendent accepts or fills the same, the withdrawals are legal and no vacancies exist.

June 15, 1938

6-16



Honorable Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Attention: Geo. B. John
Director of Finance

Dear Sir:

This Department is in receipt of your letter of June 13th, as follows:

"The attached letters from Mr. Charles Higgins are self-explanatory. Also, attached to Mr. Higgins' letters are replies from this Department.

"Mr. Higgins has requested that the opinion of the Attorney-General be secured in answer to the following questions based on the information given in his letters:

"1. If a board member resigns, is a subsequent withdrawal of his resignation legal, if done before the county superintendent fills the vacancy by appointment?

"2. What constitutes proper notice of resignation; also, proper notice of withdrawal of resignation?"

In connection with the questions submitted we have read the correspondence which you have attached relative to the controversy, but it appears that the matter finally resolves itself into the legal questions which you present.

Section 9290, R. S. Mo. 1929, refers to the tenure of board members and the filling of vacancies, and provides as follows:

"If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; but should they be unable to agree, or should there be more than one vacancy at any one time, the county superintendent of public schools shall, upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 9288, and shall serve until the next annual school meeting."

The procedure as to a vacancy or vacancies, caused by resignation, should be as follows:

"upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment."

The general principles with reference to vacancies and the effect of a withdrawal or attempted withdrawal of a resignation is discussed in the decision of State ex rel. Kirtley v. Augustine, 113 Mo. l. c. 24, as follows:

"It is well established law, that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment. 1 Dillon on Municipal Corporations (3 Ed.) sec. 224; Mechem on Public Offices, sec. 413; Van Orsdall v. Hazard, 3 Hill (N. Y.), 243; State ex rel. v. Boecker, 56 Mo. 17.

"By section 11, article 5, Constitution of Missouri, it is provided that: "when any office shall become vacant, the governor, unless otherwise provided by law, shall appoint a person to fill such vacancy," etc. It seems that no provision exists in our statutes for filling the vacancy of county treasurer. Hence it follows that the power of appointment remains, as directed by the constitution, with the governor. And the authority to fill the vacancy being with the governor, here likewise rests the power to accept the resignation. In order then to create a vacancy in the office held by Augustine his resignation must have been lodged with the governor, and by the governor accepted. There being no particular mode pointed out by statute or by the Constitution, this resignation may be in writing or by parol. No particular form is required. It is only necessary that the incumbent evince a purpose to relinquish the office--that this purpose be communicated to the proper authority, and that this resignation be accepted either in terms, or something tantamount thereto, such as appointing a successor, etc. Edwards v. United States, 103

U. S. 471-474; The People v. Board of Police, 26 Barb. 502; Mechem on Public Offices and Officers, sec. 414, et seq.

"When this resignation shall have been communicated to the proper authority and the same shall be accepted--whether formally or by the appointment of a successor--it is beyond recall, it cannot then be withdrawn. Mimmack's case, 97 U. S. 426.

"In view then of these principles it would seem that defendant Augustine had accomplished a complete resignation of the office to which he was elected. It is clear that he and the members of the county court assumed the law to require his resignation to be presented to the county court. In this they were clearly mistaken, since as already shown the governor of the state, the appointing power, was the proper party to whom the resignation should have been tendered. However defendant's resignation was, by his knowledge and consent, forwarded to the governor, and he acted thereon by designating a successor, and this too before defendant made any effort to withdraw such resignation. This conduct on the part of Augustine signified a complete renunciation of the office--a resignation--and there was by the governor such an acceptance as constituted a vacancy. The naming a successor (though a formal commission had not been made out) committed the governor to, and at law constituted, an acceptance of Augustine's resignation. Mimmack's Case, supra; Mechem's Public Offices and Officers, sec. 415."

In the decision quoted above it appears that the matter had reached a further step in the procedure than in the instant case. The successor had been named but had not received the commission. But as stated above, the above principles are fundamental in considering the question. School directors are considered public officers. State ex inf. McKittrick v. Whittle, 333 Mo. 705.

Quite analogous to the situation is the decision of Rockingham County v. Luten Bridge Co., 35 S. W. (2d) 1. c. 306, as follows:

"The North Carolina statutes make no provision for resignations by members of the boards of county commissioners. A public officer, however, has at common law the right to resign his office, provided his resignation is accepted by the proper authority. Hoke v. Henderson, 15 N. C. 1, 25 Am. Dec. 677; * * * * * And, in the absence of statute regulating the matter, his resignation should be tendered to the tribunal or officer having power to appoint his successor. 22 R. C. L. 558; * * * * * State v. Augustine, 113 Mo. 21, 20 S. W. 651, 35 Am. St. Rep. 696. In the case last cited it is said:

"It is well-established law that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment. 1 Dillon on Municipal Corporations (3d Ed.) Sec. 224; * * * * *

"In North Carolina, the officer having power to appoint the successor of a member of the board of county commissioners is the clerk of the superior court of the county. Consolidated Statutes of North Carolina, Section 1294. It is clear, therefore, that, when Pruitt tendered his resignation to the clerk of the superior court, he tendered it to the proper authority.

"The mere filing of the resignation with the clerk of the superior court did not of itself vacate the office of Pruitt, it was necessary that his resignation be accepted. *Hoke v. Henderson*, supra; *Edwards v. U. S.* 103 U. S. 471, 26 L. Ed. 314. But, after its acceptance, he had no power to withdraw it. *Mimmack v. U. S.*, 97 U. S. 426, 24 L. Ed. 1067; * * * * * If, as the offer of proof seems to indicate, the resignation of Pruitt was accepted by the clerk prior to his attempt to withdraw it, the appointment of Hampton was unquestionably valid, and the latter, with Martin and Barber, constituted a quorum of the board of commissioners, with the result that action taken by them in meetings of the board regularly held was action by the county."

Conclusion.

It does not appear by the correspondence that the County Superintendent ever accepted the resignation of the directors. It does appear that the two directors in question handed their resignation to the remaining third director.

June 15, 1938

He in turn transmitted the same to the County Superintendent. By the terms of the statute it was necessary for the two members of the board in question to give their resignation to the County Superintendent. It does not appear that they instructed, acquiesced or directed the third member to transmit the resignations as was done in the Kirtley v. Augustine case, quoted from supra.

There is a question of fact which the correspondence does not clearly indicate and that is as to whether or not the County Superintendent ever accepted the resignations of the two members, but we must assume that he did not from the mere fact that he made no appointments as to their successors. The mere fact that the two members of the board gave their resignations to the other member of the board did not of itself vacate the offices.

For the reasons mentioned above and for the further reason that the record does not show that written resignations of the two directors were forwarded to the County Superintendent by the third member of the board (the letters show that he telephoned the County Superintendent) and for the reason that the resignations were not accepted before the two members withdrew the same, we are of the opinion that the two vacancies do not exist on the board of directors of the school. As to your second question, it appears that the answer to the first has also embodied the answer to it.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

OWN:EG

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SCHOOLS:
BUILDING AID:

Building aid, as provided by Sec. 19, Laws of Mo. 1931, page 346, is payable only to consolidated or enlarged school districts.

September 27, 1938

9-29

Honorable Lloyd W. King
State Superintendent
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department based upon the following questions:

"Section 19 of the 1931 School Law found on page 346 of the 1931 Session Acts states that there shall be paid to any consolidated or enlarged school district * * * \$1,000.00 for each school building abandoned when a new building is erected. Section II of the same act shown on page 334 of the 1931 Session Acts gives a definition of an enlarged district.

"(1) Do these two provisions limit abandonment aid to only consolidated districts and to the enlarged districts set up by the county districting board? If a number of rural districts voluntarily annex themselves to another rural district, might this district then become eligible for the abandonment aid?

"(2) If several rural schools annex themselves to a village district as defined in Section 9194 R. S. Missouri 1929, might this village district then become eligible for abandonment aid?"

As both of your questions involve the same principles of law, we will treat them together in this opinion. They involve the construction of school laws.

The rule for construing school laws has been stated by the Supreme Court of this state in the case of *State ex inf. v. Morgan*, 187 S. W. 54, 57, in the following language:

"It has been the policy of this court, in construing the statutes relating to schools and school districts, to give them a liberal construction, and to uphold the same whenever it can be done without violating the plain provision of the law."

On the question of the right of the Legislature to alter or create school districts, we find the rule stated in Vol. 56 C. J., page 197, Sec. 48, as follows:

"A state legislature has full and exclusive power, subject to express constitutional limitations, and except as it may have delegated such power to a subordinate officer or agency, to create, organize, establish, or lay off school districts or other local school organizations, or to divide, unite, enlarge, change the boundaries of, or otherwise alter existing districts and organizations, or to provide for such creation or alteration, * * *."

The Legislature has power to delegate this authority. This rule is set out in Vol. 56 C. J., page 199, Sec. 49, in the following language:

"The power of the legislature to create, organize, or alter school districts and other local school organizations may be by it delegated, or authority to exercise such power granted, to such officers, boards, or other subordinate agencies as the legislature may designate or establish."

Following the foregoing rules, the Missouri law-makers have delegated their power of creating and altering school districts to boards named in the various statutes.

By Laws of Missouri, 1913, page 722, which is now Section 9345, R. S. Mo. 1929; et seq., consolidated school districts may be formed. Consolidated districts shall have an area of at least fifty square miles and an enumeration list of at least two hundred children of school age.

In 1931 the lawmakers provided for the formation of what is known as "enlarged school districts." Laws of Missouri, 1931, page 335. Section 1 of said law is as follows:

"The county superintendent of schools of all counties in this state shall, not later than August fifteenth after the taking effect of this act, call a meeting of the presidents and clerks or secretaries of the various school districts in his or her county, whether common, consolidated, city or town, said meeting to be held on the 15th day of September, next succeeding, beginning at 10 o'clock a. m. of said day, at the county seat of his or her county, and at a place of meeting to be designated by said county superintendent of schools, as said meeting is provided for by sections 9468 and 9469 of the Revised Statutes of Missouri, 1929, which meeting when assembled, shall be called to order by the county superintendent of schools, and shall proceed to organize by the election of one of its members as chairman and another as secretary. Each president and each clerk or secretary of every board of school directors within the county, whether common, consolidated, city or town, or in the absence of any such, a duly authenticated proxy for any of such officers, as such proxies are provided for by section 9469, shall be entitled to one vote on all matters properly coming before such meeting by virtue of the above named sections and on all questions

properly coming before such meeting by virtue of the provisions of this act. When organized as above provided, the meeting shall proceed to select a county districting board of six members, who may or may not be members of such meeting, to divide the entire county into proposed enlarged school districts as hereinafter provided for. Each person elected, or appointed, on this board shall be a citizen of the United States, and of the state of Missouri, and a resident of the county, and shall be not less than twenty-one years of age. Provided, that not more than three members of such board shall come from any county court judicial district. Provided, that not more than one member of said board shall be chosen from the same municipal township, but should there be less than three municipal townships in any county court judicial district, such judicial district shall have only so many members of such board as it contains municipal townships, and the remainder of said board shall be chosen from municipal townships in the other county court judicial district: Provided further, that if any county has less than six municipal townships, then after one member of the board shall have been chosen from each municipal township, there shall be chosen from the county at large enough members to make a board of six. The county superintendent of schools shall be ex-officio secretary of such board, and shall have the deciding vote in case of a tie vote. Such board shall, within thirty days from the date of their selection, meet at a time and place to be designated by the county superintendent of schools, organize by the selection of one of their number as chairman and proceed to district the entire county into proposed enlarged school districts as provided by this act. If any member of such board shall fail or refuse to act in such

capacity, the board may choose some person eligible to act in his or her stead. A majority of such board shall constitute a quorum for the transaction of all business. The members of the board selected as herein provided shall take and subscribe to an oath or affirmation, which oath or affirmation may be administered by each other, and shall be as follows: 'I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the state of Missouri, and that I will faithfully and impartially discharge the duties imposed upon me as a member of the board selected to divide..... county, state of Missouri, into proposed enlarged school districts, to the best of my ability, according to law, so help me God.'"

Such enlarged school districts must have an assessed valuation of one million five hundred thousand dollars and an area of at least fifty square miles, unless the county superintendent, with the approval of the state superintendent, consents to a smaller area.

By the Act of 1931 pertaining to enlarged school districts, Section 19, Laws of Missouri, 1931, page 346, it is provided as follows:

"There shall be paid to any consolidated or enlarged school district in which a new school building has been erected in accordance with plans approved by the state superintendent of schools, the sum of \$1,000.00 for each school building abandoned on account of such new building. This amount shall be paid in the same manner as other state apportionment aid and at the time of the next annual apportionment following the opening of school in the new building and the abandonment

of the school building or buildings: Provided, however, that any consolidated district receiving building aid under the provisions of this section shall not receive building aid under section 9357, and such districts as elect to receive building aid under said section 9357 shall not be entitled to aid under this section."

This section being in the 1931 Act particularly relating to enlarged school districts, and by special reference including consolidated districts, we do not therefore think that it would apply to any other district. To receive the benefits of this section, the district must be a consolidated or enlarged school district formed under the foregoing laws relating to consolidated and enlarged school districts. By applying the maxim, "The expression of one thing is the exclusion of another," we think that by the lawmakers only including the consolidated and enlarged school districts in said Section 19, Laws of Missouri, 1931, page 346, as to who could receive the one thousand dollars building aid, it excluded all other districts.

CONCLUSION

1. We are therefore of the opinion that only consolidated and enlarged school districts are entitled to the building aid prescribed by Section 19, Laws of Missouri, 1931, page 346, and that if a number of rural districts voluntarily annex themselves to another rural district, not following the procedure for forming a consolidated or enlarged district, the district to which they attach themselves is not entitled to the building aid provided by said section.

2. For the same reasons, we are of the opinion that if several districts attach themselves to a town or village district which is not a consolidated or enlarged

Honorable Lloyd W. King

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Sept. 27, 1938

district, that such town or village district is not entitled to receive the benefits of said Section 19, supra, unless such town or village district forms itself into a consolidated or enlarged district.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

ELECTIONS: Registrars in cities of 10,000 to 30,000 population should be elected every two years.

October 1, 1938

Hon. Edwin L. Kies, Clerk
Cape Girardeau County Court
Jackson, Missouri



Dear Sir:

We acknowledge receipt of your recent opinion request which reads as follows:

"At the General Election in November, 1934 and again in November 1936, Registrars were Elected for the City of Cape Girardeau. These registrars were elected in November 1936 and commissioned for a term of four years. Now it appears that according to Section 5 page 241, Laws of Missouri, 1933, registrars were to be elected in 1934 for a term of four years, expiring 1938.

"I would like for you to advise me at the earliest possible date if the registrars elected in November 1936 for a term of four years would be re-elected for four years in November 1938 or would they hold over until 1940.

"I shall appreciate this information at once, as it will be necessary for the committees of both parties to meet and select their respective candidates, if registrars are to be elected in the November Election of this year."

Registration in cities of 10,000 to 30,000 population is governed by an act found at page 239, Laws of 1933. Section 5 of said act provides for election of registrars in the following language:

"In all cities of this state which now contain or may hereafter contain 10,000 inhabitants and less than 30,000 inhabitants, at each general election for State officers, there shall be elected, in each election district or ward of such cities, by the qualified voters of such election district or ward, one registrar of election, who shall have the qualifications of an elector in his election district or ward and be the owner of real estate in this State, and who shall hold office for four years and until his successor is elected and qualified."

A reading of the foregoing section reveals inconsistent provisions within it. The section provides that at each general election for state officers, registrars shall be elected, while at the same time, it provides that such registrars shall hold office for four years. A "general election" is defined by Section 655, R.S. Missouri, 1929, as "the election required to be held on the Tuesday succeeding the first Monday of November biennially". Some state officers are elected at each biennial election. It would appear, therefore, that there is a general election for state officers every two years, and if registrars are required to be elected at such elections, they could not hold office for four years, since at the end of the first two years the law would require other registrars to be elected. The question then is, what did the Legislature mean by these conflicting provisions?

It is elementary that in construing a statute, we should attempt to ascertain the intention of the Legislature, and in this attempt, efforts should be made to harmonize apparently conflicting provisions. Following this rule of construction, we might conclude that the terms "general election for state officers" referred to presidential elections at which most of the state officers are elected. However, Section 30 of the act, which is the last expression of the Legislature in connection with the matters in the act, provides that the registrars who had been elected at the November election in 1932 should continue in office until the general election in 1934. This clearly shows that the Legislature intended that new officers should be elected at the general election in the year 1934 which was not a

presidential election. It, therefore, seems clear that the Legislature intended that the registrars should be elected every two years.

In trying to arrive at the legislative intent in these conflicting provisions, we think it will be necessary to follow the rule of construction that the last expression of the Legislature in the law must prevail. That rule is stated in 59 C.J. 999 in the following language:

"In the consideration of conflicting provisions in a statute, the great object to be kept in view is to ascertain the legislative intent, and a construction which best secures the rights of all the parties affected has been held a proper construction. In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails. However, this is a purely arbitrary rule of construction, which is subject to the rule that the statute must be construed as a whole to find the legislative intent, and has no application where the prior section or provision is more in harmony with the general purpose of the act, or where the literal interpretation of the later section would nullify the whole act, and is to be resorted to only when there is clearly an irreconcilable conflict and all other means of interpretation have been exhausted."

The last expression of the legislative will in the act under consideration indicates clearly that the Legislature intended that registrars be elected at each general election. We think, therefore, that this provision will have to prevail over the provision of Section 5 which says that the registrar shall hold office for four years. This is especially true when the first part of Section 5 provides definitely that "at each general election for state officers, there shall be elected, * * * one registrar of election".

October 1, 1938

This language is plain and definitely requires the election of registrars every two years. This provision, taken with Section 30 of the act, clearly shows that the Legislature intended that registrars should be elected at every general election at which state officers are elected. The only way that we can give the statute meaning at all in the face of the conflicting provisions is to hold that the provisions requiring the election of registrars at each general election takes precedence over the provision that the registrars should hold office for four years.

CONCLUSION

It is, therefore, the opinion of this office that registrars of election in cities of 10,000 to 30,000 population should be elected at each general election for state officers and that they would hold their terms for two years.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

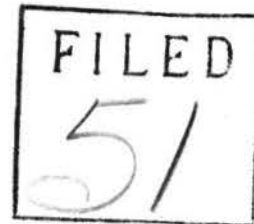
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PENAL INSTITUTIONS: Sufficiency of formal account in
demands for expenses of Reformatory inmates

February 2, 1938

23

Honorable G. W. Lane
Secretary to Department of
Penal Institutions
Box 236
Jefferson City, Missouri



Dear Mr. Lane:

We acknowledge your request for an opinion dated January 12, which reads as follows:

"I would appreciate an opinion from your office as to the form statements of accounts due from various counties to the Department of Penal Institutions for the credit of the institutions at Boonville, Chillicothe and Tipton, when it is desired to file suit against delinquent counties.

"I enclose a sample of statement of account that has been in use since my connection with this institution. General Reagan has had charge of this class of work. Kindly let me know if enclosed form is considered sufficient, if not will you please suggest one that meets the approval of your department.

"Of course this office bills each county quarterly and in advance by sending a statement to the county clerk of each county having inmates at any or all three of the institutions above mentioned, giving the name of each inmate, date

February 2, 1938

received and date of parole, discharge, escape or death. These 'billings' are made up from the original records which are and remain in my office.

"In the event there is a credit by reason of discharge, parole etc. it is shown on the left hand side, as are all credits by cash. The sum total of all credits are deducted from the gross amount due thus leaving the net amount on which suit is filed.

"We have several counties delinquent and it is the desire of Director Matthews that suit be filed as soon as the method of procedure is suggested or approved by your department."

The expense of each person committed to Boonville Reformatory, payable by the counties, is provided in Section 8358, Revised Statutes Missouri 1929, which reads:

"There shall be paid to the state prison board the sum of fifteen dollars per month for the support, maintenance, clothing and all other expenses of each person committed to said reformatory, from the time of his reception into said institution until his discharge therefrom: Provided, that no payment shall be made for the time that any such person may be absent from the reformatory on probation, by permission of the board. All payments shall be made quarterly in advance: Provided, that all payments for the support of persons chargeable to

a county shall be paid by such county in cash, and for that purpose the county court is authorized to discount its warrants, but the Missouri reformatory shall not receive any county warrants for the maintenance and support of any person committed to such institution."

Section 8359, Revised Statutes Missouri 1929, provides, in part:

"When any boy under seventeen years of age shall be committed to said reformatory or said training school by any court having competent jurisdiction, upon conviction of any felony or misdemeanor, or when the governor, except as hereinafter provided, shall commute the sentence of any person from imprisonment in the penitentiary to commitment to the reformatory, the expenses of the maintenance of said boy, as provided in the foregoing section, shall be paid by the county in which he was convicted. The clerk of the court in which the conviction is had shall certify the judgment of conviction to the county court of said county, and the governor shall cause to be certified to said county court any commutation made by him. The board shall cause to be filed with the said court a certificate showing the date when such boy was received into said institution, and the support of said boy, at the rate and in the manner stated in the foregoing section shall be paid by said county upon an account presented by the Secretary of said board to said county court: * * * "

The expense of each person committed to Chillicothe Reformatory, payable by the counties, is provided in Section 8372, Revised Statutes Missouri, 1929, which reads:

"There shall be paid to the state prison board the sum of fifteen dollars per month for the support, maintenance, clothing and all other expenses of each person committed to said industrial home for girls, from the time of her reception into said institution until her discharge therefrom; Provided, that no payment shall be made for the time that any such person may be absent from the industrial home for girls on probation, by permission of the board. All payments shall be made quarterly in advance: Provided, that all payments for the support of persons chargeable to a county shall be paid by such county in cash, and for that purpose the county court is authorized to discount its warrants, but the industrial home for girls shall not receive any county warrants for the maintenance and support of any person committed to such institution."

The expense of each person committed to Tipton Reformatory, payable by the counties, is provided in Section 8385, Revised Statutes Missouri 1929, the language being identical with Section 8372, supra.

In addition to the above legislative mandate the Legislature has given the prison board power to make rules and regulations, as provided in Section 8338, Revised Statutes Missouri 1929, which reads, in part:

"The state prison board shall, subject to law, have the exclusive government, regulation and control of the Missouri state penitentiary, the Missouri reformatory, the industrial home for girls, the industrial home for negro girls and of all other penal or reformatory institutions hereafter created and of all persons who now are or who hereafter shall be legally sentenced to either of the institutions hereinabove mentioned or referred to and who shall be committed to the custody of said board, and said board shall make and enforce such by-laws, rules and regulations as they from time to time deem necessary and proper in the management of all institutions or persons now or hereafter legally committed to said board, and shall be vested with and possessed of all other powers and duties necessary and proper to enable it to carry out fully and effectually all the purposes of this article. * * * * "

CONCLUSION

The by-laws, rules and regulations of the prison board, as to formality of statements of account, which are not in conflict with Sections 8359, 8372 or 8385, supra, have the same legal force as statutory mandates, and the secretary of the board must consider them along with the statutes if his formal statements of account are to be sufficiently up to legal specifications.

Where there are no by-laws, rules or regulations of the penal board, then, the regulatory statutes

touching the subject matter are the only yardstick of legal requirement for statements of account and their sufficiency in form.

The form of statements of account demanding from counties the expense of inmates at Chillicothe and Tipton is not mentioned in any particular statute.

As to computing any demand account against any county for expenses of inmates at Boonville, Sections 8358 and 8359, supra, provide that the prison board cause to be filed with the county clerk a certificate showing the date when such boy was received, the amount due on said boy at the rate of fifteen dollars per month, secured quarterly in advance. The Legislature makes it the specific duty of the secretary to the board to present the county court with an account of the state's claim as a condition precedent to payment for these expenses. This account to the county court is in addition to the quarterly advance certification filed with the county clerk.

The intention of the Legislature in Sections 8358 and 8359, supra, was to completely inform county officers in detail, and by items, exactly how much their county owes on each individual boy committed to Boonville. This information to a county court or to any court is not unreasonable and is no more definite information than any court is entitled to before adjudicating payment of any alleged account which is claimed to be due and owing.

In Section 8359, supra, the phrase "account presented by the secretary of the board" means more than a mere statement of alleged balances. The phrase means that alleged balances be broken down and itemized. This, you state, is done in the certified quarterly advance statement. The statute speaks of "such boy" and "said boy", which would indicate that the Legislature intended the secretary's system of accounting to a county court be broken down to show exactly how the alleged account of each boy stands when submitting the

Honorable G. W. Lane

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February 2, 1938

statutory account. Where the individual items of account are correct the net balance due is bound to be correct.

This Department is of the opinion, based upon the facts stated and the purported account statement to the county court which you exhibited herewith, that such an account statement presented to any county court for expenses of any boy at Boonville is not sufficiently specific to comply with statutory preciseness.

The sum total of all credits by reason of discharge, parole, etc., subtracted from the alleged gross amount due leaves the alleged net amount due. If suit be filed, this alleged net amount would figure the same total in net amount due if you credit the account of individual boys with such credits, pursuant to a ruling of the board. In this way the county receives full credits and each boy's separate account stands on its own merits, both on your books and in the courts, as was intended by the Legislature. When suit is filed under such suggested bookkeeping and accounting, then each boy's expenses can be adjudicated on its own merit and if disallowed by the trial court it will be an easy matter to so note on your book the claim of the particular boy that was disallowed.

Respectfully submitted

Wm. ORR SAWYERS
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

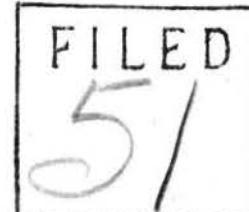
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TAXATION: The Lien for State and County taxes, in Missouri, attaches on the first day of June of the year preceding the year in which said taxes become payable, and the Federal Government, when purchasing lands after said lien has attached, should pay said lien, notwithstanding an opinion of the Dept. of Justice at Washington to the contrary.

Supplementary to opinion #90 - Mr. H. Tandy 6-19-35
February 14, 1938.

2-16

Mr. A. W. Landis,
Regional Title Attorney,
401 New Federal Building,
St. Louis, Missouri.



Dear Sir:

This acknowledges receipt of your communication of December 30th enclosing a copy of an opinion rendered by the Department of Justice, Washington, D. C., and written by Honorable Harry W. Blair, Assistant Attorney General of the United States, which opinion is to the effect that the date of the levy of a tax is the beginning of the State's lien on the land for taxes, and which opinion cites two Federal cases, to-wit, United States v. Pierce County, 193 F. 529, and Bannon v. Burnes, 39 F. 892, as authority for the above conclusion.

You also call attention to an opinion of this Department of date June 19, 1935, rendered to Honorable William H. Tandy, Attorney, U. S. D. A., Rolla, Missouri, and written by Honorable Wm. Orr Sawyers, Assistant Attorney General of Missouri, holding contrary to the opinion of the Department of Justice at Washington, the opinion of this office holding that the first day of June of the year next before the year in which the tax becomes payable is the time when the lien in favor of the State attaches.

The writer has reviewed these two opinions and made some investigation of the law and on behalf of this Department makes the following observations, which, in addition to the reasoning and authorities contained in the opinion heretofore rendered by this office, lead us to believe that the correct result is reached in the opinion heretofore rendered by this office.

It occurs to us as a primary and undisputed principle of law that the Federal Courts will apply the State law in the decision of a case involving the construction of the revenue

laws of Missouri, although the case being tried is in the Federal forum, provided the law on such question has been declared by the highest courts of the State.

As far back as 1864 the question was before the Supreme Court of this State as to when the lien attached in favor of the State for taxes, and in the case of Blossom v. Van Court, 34 Mo. 390, this State declared the law to be that the tax lien in favor of the State attached on the first day of February of the year that the assessment was to be made. Van Court deeded certain lands to Blossom by deed dated February 11, 1857. Van Court was owner of said land on the 1st day of February, 1857. The statute on the duty of assessors at that time, the 18th section of the 2nd article of the Act of 1855, provided:

"Every assessor shall commence on the first day of February in each year, during his continuance in office, and go through all parts of the county * * * in which he is the assessor, and require every person who shall have owned * * * any property on the said first day of February in each year, taxable by law, * * * to deliver him a written list of the same * * *."

The court, speaking of the above provision, said (page 394):

"The section above quoted appears to fix definitely that the tax should be assessed against the person who was on the first day of February the owner of the property, thus fixing his liability on that day, and charging the property with it as an encumbrance, (although the amount of the encumbrance is not ascertained until afterwards.) The defendant having conveyed the land on the eleventh day of February, was liable for the taxes assessed against the property on the first day of that month."

The court in that opinion states that the state and county taxes constitute a liability of the owner of the property as well as an encumbrance upon the land itself, which could be sold for their nonpayment.

The principle and holding of the Supreme Court of this State as declared in the above case was reaffirmed in the case of McLaren v. Sheble, 45 Mo. 130. The facts in the latter case were that the defendant Sheble on the first Monday of September, 1866, owned certain real estate and thereafter in October conveyed the same to the plaintiff. The deed contained the covenant of warranty implied in the words "grant, bargain and sell." The grantee, plaintiff therein, paid the state and county taxes assessed against the property in the name of the defendant for the fiscal year 1866-7, the defendant refusing to do so, and brought this suit to recover from the defendant such payment. No actual assessment of the property for the year 1866 had been made at the date of the conveyance by deed. The assessment, however, was subsequently made in accordance with the statute in the name of the defendant as being the owner on the first Monday of September of that year. The court said, page 131:

"Did the lien of the tax imposed by virtue of the assessment take effect by relation from that date? That is the only question presented for consideration, and it is substantially determined by the decision in Blossom v. Van Court, 34 Mo. 390. * * * That case decides in effect that the tax lien does relate back to and take effect from the inception point of the assessment, although the assessment may not be consummated till a later day or month in the year. The language of the court on this point is clear and explicit. The statute under which that decision was made required the assessor to begin his work on the first day of February; the present statute requires the assessment to date from the first Monday of September.
* * *

"According to the rule laid down in Blossom v. Van Court, the defendant, being the owner and occupier of the premises on the first Monday of September, 1866, was liable for the taxes of the fiscal year beginning at that date, and such taxes constituted a lien upon the property, by relation, from and after the first Monday of September,

although not actually levied till the year 1867. The rule is just. Suppose that A., on the first Monday of September in any given year, had \$10,000 cash, and returned it as the law requires; and B., on the same day, had \$10,000 invested in real estate, and in like manner returned it for taxation. Suppose, then, that these parties, on some subsequent day prior to the consummation of the assessment, should exchange property, who should pay the taxes? A. would be compelled to pay the personal taxes assessed on account of the \$10,000 cash returned, and, according to the theory of the defendant, also the taxes assessed on account of the real estate returned by B.--thus paying the taxes of the two for that year, relieving his vendor from all tax payments whatever, in the case supposed. The true and equitable rule is for each party to pay the taxes assessed on account of the property owned by them respectively on the initial day of the assessment, in the absence of any stipulation to the contrary.

"This equitable rule is recognized in Blossom v. Van Court, and that case, as already observed, decides that the tax lien takes effect and becomes an encumbrance from the inception of the assessment."

The statutes of 1865, which were operative when the case of McLaren v. Sheble was decided, provided (Sec. 31, p. 103, General Statutes 1865):

"The clerk of the county court shall deliver to the assessor on or before the first day of September in every year the assessor's books of the preceding year * * * and take his receipt therefor, and the assessor, so soon as he shall have completed his assessment and made his assessor's book for the year, shall return the whole of such papers and documents to the clerk."

We have examined the Laws of 1865, Chap. 12, beginning on page 98, and find that it is substantially the same with reference to the assessor's duties as the present law of Missouri, except it has no provision similar to Sections 9746 and 9747, R. S. Mo. 1929, which are noted hereafter.

The above two cases of Blossom v. Van Court and McLaren v. Sheble are approvingly cited by the Supreme Court of Missouri in the case of Stafford v. Fizer, 82 Mo. 393, 397.

In State ex rel. Watson v. Harper, 83 Mo. 670, these two cases are again approvingly cited, and on page 676 the court says:

"Then again, this lien which attached upon the assessment of the taxes under the law of 1867, supra, is retained and preserved by sec. 6832, R. S. 1879, which provides that the 'taxes due and unpaid on any real estate * * * shall be deemed and held to be back taxes, and the lien heretofore created in favor of the state of Missouri is hereby retained.' It is thus very evident that the law of 1867 provided for, and created a lien for the taxes and the law of 1877 preserved it."

Again in 1912, in the case of Morey Eng. & Const. Co. v. Ice Rink Co., 242 Mo. 241, the Supreme Court of this State approvingly cites the case of Blossom v. Van Court and McLaren v. Sheble, and with reference to said two cases states, page 249:

"Both cases hold that the lien of the tax takes effect from the initial point of the assessment, and by virtue of the assessment."

Likewise, the Blossom and the McLaren cases are approvingly cited by the Supreme Court of Missouri as late as 1936. See the case of Dennig v. Swift & Co., 339 Mo. 604, 609, 610, where the court says:

"Blossom v. Van Court and McLaren v. Sheble, as indicated by our previous reference to those cases, turned on the question of when the lien of the tax attached."

It will be noted that under the well defined law as declared by the highest court of this state, it is determined and settled that the lien for taxes attaches to the land and becomes fixed upon the initial date when it becomes the duty of the assessor to begin assessing the property. Section 9756, R. S. Mo. 1929, fixes the first day of June as the day that he shall begin his work of assessing the property of his county, and under the holding in the McLaren case and the Blossom case, the lien attaches on the first day of June of a given year for the taxes that are payable in the fall of the next year.

In addition to the statutory law under which the Blossom and McLaren cases were decided, there has since then been placed on the statute books of Missouri Section 9746, R. S. Mo. 1929, which provides:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

and Section 9747, which in part provides:

"Real property shall in all cases be liable for the taxes thereon, and a lien is hereby vested in favor of the State in all real property for all taxes thereon, which lien shall be enforced as hereinafter provided * * *."

The cases of *Bannon v. Burnes*, 39 Fed. 892, and *United States v. Pierce County*, 193 Fed. 529, relied on by the Justice Department of the United States as authority for the conclusion reached in their opinion, were both decisions of the inferior Federal Court. The *Bannon* case was decided by the Circuit Court for the Western District of Missouri in 1889, which is the same as the District Court at this time. The case of *United States v. Pierce County* was decided by the District Court of the State of Washington in 1912. Both of those cases have been disapproved.

The Circuit Court of Appeals for the Second Circuit, in 1931, in the case of *United States v. City of Buffalo*, 54 Fed. (2d) 471, cited the above two cases, 39 Fed. and 193 Fed., and Judge Hand, writing a separate concurring opinion, said the following, page 474:

"I agree in the result but for other reasons than my brothers. The question appears to me wholly one of state law, with which the sovereignty of the United States has nothing to do, although of course I agree that no state may tax property of the United States. On the other hand I do not understand it to be disputed that when the United States takes over property, it takes it subject to whatever liens are upon it, tax liens like the rest. If the law of a state were that all taxes should be liens as of March first, the time of the assessment, but might be computed, levied and extended on the rolls before July first, I see no reason why they should not be a lien upon land conveyed to the United States on March second. The act of liquidating and formally imposing the tax would not in my judgment be in defeasance of the sovereignty of the United States. I cannot agree with the contrary ruling in U. S. v. Pierce County (D.C.) 193 F. 529. Bannon v. Burnes (C.C.) 39 F. 892, contains a dictum in accord, but it was altogether unnecessary to the result. The levy and extension on the rolls are not adversary proceedings against the United States, like an arrest or seizure of its property; they do no more than fix the amount of a charge already imposed, and the liquidation does not depend upon questions in which the United States is interested except as all other owners of property. They are not directed against it individually, as is a suit, or a condemnation."

This view above expressed by Judge Hand was approved by the United States Circuit Court of Appeals of the 9th District in 1933 in the case of United States v. John K. & Catherine S. Mullen Benev. Corp., 63 Fed. (2d) 48. The court there in a unanimous opinion, after quoting the above quoted portion of the opinion of Judge Hand, said, page 54:

"While it is conceded in the case at bar that the assessments made by the City of American Falls was void by reason of the fact that the government owns the property subjected to the assessment, we are inclined to agree with the position taken by Circuit Judge L. Hand in his concurring opinion."

The decisions cited in the opinion of the Department of Justice are not authority for the conclusion reached in said opinion because those decisions are overruled in later cases by superior Federal Courts. The Bannon and the Pierce County cases, supra, overlook the fact that in the construction of state revenue laws the Federal Court will adopt the construction of the highest State Courts as placed on said laws by the State Courts. If authority were desired supporting this latter statement, see *Stone v. Southern Illinois & Missouri Bridge Co.*, 206 U. S. 267, 51 L. Ed. 1057, where the court said:

"These questions involve the powers of corporations under the laws of Missouri, which are concluded by the adjudication of the State Supreme Court."

Also, *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. Ed. 327, where the Supreme Court of the United States, speaking of the construction of a state statute said:

"Whether the notice to produce was broader than the statute provided for is a question of the construction of the state statute, and of the notice, and the decision of the state court is final on that question."

Likewise, *Ughbanks v. Armstrong*, 208 U. S. 481, 52 L. Ed. 582, where the Supreme Court said with reference to the construction of a statute defining the Michigan indeterminate sentence and the construction thereof by the Michigan courts, the following:

"In such a case as this we follow that construction of the Constitution and laws of the state which has been given them by the highest court thereof."

Such a rule has also been applied with reference to treaties. See *Re Ghio*, 157 Cal. 552, 108 Pac. 516, 37 L.R.A. (N.S.) 549, 555, where the Supreme Court of California said:

"The clause of the Argentine treaty relates to legal proceedings for the settlement of estates, and the words used are to be given the meaning they usually have in their respective countries when used in that connection."

If question might be raised as to the liability of the United States for the lien which had attached to real estate at the time the United States became the record owner thereof, the case of *Mullen Benev. Corp. v. United States*, 40 Fed. (2d) 937, holds that the United States by taking possession of realty impliedly contracts to pay the amount of liens at that time against said property. The court says:

"Admittedly an action may be maintained against the United States upon an implied contract. If, under circumstances, where it has taken over for a public purpose, the private property of another, a contractual obligation will be imposed by law on it to compensate for destroying the interests of another, * * *. When the United States, without compensating the plaintiff, a lienholder, took permanent and exclusive possession of the lands and devoted them to reservoir purposes, it destroyed the lien back of the bonds and made it impossible for the plaintiff to collect on its bonds, and when in doing so it was taking private property without just compensation and impliedly contracted with the bondholder and obligated itself to pay the lien upon the property. Otherwise, one who may have a lien interest in land would be deprived of his right to realize upon his lien."

From the foregoing, it is our opinion that the lien in favor of the State for state and county taxes attaches to real estate in Missouri on the first day of June of the year

2/14/38

next preceding the year in which said taxes become payable, and that the law is and would be construed by the Federal Courts in following the settled construction of such law by the State Courts of Missouri, that said lien so attaches, and that it is a legally enforceable obligation against said lands by proceeding in the Federal Court, and that the United States by taking over the title to said property is obligated to pay and discharge said lien for state and county taxes.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

SCHOOLS: School board acting on own initiative, without ratification of qualified voters (Sec. 9195, R. S. 1929), cannot issue warrants for tuition and cost of transporting pupils.

May 7, 1938

5-11



Honorable Charles F. Lamkin, Jr.
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Mr. Lamkin:

This Department acknowledges receipt of your letter of May 3d, wherein you request an interpretation of certain sections relating to transportation of school children. Your letter of request is as follows:

"A school district in this county, having less than twenty-five children last year arranged with the board of an adjoining district for the transportation and tuition of the pupils of school age to that adjoining district, acting under Section 9195 R. S. Mo. 1929. I will appreciate your advising me whether this arrangement can be legally carried out from year to year by the action of the board alone. I will also appreciate your opinion on the meeting referred to in the last sentence of the pertinent statute. Does this last sentence mean that a two-thirds vote is required to ratify the action of the directors in sending children to another district, or does it mean that when such meeting takes such action that the children must thereafter be sent to another district until another meeting rescinds the action? If the board, acting on its

May 7, 1938

own initiative sends the children of the district to another district, may that board lawfully issue warrants for the payment of tuition and for the cost of transporting pupils?"

Section 9195, R. S. Mo. 1929, referred to in your letter, is as follows:

"Whenever any school district in this state, now organized or that may be hereafter organized under the laws of this state, shall fail or refuse, for the period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body, and the territory theretofore embraced within such lapsed district shall be deemed and taken as unorganized territory, and the same, or any portion thereof, may be attached to any adjoining district or districts for school purposes, in the same manner as is now provided in section 9273: Provided, that no school district shall be deemed to have lapsed where the failure to make the needed provision for the eight months of school results from the irregular or void proceedings had for that purpose: Provided, that in any district enumerating fewer than twenty-five children the board may, from year to year, arrange with the board or boards of other district or districts for the admission of all children of school age in said district containing fewer than twenty-five children enumerated, and, if desired, arrange for

transporting children to and from school. And, when ratified by a two-thirds vote of the qualified voters of said school district, voting at a special meeting, such arrangements shall be final, and the board will be authorized to issue warrants upon the teachers' fund for payment of tuition, and upon the incidental fund for the payment of cost of transporting pupils."

In determining the questions to the effect: First; Is it necessary for two-thirds of the qualified voters of the district to ratify the action of the board? Second; If the voters do ratify the action of the board, is such ratification permanent, annual, or for a specified time, which the voters could rescind at their will? We are only concerned with the last proviso of Section 9195, quoted supra. One rule of statutory construction is to the effect that when a proviso is in a statute all of the words contained after the proviso are to be taken into consideration and deemed a part of the proviso.

Analyzing the proviso we find that the first element is that the district must contain fewer than twenty-five children; that the action of the board is discretionary as it uses the word "may"; that the action of the board is to be taken "from year to year"; and we think clearly, that in order for the action of the board to become legal and binding, two-thirds of the qualified voters of the district shall ratify the same. The further logical construction of the statute is to the effect that the qualified voters must take action annually because the board can only take action "from year to year." Conditions may vary from year to year. The district may not have fewer than twenty-five enumerated children from year to year. It may vary and have more or less; if more, the board would not take such action. Hence, the ratification by two-thirds of the qualified voters will expire and when enumeration again became less than twenty-five certainly it would be necessary for the qualified voters to again ratify the action of the board.

We are enclosing opinion rendered by this Department on February 21, 1938, to Mr. G. Frank Smith, Superintendent

Hon. Charles F. Lamkin, Jr.

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May 7, 1938

of Schools, Oregon, Missouri, wherein a similar construction is placed on Section 9197, R. S. Mo. 1929.

As school boards are creatures of the statute their powers are limited to those expressly given by statute. (Consolidated School District No. 6 vs. Shawhan, 273 S. W. 182.) Therefore, we are of the opinion that if the board acts on its own initiative without the ratification of the qualified voters, as provided by Section 9195, supra, that said board cannot issue warrants for tuition and the cost of transporting pupils.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney-General

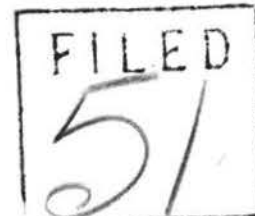
APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN: EG
Enc.

SCHOOLS: Two directors cannot function legally without proper notice to the third director. Injunction is the proper remedy to prevent two members from acting illegally.

May 17, 1938



Honorable Charles F. Lamkin, Jr.,
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

This Department is in receipt of your letter of May 12th, wherein you make the following inquiry:

"Two of the directors of a common school district in this county hold meetings without notifying the third director of the time, place or purpose of such meetings. At such meetings warrants are issued to pay the various debts of the district. I will appreciate an opinion from you touching the question whether such behavior on the part of the two directors is such a neglect of duty as will justify an attempt to remove them from office, and if so, what the correct procedure would be for such a move."

Section 9289, R. S. Mo. 1929, provides for the organization of the school board. Said section reads as follows:

"The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall

May 17, 1938

enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a quorum for the transaction of business: Provided, each member shall have due notice of the time, place and purpose of such meeting; and in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all the meetings of the board. No member of the board shall receive any compensation for performing the duties of a director."

In the decision of *School District v. Smalley*, 58 Mo. App. 658, it was held to the effect that if two directors meet and without keeping a record of their proceedings and without notice to the third member, issue warrants, the warrants will be illegal, but if paid no action can be maintained against the directors who issued them, provided they were issued for a valid indebtedness of the district.

Section 9289, quoted supra, contains a provision relative to notice to the individual members. The effect of failure to follow the statute, and a decision which indicates that the terms of such a statute are mandatory, is contained in the case of *Johnson v. Dye*, 142 Mo. App., 1. c. 427, as follows:

"If the statute is mandatory, then in as much as the president did not call this meeting and refused to attend it, it was irregular, and the plaintiff would not be entitled to recover, as a teacher cannot be legally employed except at a regular or special board meeting. (*Pugh v. School District*, 114 Mo. App. 688, 91 S. W. 471.)

"The statute authorizes a majority of the board to hire a teacher. This means that a majority acting at a legal meeting, and does not mean that directors acting separately, although a majority of the board, can make a binding contract. (Kane & Co. v. School District, 48 Mo. App. 408; Johnson v. School District, 67 Mo. 321.)

"It is the general rule that where the charter, statute, or by-law of a corporation, provides a method by which the notice shall be given of a special meeting, its provisions must be obeyed."

The general rule on failure to give proper notice is contained in 56 Corpus Juris, 337, Par. 210, as follows:

"As a general rule, which, in some jurisdictions, has been enacted into an express statutory requirement, a proper call for a notice of a meeting of a board of education, or of directors, trustees, or the like, of a school district or other local school organization, must be given or communicated to each member of such board in advance of such meeting, in order to render proceedings had thereat valid, and a want of such notice to any member who does not attend the meeting will invalidate the action taken, except that in the case of regular meetings, the time and place of which are fixed by statute or by a rule of the board, all must take notice thereof, and no express notice is required; but the general rule has been qualified in some cases, which hold that want of notice to a member will not invalidate action taken by the board where he is absent from the state and would not have been

able to attend the meeting even if notice had been given him."

Further rules bearing on the question are to be found in Corpus Juris, supra, page 334, Par. 205, as follows:

"A board of education, or of directors, trustees, or the like, of a school district or other local school organization can exercise its powers in no other mode than that prescribed or authorized by statute. As a general rule, and under most statutes, such a board can act only as a body, at a meeting duly and regularly called or held; and, except as power may validly have been delegated to him or them by the board, or it may subsequently ratify his or their action, no act of a member of the board, or even of a majority or all of its members, when not assembled in a meeting and acting as a board, is valid or effectual, or can bind the district."

From the above decisions and authorities it would appear that the acts of the two directors, assuming that the third director was not notified or that he did not refuse to attend, are illegal and could not bind the district if appropriate proceedings were had contesting the same. But as to Section 9290, R. S. Mo. 1929, which we assume is the section you refer to in your letter, it is very questionable whether said section will apply to their acts; the pertinent part of this section being:

"If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business * * *"

May 17, 1938

The only phrase that has any possible reference to the conduct of the two directors would be, "repeated neglect of duty." It does not appear that the directors are neglecting their duties but that they are exercising or attempting to carry out their duties in an illegal or wrongful manner.

As to the question of the remedy or the procedure, we are of the opinion that quo warranto would not be the proper remedy. In the decision of *State v. Thatcher*, 102 S. W. (2d) 1. c. 938, the Missouri Supreme Court seems to have adopted the rule of the Supreme Court of Wisconsin as follows:

"In considering the nature and purpose of the information in the nature of a quo warranto, it is to be premised that it does not * * * command the performance of his official functions by any officer to whom it may run, since it is not directed to the officer as such, but always to the person holding the office or exercising the franchise, and then not for the purpose of dictating or prescribing his official duties, but only to ascertain whether he is rightfully entitled to exercise the functions claimed.' *High Extraordinary Remedies* (3d Ed.) p. 557."

Another remedy which might be applicable is that of injunction. The following authorities appear to make this remedy available.

In *School District v. Smith*, 90 Mo. App. 215, the court states as follows:

"Quo warranto would be the appropriate remedy to attack the legality of the organization of a school district; but where the petition does not raise the legality of the organization of a district, but instead calls in question the proceedings which are about to result in attaching new territory to the district as theretofore organized,

May 17, 1938

injunction is the appropriate remedy."

"Under Rev. St. 1899, Section 3649, providing that a remedy by injunction shall exist 'to prevent the doing of any legal wrong whatever whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages,' injunction is the proper remedy to restrain the county commissioner from proceeding to change the boundaries of school districts where there has been no valid election in such districts to authorize such change."

Also, in the decision of Black v. Ross, 37 Mo. App. 250, the court said the following:

"Where the directors of a school district are about to make an unlawful and unauthorized disposition of the public school fund, individual taxpayers are entitled to an injunction to prevent such disposition, and the fact that the directors are solvent, so that damages could be recovered in an action at law against them, does not render that remedy adequate."

We are, therefore, of the opinion that if any remedy is available against the directors of the school district in question, it would be by injunction.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

ELECTIONS:
COUNTY BUDGET:

If petition under Section 12805, election on restraining of animals should be held even though costs exceed the estimate for elections in budget.

September 29, 1938

9/30



Mr. Hubert E. Lay
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"Recently a petition as is provided for under section 12805 R.S. 1929 was filed with the County Clerk asking the County Court to submit to the qualified voters at the general election 1938, the question of restraining animals from running at large.

"The least possible cost for submitting this question will be approximately \$225.00, and since the petition was not filed until long after the 1938 Budget was made and approved there is no provision or allowance for such sum under Class 2 of expenditures.

"Under the present budget and expenditures to date the county will be unable to issue warrants for salary of its officials for the month of December.

"In your opinion would the County Court be justified in refusing to submit the

above question at this election on the grounds that the county did not have sufficient funds now to pay the expenses already set out in the budget, and that no allowance was made in the budget for such expenses."

As stated in your request, Section 12805, R. S. Mo. 1929, provides that the question of restraining animals may be submitted at a general election in any county upon the petition of one hundred householders of such county.

Section 12806, R. S. Mo. 1929 provides that any such election shall be governed in all respects by the laws applicable to general elections for state and county purposes.

In 1933 the Fifty Seventh General Assembly enacted what is commonly known as the County Budget Act. The Act sets up six classes of expenditures, and under class two it is provided as follows (Laws of Missouri, 1933, page 341, section 2):

"Class 2: Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this act. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1. * * * * *

This sum is to pay "the cost of elections" and has "priority of payment over all except class 1."

The expense attendant to the voting on the question of restraining animals is a part of the "cost of elections" and is a proper payment out of Class two. Under the County Budget Act this cost must be met by the county before any

Mr. Hubert E. Lay

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September 29, 1938

of the subsequent classes, that is, roads and bridges, salaries, miscellaneous expenses, etc., are paid.

This department has held in an opinion to Honorable Homer Rinehart on January 24, 1935, that regardless of the estimate made by the county court for class one that the bills should be paid regardless of the fact that by paying the same the gross amount will exceed the sum set aside and originally estimated for the reason that class one constitutes a first lien on the funds of the county and the priority of the classes should be sacredly preserved. A copy of this opinion is herein enclosed.

The reasoning set forth in that opinion applies equally to class two and, therefore, even though the estimate of class two is insufficient to meet the expenses of holding the election still such election should be held and the expenses paid although subsequent classes may suffer thereby.

CONCLUSION

It is, therefore, the opinion of this department that the question of whether animals should be restrained should be submitted to the voters even though the expenses of such election would cause the estimate of expenditures for holding elections under class two of the County Budget Act to be exceeded.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

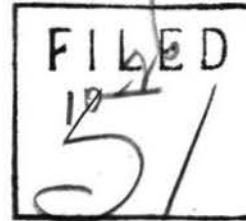
J. E. TAYLOR
(Acting) Attorney General

AO:DA

RAILROADS:
RATES FOR SPECIAL
ROAD DISTRICTS:

Railroads may make special rates for hauling road materials for special road districts.

October 19, 1938



Honorable Charles F. Lamkin, Jr.
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

This is in reply to your request for an opinion from this department based upon the following statement:

"Certain townships in this county are about to engage in a system of gravel roads by contract, under a P. W. A. grant. The usual practice is to advertise for sealed bids, which are opened at a specified time, and the contract awarded to the lowest bidder. The material to be used on the several projects will be crushed limestone or gravel. In connection with the material used, it has been the practice of at least one contractor in this vicinity to be able to underbid his competitors by obtaining a private rate agreement for hauling road building material from the Wabash railroad. The details of this agreement are unknown to the other contractors and they are not advised as to whether or not they can obtain the same preferential treatment. As a result, the contractor concerned has an unfair advantage. After obtaining the contract, it is his practice to have the road building material such as gravel, consigned by the railroad to the township board. This is evidently done with the idea in mind that it will bring the transaction within Paragraph 3 of Section 5155, R. S. Mo. '29, which reads as follows: 'Nothing in this chapter shall prevent the carriage, storage, or handling

of properties, or road building materials at reduced rates for the United States, for the municipal government, or special road district.' It is my opinion that such a transaction is merely a subterfuge to evade the statutes, requiring the posting of rates by railroads and their uniform application to all shippers. The shipments contemplated will be entirely intrastate. Since the statutes provide various penalties, some of them penal in nature for railroads engaging in practices of this sort, I feel it proper to ask for an opinion upon the following questions:

"a. In your opinion, where road work is to be let by contract, the contractor to assume the responsibility of grading, procuring material, transporting it, and placing it on the road, the municipality having no concern in the methods used, may the law concerning the posting of rates and their uniform application be evaded by such a contractor by consigning road building material to a township, enabling the railroad to claim the protection of the paragraph of the statutes set out?

"b. Even if it should be announced in advance that a certain reduced rate would be available upon a certain railroad to all contractors, and that all contractors would be allowed to consign road building materials to the municipality, so as to come under the protection of the paragraph stated, but the contract documents made no reference to any such pre-arrangement and the entire responsibility under the proposed contract for obtaining and spreading and paying for the material used, rested upon the contractor, would such a consignment at the reduced rate for the successful contractor be lawful?"

Oct. 19, 1938

Your request refers to intrastate shipments of road materials for special road districts. It also appears that probably one contractor is able to underbid other contractors on road building jobs for your special road district because he gets a special freight rate from the railroad for this particular work.

Paragraph 3 of Section 5155, R. S. No. 1929, contains the following provision:

"Nothing in this chapter shall prevent the carriage, storage, or handling of properties or road building materials free or at reduced rates for the United States, state, municipal government or special road district."

It is by virtue of this provision of the statute that the carrier is authorized to make a special freight rate for road building materials for special road districts.

While this clause does not provide that the contract for such road materials must be made with the special road district, yet if the materials are furnished under a contract for the special road district, and if such district receives the benefit of the reduced rates authorized by said clause, then the purposes of the law have been accomplished. However, if any other person than the special road district benefits in any degree on account of such reduced freight rate, then such reduction is unauthorized and the carrier is subjected to the provisions of Section 5155, R. S. No. 1929, which are in part as follows:

"No common carrier subject to the provisions of this chapter shall after the taking effect of this chapter engage or participate in the transportation of passengers or property, between points within this state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this chapter. Any railroad corporation, or common carrier, which shall undertake to perform any service or furnish any product or commodity unless or until the rates, tolls, fares, charges,

Oct. 19, 1938

classifications and rules and regulations relating thereto, applicable to such service, product or commodity, have been filed with the commission and published in accordance with the provisions of this article, shall forfeit to the state not less than one hundred dollars nor more than five hundred dollars. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

* * * * *

"3. * * * Provided, further, that nothing in this chapter shall prevent the carriage, storage, or handling of properties or road building materials free or at reduced rates for the United States, state, municipal government or special road districts. * * *."

The provisions of this section cannot be evaded by the carrier consigning the road materials to a special road district for the contractor who is constructing the road. Such consignments are not prohibited, but the special road district must receive the full benefit of the reduced rates before the carrier is authorized to make such a rate, and we think under the statute the burden is on the carrier to be certain that the special road district is receiving the full benefit of such reduced rate before it is authorized to make the rate.

October 19, 1938

CONCLUSION

Answering subsection (a) of your request, we are of the opinion that the law concerning posting of rates and their uniform application to all persons may not be evaded by a contractor who has road building materials consigned to the special road district, because under said clause of Section 5155, supra, the carrier, when making a special rate for the district, is required to see that such district receives the full benefit of the reduced rate. These rates may not be made for the contractor in any sense. The railroad is not relieved from the provisions of Section 5155, supra, if it makes a special rate to a district, not knowing the district is getting the full benefit of the rate, and in which the district does not receive all the benefits of such reduced rate.

Answering subsection (b) of your request, we are of the opinion that a consignment of road material for a special road district at a reduced rate to a contractor for the building of a road for the district would be lawful, providing the special road district receives the full benefit of the reduction in the rates; otherwise it would be discriminatory and contrary to the provisions of Section 5155, supra, and unauthorized.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

COUNTIES:

Judgment on a warrant gives no preference, outstanding warrants paid out of surplus in the order of their presentation and registration.

November 16, 1938

Mr. Hubert E. Lay
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"In 1937 most of the warrant holders of Texas County sued the county and obtained judgment. There are however several warrants properly presented for payment and registered which are not in the judgment. We now have an emergency fund which has been created during back years, and the court made an order directing the County Treasurer to pay the oldest registered warrants with this fund. The oldest unpaid warrants were issued in 1930.

"Should the treasurer pay the warrants in the order of their presentation and registration whether the warrant is in the judgment or not? Or should he pay the warrants first not in the judgment, although some may not have been issued or registered until long after many in the judgment? If he should pay those in the judgment should the judgment be credited with the payment of the particular warrant paid?"



Section 12139, R. S. Mo. 1929, provides in part as follows:

"He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment: * * * * *

At the outset it must be pointed out that a judgment found on a warrant gives no priority or preference over the warrant, or over other warrants. This view is taken in State ex rel. Wright v. Hortsman, 149 Mo. 290, in which the court said at l.c. 295:

"* * Their judgment gave them no lien on the property or revenue of the county, and they could not have compelled the county court to levy a tax to pay their debt in preference to other debts of equal merit. * * * The law gives them no lien on it and there is no reason why they should have it applied to their debt in preference to others."

It is well settled in Missouri that a warrant drawn in excess of the county revenue for a certain year is valid and is payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years. As was said in Kansas City, Ft.S & M R Co. v. Thornton, 152 Mo. 570, l.c. 575:

"* * * * only the surplus of revenue collected for any one year can be applied to the deficit of any other

year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year. * * * * *

A similar ruling may be found in State ex rel. v. Allison, 155 Mo. 344; State ex rel. v. Payne, 151 Mo. 673; Andrew County v. Schell, 135 Mo. 31.

The question, therefore, arises in what order should the warrants be paid. The court en banc in State ex rel. National Bank of Rolla v. Johnson, 162 Mo. 621, had before it the identical question and Judge Gantt, after quoting Section 3166, R. S. Mo. 1889, which is now Section 12139, R. S. Mo. 1929, stated:

"We conclude that this surplus, after the current expenses for the years 1895 and 1896 had all been paid, at once became subject to this general statute, section 3166, which provides a just and equitable rule for the payment of the debts of the counties. The preferred right of payment according to registration is not taken away * * * and when * * a surplus, as in this case, remains, then it is applicable to unpaid warrants of former years and section 3166 provides the rule of priority."

Under the above holding, all warrants of previous years should be paid in the order of their presentation and registration.

CONCLUSION

It is, therefore, the opinion of this department that a judgment on a warrant obtained by a warrant holder gives him no preference over other warrants.

It is further the opinion of this department that when there is a surplus in any year that such may be used

Mr. Hubert E. Lay

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November 16, 1938

by the county to pay outstanding warrants, said warrants to be paid in the order of their presentation and registration.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

STATE HIGHWAY PATROL:

Witnesses' fees earned by members may be retained except in state criminal cases. Where retained expenses are not reimbursed by State.

June 27, 1938

Captain Thomas L. Leigh
Commanding Troop "C"
State Highway Patrol
329 S. Kirkwood Road
Kirkwood, Missouri



Dear Sir:

We wish to acknowledge your request for an opinion under date of June 22, 1938, as follows:

"I have a question in regard to the disposition of witness fees payable to members of the Patrol for services in civil cases, the determination of which will be of importance to the members of this Troop and to the State Patrol in general.

I have taken this matter up with Col. B. M. Casteel and the gist of his reply is that we must determine the legal questions involved before disposing of these fees.

Section 11, Page 234, Laws of 1931 states in part, "All fees for the arrest and transportation of persons arrested and witness fees for members of the Patrol shall be the same as provided by law for sheriffs and shall be taxed and collected as costs and paid into the State Treasury as provided by law."

This Section, of course, applies to criminal costs, and the universal practice is, and has always been, that witness fees and mileage taxed in criminal cases are paid into the State Treasury.

June 27, 1938

There is another class of criminal cases in which we are some times summoned as witnesses. These are criminal cases in Federal Court. In this type of cases the fees and costs are figured according to the Federal Law and are paid by the U.S. Marshall out of Federal funds. No state money is involved. What should be done with the fees earned in these cases?

We are also called upon with increasing frequency to appear as witnesses in civil cases in State Courts. These are usually cases growing out of automobile accidents which we have worked in line of duty. To be more specific, I have here now, on my desk, two checks signed by the Circuit Clerk of Washington County. These checks are for attendance and mileage in a civil case in Potosi and are payable to members of this Troop. These members were summoned in the usual way and testified as witnesses. When the case was finally disposed of the costs were paid and the clerk of the court mailed checks to the individual troopers. My questions are, does Section 11 apply in this case or are these checks legally the property of the persons to whom they are made payable?

I have had some correspondence with Colonel Casteel on this question and I know that he is anxious to have the best legal opinion possible upon it. Since the question originated in this Troop I think it is his wish that I incorporate the facts in a request for an opinion.

I will appreciate the opinion of your office on this question."

Section 11 of the Laws of Missouri 1931, page 234, provides as follows:

"The necessary expenses of the members of the patrol in the performance of their duties shall be paid by the state when such members are away from their places of residence or from the district to which they are assigned, subject to the approval of the commission. All fees for the arrest and transportation of persons arrested and witnesses' fees for members of the patrol shall be the same as provided by law for sheriffs and shall be taxed and collected as costs and paid into the state treasury as provided by law."

The primary rule of statutory construction is to ascertain and give effect to the lawmakers' intent. *Meyering vs. Miller*, 51 S.W. (2) 65, 330 Mo. 885.

An examination of the above statute reveals that it was the intention of the legislature that "the necessary expenses of the members of the patrol in the performance of their duties" should be "paid by the State" when they are "away from their places of residence or from the district to which they are assigned", and the State would look to reimbursement of expenses from "all fees for the arrest and transportation of persons arrested and witnesses' fees".

Did the Legislature intend to include all "witnesses' fees" earned by members of the patrol? We believe that the rule of *eiusdem generis* is applicable. Said rule of statutory construction is defined by the Court in the case of *Puritan Pharmaceutical Company vs. Pennsylvania R. Company*, 75 S. W. (2) (Mo. App.) 508:

"Rule of construction known as 'ejusdem generis' rule means that, where general words in statute follow specific words, designating special things, general words will be considered as applicable only to things of same general character as those which are specified. *Mangelsdorf vs. Pennsylvania Fire Insurance Company*, 224 Mo. App. 265, 26 S.W. (2) 818."

The specific word in the statute is "fees", and is followed by the general words "for the arrest and transportation of persons arrested and witnesses" indicating that the witnesses' fees that the Legislature had in mind were those fees growing out of criminal cases.

The Legislature having made it the duty of the State Highway Patrol to make arrests in cases of violation of law and knowing that by reason of same the members of the patrol would be called as witnesses in criminal cases, provided that their fees be taxed and collected as costs and paid into the State Treasury. They provided that in turn the State would pay their necessary expenses, subject to the approval of the Commission, when called away from their residence or from the district to which they are assigned.

From the foregoing we are of the opinion that the fees earned by attendance of the members of the State Highway Patrol as witnesses in criminal cases in State courts should be taxed and collected as costs and paid into the State Treasury.

We are further of the opinion that the fees earned by attendance of members of the State Highway Patrol as witnesses in civil cases may be retained by said members but in said cases the members of course would not be entitled to be reimbursed by the State for any expenses incurred.

The next question to be determined is whether Section 11 *supra*, also includes witness fees earned by members in criminal cases in the Federal Courts. Said Section 11 in referring to the

June 27, 1938

various fees states that they "shall be the same as provided by law for sheriffs". The witness fees in federal cases being on an entirely different scale it is evident that the Legislature was referring only to those fees earned by members in State courts.

We are therefore of the opinion that the fees earned by the attendance of members of the State Highway Patrol as witnesses in criminal cases in Federal Courts may be retained by said members, but in said cases the members would not be entitled to be reimbursed by the State for any expenses incurred.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

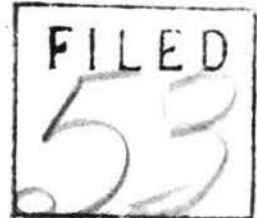
J. E. TAYLOR
(Acting) Attorney General

MW:MM

ELECTIONS:
OFFICERS:

An officer may not be elected to another office during the term of his office, and if he is elected and enters upon the duties of such other office, a vacancy exists in the office held and an appointment to fill the vacancy is in order.

May 18, 1938



Honorable Harry J. Libby,
Judge of Second Judicial Circuit,
Shelbina, Missouri.

Dear Sir:

This is in reply to your request of May 12, 1938, for an official opinion from this department based upon the following letter:

"Mr. Robert E. Stone, with whom you are personally acquainted, is the present duly elected, qualified and acting Collector of the Revenue of Macon county, Missouri, having been elected at the General election for state and county officers held in November, 1934, and who qualified and took office for a term of four years expiring March 1st, 1939.

Mr. Stone desires to become a candidate in the State wide primary in August of this year for the democratic nomination for Clerk of the county court of Macon county, Missouri, the term of which office, if he be nominated and elected, will commence January 1, 1939, whereas, under the law his term of Collector of the Revenue will not expire until March 1st, 1939.

Mr. Stone understands of course that he cannot hold two offices at once

and the same time. He would like to obtain an Opinion from you about the following matters: (1). Whether if nominated and elected, County Clerk of Macon county Missouri, for the term commencing January 1, 1939, the present incumbent County Clerk can hold over until March 1, 1939, and he, himself hold the office of Collector until that time; or (2) whether if nominated and elected, he would have to resign his office as Collector of the Revenue, effective January 1, 1939, and let the Governor make an interim appointment of a collector, to serve from January 1, 1939 to March 1, 1939.

I am, of course, not in a position to advise him, and have suggested to him that he obtain an opinion from you, and I am therefore writing you, requesting that you give him an opinion on the above questions."

The office of the county clerk is the clerk of the court of record. Upon our research on the question which you have submitted, we find that the following sections apply: Section 11664, R.S. Mo. 1929, provides as follows:

"At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the supreme court, the St. Louis court of appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon

the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

Section 5, article XIV of the Constitution of Missouri provides as follows:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Section 8, article XIV of the Constitution of Missouri provides as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

Volume 46, Corpus Juris, page 969, section 111, quotes the rule on an office becoming vacant in the following language:

"* * * * Under a provision that officers shall hold over until their successors are 'elected' and qualified, the officer holding over is in all respects a de jure officer, and the expiration of the term does not produce a vacancy."* * * * *

And in the case of State v. Brown, 274 S.W. 965
l.c. 976, the rule is stated as follows:

"The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Lusk, 18 Mo. 333; State ex rel. Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires."

By the rule laid down in Corpus Juris, supra, and the case of State v. Brown, supra, the failure of the newly elected officer to qualify would not constitute a vacancy in the office to which he was elected, but the incumbent would be authorized to hold such office until a successor is duly elected and qualified. Section 11666 R.S. Mo. 1929 provides in part as follows:

"Every clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Missouri, with good and sufficient securities, who shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such court, in vacation."
* * * * *

Section 11668, R.S. Mo. 1929 provides as follows:

"The certificate of the election of any clerk, signed by the presiding judge of the county court, and the bond of every clerk, shall be deposited in the office of the secretary of state, with the approval of the court or judges indorsed thereon."

These sections contain the duties to be performed by the county clerk and the county court before the clerk is authorized to assume the duties of the office.

However, the failure of the newly elected official to comply with the foregoing requirements would not constitute a vacancy in the office of the clerk of the county court.

In the case of Aiken v. Sidney Steel Scraper Company, 197 Mo. App., 673, l.c. 681, the court said:

"The failure of a person duly elected or appointed to an office to take the prescribed oath or give a bond, as required, or either, does not, when he has proceeded to exercise the functions of the office, invalidate his acts so far as the public or third persons are concerned. As to them, his acts are as valid as though he were an officer de jure. His title to the office cannot be attacked collaterally, but only by direct proceedings in the nature of quo warranto. The failure to qualify constitutes a ground for ousting him from the office."

As stated in Section 11664, supra, the clerk shall enter upon the discharge of his duties on the first Monday in January next ensuing his election.

May 18, 1938

Your request includes the question of whether or not the provision, "that the clerk shall enter upon the discharge of the duties of the office on the first Monday in January next ensuing his election", is directory or mandatory.

On the question of mandatory and directory provisions of the statute the court in the case of Bituminous Paving Company v. McManus, 144 Mo. App. 593, l.c. 607, said:

"The distinction between mandatory and directory enactments has often been under consideration by the courts. Into which of these classes any given statute falls is to be determined by its character and purpose. If no substantial rights depend upon it and no injury can result from ignoring it, and the purpose of the Legislature can be accomplished in a manner other than as prescribed therein and substantially the same results obtained, then the statute will generally be regarded as directory."

* * * * *

In the case of State ex rel. Attorney General, v. Churchill, 41 Mo. l.c. 43, the court said:

"It is stated that Jasper N. Norman was duly elected treasurer of the County of Laclede at the election in November, 1866, received his certificate of election, gave his bond, which was approved by the County Court and ordered to be filed, and took the oaths required by law, which were enclosed in his certificate or commission; but that a few days afterwards, on motion of the county attorney, the County Court made an order rescinding the approval of the bond, and declaring

it annulled, for the reason that it had not been offered and filed within ten days after the election, as required by the statute--G.S. 1865, ch. 38, section 5. The court also declared the office vacant and proceeded to appoint the defendant county treasurer, who gave the required bond, was duly qualified, and entered upon the duties of his office.

We think the court erred in this proceeding. The bond was not void, nor voidable, merely because not presented and filed within the ten days. This provision of the statute is directory only. The matter of time was not essential to the validity of the bond, nor a condition precedent to the party's title to the office. The time not being of the essence of the thing required to be done here, it was not material--Rex v. Lexdale, 1 Burr. 497; Sedgw. Stat. & Const. Law, 368--74. When a sheriff was required to give bond within twenty days after his election, it has been held that the statute as to the time of giving the bond was directory merely, and that the failure to give the bond within that time did not forfeit his title to the office--People v. Holly, 12 Wend. 481. We are of the opinion that the orders of the court vacating the bond, declaring the office vacant, and appointing the defendant treasurer, should be regarded as having been done without authority of law and as mere nullities."* * * * *

From the foregoing rules of construction the provisions of said Section 11664, supra, might be considered directory under certain circumstances, but, the court in the case of Louis S. Flatan v. The State ex rel. W. C.

Edwards, 56 Texas Reports, 93 l.c. 98, in discussing an exception to the general rule of such directory statute said:

"The term of office provided by the constitution is short, and such persons as seek office, and by the vote of the people are elected thereto, should not be dilatory in qualifying after they have been notified by certificate of election that the people have honored them by their confidence expressed through the ballot. The statute provides that a person elected to the office of sheriff shall give bond and take the oath of office within twenty days after notice of his election; and he that seeks an extension of the time provided by statute should show some extraordinary reason therefor.

The time prescribed by statute within which a person elected to an office shall qualify has been held to be directory in some of the other states, and so was held to be in this case upon former appeal. These rulings were no doubt made to cover such cases as might arise in which a person could not, for some good reason beyond his own control, qualify within the prescribed time, in order that the right of the person to qualify might not be destroyed without wrong upon his part, and that the wish of the people might not be lightly defeated; but it is not believed that the rule can be extended to cases in which there is neglect upon the part of an elected person.

In this case the certificate of election

issued to the relator on the 18th day of November, and from the 20th day of that month, after several adjournments made as alleged in the answer to enable him to perfect and present his bonds, on the 18th day of the December following he presented bonds which were adjudged by the court insufficient. These facts might be held to constitute neglect, and if so, as more than twenty days had elapsed after he received his certificate of election, it might well be held that the extension of time should not have been given. The plain words of the statute should have their full effect in reference to the time within which an elected person should qualify, in all cases in which there is neglect or refusal to qualify."

From this case if the officer fails to qualify for the office to which he is elected and such failure is brought about by his own negligent acts or omissions, then the statutes providing when he should enter upon his official duties should be construed as mandatory.

We fail to find where the Missouri courts have passed on this particular question, however, we believe the reasoning in the Texas case is good and we are following that ruling in arriving at our conclusions in this opinion.

CONCLUSION

From the foregoing this office is of the opinion that:

1. The present incumbent county clerk will hold his office until his successor is duly elected and qualified.
2. That the county collector, should he be elected to the office of county clerk would not be authorized to fail to qualify and enter upon the duties of the office of county clerk on the first Monday in January following

Hon. Harry J. Libby

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May 18, 1938

his election because of the fact that he held the office of county collector the duties of which were so incompatible with the duties of the office of county clerk that he could not hold both offices at the same time, and for that reason he could not qualify until March first.

We are further of the opinion that if the county collector is elected to the office of county clerk that the office of county collector would become vacant at the time that the county collector qualifies and enters upon the duties of the county clerk, and that interim appointment of county collector to serve from the first Monday in January, 1939, to March 1, 1939, would be necessary.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

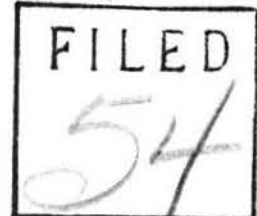
J. E. TAYLOR
(Acting) Attorney General

TWB:DA

TAXATION AND REVENUE: A deed delivered under and by virtue of Section 9957a of Senate Bill 94 extinguishes the liens of city sewerage districts insofar as such liens apply to the period prior to the issuing of the certificate of purchase.

January 27, 1938

Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Mr. Long:

We wish to acknowledge your request for an opinion on January 19th, 1938, which is as follows:

"Please give me a ruling on the following situation.

There are certain pieces of real property in this City which have been sold for delinquent state taxes. On these particular pieces of property there happens to be delinquent sewer tax bills and the holder of such delinquent sewer tax bills has now brought suit for the enforcement of his lien. Kindly advise me whether or not that a purchaser of the Tax Certificate gets a good title after his two year period, that is free of all sewer tax liens of this kind.

I understand of course that this person who holds the sewer tax lien has an interest in such property and could redeem the same but upon his failure to do so has his tax been cut out?"

Under Section 6994, Article VIII, Chapter 38, R. S. Mo. 1929, providing for the assessment and levy of taxes for a city of the fourth class, it is provided that:

"A lien is hereby created in favor of such city against any lots or tracts of land for any such tract assessed by such city against the same, which said lien shall be superior to all other liens or encumbrances except the lien of the state for state, county or school taxes."

Section 7032 of the same chapter provides for the creation of sewerage districts in cities of the fourth class and the levy and assessment of a special tax by ordinance against such lot or tract of land within the district in the name of the owners thereof and for the issuance by the clerk of a certified tax bill under the seal of the city to be signed by the mayor and attested and recorded by the city clerk and to be delivered to the contractor for the work, who shall proceed to collect the same by the ordinary process of law in the name of the city to his own use. Said Section reads in part as follows:

"Provided however, that if any installment is not paid when the same becomes due the remaining unpaid installments shall, at the option of the holder of the tax-bill, become immediately due and payable. Every such certified tax-bill whether the same be made payable in installments or not, shall bear interest at the rate of eight per centum per annum from thirty days after the date of issue until paid, and shall be a special lien against the property described therein for a period of five years from its date, except when made payable in installments, when the special lien shall for a period of one year after the date of the last installment payment shall become due. Every such certified tax-bill shall on action brought to recover the amount thereof be prima facie evidence of the validity of the charges against the property therein described and of the liability

of the person or persons therein named as the owner or owners of such property. (R. S. 1919, Sec. 8483. Amended, Laws 1921, p. 503.)

In the case of Missouri Real Estate and Loan Company vs. Burrie, 202 Mo. App., page 242, l.c. 244, in passing on the question as to whether the lien of a subsequent general city tax lien is superior to the lien of a prior special tax bill issued by the city for public improvements, the court said:

"It must be conceded that a general tax which has primarily for its object the support of the government whereby the government may exist, and lives and property may be protected and the pursuit of happiness guaranteed, is of great dignity and more importance than a tax bill issued for public improvements. It is true that a general tax is frequently levied for public improvements. But it is not feasible to levy a special tax, of the nature here involved, for what we understand to be meant by the expression, 'support of the government.' We can subsist without the special tax but no civilized government could be organized and maintained without the general tax. So we conclude that the general tax being first in vital importance should be allowed first place in the means of payment.

" * * * * The Jaicks case was decided by this court, but certified to the Supreme Court by reason for one conclusion being contrary to that of the St. Louis court of Appeals found in 150 Mo. App. 188. The Supreme Court took our view as expressed by Trimble, J., who wrote the opinion. In that case (264 Mo. p. 700) Judge Trimble

said that: 'It is true, general taxes are levied for the support of the government and in that sense general taxes are the more important of the two and ought to take precedence over special taxes, so that the lien of a general tax ought to be prior to a special tax, even though the latter be prior in point of time.'

"So it was said in McCullum v. Uhl, 128 Ind. 304, 308, that: 'The lien of the State for taxes is paramount and is superior to the lien of the ditch assessment.' In State v. Kilburn, 81 Conn. 9, it was held that a special sewer tax assessment by a city could not be given preference over a prior school fund mortgage authorized by the State. At the close of the opinion (p. 13) the court in referring to special assessments, said: 'They are imposed by authority of the State, and by a political agency of the State, which, so far forth, participates in the exercise of its sovereignty. But because a city to that extent shares in the privilege of a sovereign to command a preference over ordinary creditors, it does not follow that it can command it as against the sovereign itself.'"

Section 9952a, Senate Bill 94 (Laws of Mo. 1933, p. 425-449) provides in part as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming

an interest in or to any of said lands
or lots in the notice of such sale;

* * * * *

A reading of the above section shows that it is not now necessary when the State's lien is foreclosed to apprise the owner or any person having a lien or interest in said land. This is radically different from the suit previously brought in the circuit court which extinguished any and all liens if such were parties to the suit. Little River Drainage District v. Sheppard, 7 S. W. (2d) 1013.

When land is sold under Section 9953a of said law for delinquent and unpaid taxes the county collector gives to the highest bidder a certificate of purchase. The purchaser of said certificate may get possession of the premises one year after date of sale, by virtue of Section 9954a, and at the expiration of two years if the property has not been redeemed it is conveyed to the holder of the certificate of purchase by the county collector by a form of conveyance which is "prima facie evidence of a good and valid title in fee simple." Section 9957a.

Section 9956a provides in part as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: * * * * *

By Senate Bill 94 we thus have a complete scheme for the foreclosing of the State's lien, and specifically gives the right of redemption to any owner or person having an interest therein in said land to redeem same within two years. After a lapse of two years, upon application of the holder of a certificate of purchase, a title in fee simple is given by the county collector.

While you ask the question as to the extinguishing of the lien for delinquent sewerage district taxes by virtue of the sale of such land by the county collector, yet, your question is divis-

ible into two parts: (1) Is the lien extinguished at the time the certificate of purchase is issued, or (2) is the lien extinguished at the time the county collector gives a deed two years after the certificate of purchase?

As Senate Bill 94 was enacted in 1933 we have been unable to find any case that has been adjudicated by the court which is determinative of the question and supporting our conclusion. However, prior to the enactment of Senate Bill 94 many cases were decided by the court on the question involved. In *Little River Drainage District v. Sheppard*, 7 S. W. (2d) 1013, the court said (p. 1014):

"The lien for state and county tax shall be paramount. The statute does not say that it shall necessarily destroy the district lien for special taxes. The plaintiff district, according to the stipulation and finding of the trial court, was not made a party to this proceeding. No person or corporation can be affected by a proceeding to which he or it was not made a party, and that applies to tax suits. For instance, the state's lien for taxes is superior to a prior mortgage lien, and a sale under such tax lien conveys title to the purchaser but does not affect the mortgagee's right to redeem."

In said suit the court held that because the drainage district was not made a party to the tax suit that said suit would not have the effect of extinguishing or satisfying the drainage district's lien. However, the court made this pointed observation (p. 1014):

"If the district had been made a party to the proceeding with an opportunity to meet and pay the general taxes at the time, a different question would be presented for consideration."

Also, in *McAnally v. Little River Drainage Dist. et al.*,

28 S. W. (2d) 650, the Supreme Court of Missouri, en banc, made this remark:

"Since the ruling in Little River Drainage District v. Sheppard, 320 Mo. 341, 7 S. W. (2d) 1013, respondents concede they lost their lien for delinquent annual installments levied prior to the levy and subsequent sale of the land in question for state and county taxes for the year 1926."

In the case of Dyer vs. Harper 336 Mo. 52, an opinion was rendered on December 1, 1934, it being after the passage of Senate Bill 94, but based upon the 1929 statutes. On page 56 the court said:

"The lien created by the judgment for state, county and school taxes was superior to the lien for drainage taxes. In the suit to enforce the collection of state, county and school taxes the Big Creek Drainage District No. 2 was not made party, and therefore its lien was not destroyed by a sale under such a judgment. At a sale under a judgment for drainage taxes, the purchaser would acquire the right to redeem in an action against the holder of the tax title, by making a proper tender of the amount due the holder of the tax title. (Little Drainage District v. Sheppard, 320 Mo. 341, 7 S. W. (2d) 1013.)

Section 9952a of Senate Bill 94 provided that it was not necessary to include the name of any person claiming an interest in and to the lands in the notice of sale. Section 9956a thereof gave such party the right of redemption within two years following the sale and Section 9960c gave lien holders the right to pay taxes and obtain an additional lien therefor. Section 9957 thereof imposed upon such person the burden of

January 27, 1938

exercising such rights under said statutes within two years from the date of sale or be barred when the certificate holder received the deed, "which shall vest in the grantee an absolute estate in fee simple".

CONCLUSION

It is, therefore, the opinion of this department that the liens for a sewerage district in a city of the fourth class do not become extinguished at the time the certificate of purchase is delivered because of the provisions of Section 9956a for redemption.

It is our further opinion that when the deed is delivered by virtue of Section 9957a, the sewerage district liens in such city become extinguished and satisfied insofar as such liens apply to the period prior to the issuing of certificate of purchase.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

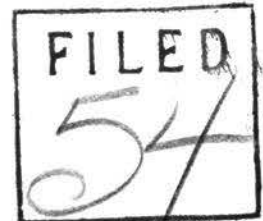
J. E. TAYLOR
(Acting) Attorney General

SVM:RT

ELECTIONS: Declaration which fails to state township in which candidate for J.P. desires to run in primary is insufficient.

June 8, 1938

6-15



Hon. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This will acknowledge receipt of your letter of June 4, 1938, requesting an opinion as follows:

"The office of the County Clerk of this County closed at five o'clock Friday, June 3rd. Between the hours of 5:00 P.M. and 6:00 P.M. Friday, June 3rd a written statement was slipped under his door. Following is a copy of such statement.

Louisiana, Mo. June 3 - 1938

I hereby declare myself a candidate for Justice of the Peace on the Democrat ticket and if elected will qualify for same.

John S. Capps, 114½ N Main Street
Louisiana, Mo.
Pike Co., Mo.

This statement was in a plain envelope and was addressed as follows:

To County Clerk
Pike County
Bowling Green, Mo.
Buffalo, J.P.

Louisiana is in Buffalo Township of this County. Please advise me whether or not this man has properly filed."

Your letter presents three questions - all of which bear on the validity of this declaration. These are: (1) Is a candidate for Justice of the Peace in a county not under township organization excepted from paying to the County Central Committee of his political faith the sum of money required of certain candidates in Section 10258, R.S. Missouri, 1929, and filing his receipt for said money with his declaration? (2) Is slipping the declaration under the county clerk's office door, within the required time, a sufficient filing thereof? (3) Is this declaration sufficient in itself, and may the envelope in which it was enclosed be considered a part of the declaration?

We shall consider the last question first.

Section 10257, R.S. Missouri, 1929, is as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form: *"

In State ex rel. v. Swanger, 212 Mo. 472, the Supreme Court of Missouri considered and determined the effect of a failure to follow the statutes then in force with respect to nominations. This failure was in the affidavit of a qualified elector required to be appended to the nomination paper. The statute required, among other things, that said affidavit shall state that the respective residences of each signer of the nomination paper are stated therein. It was this provision of the statute which the elector's affidavit failed to follow. The court held that such failure was not fatal to the nomination and said at l.c. 477:

** * the State Primary Act being highly remedial and not in contravention of the common law, under canonized rules of construction its provisions should be liberally construed to further and give force to its beneficent life and purpose in advancing the remedy provided and retarding the mischief struck at. The rigor of very strict compliance with the minutiae of directory provisions (such as this) of the Primary Act is not to be exacted at the hands of the plain citizens unskilled in technical percision who are called upon to initiate action under the primary law, unless vehement call is made therefor by the act. The mind of the judicial interpreter of such a law must not be narrow and on the qui vive for flaws or it will stumble; and, absent the oil of common-sense construction, the new and untried machinery of the law will break down and its technical burdens prove its utter undoing. Many instances readily recur of the application of the doctrine of the sufficiency of substantial compliance as against very strict compliance."

The nomination paper in this instance actually contained the names and addresses of each signer.

The effect of the holding in this case is that the provision of primary election statutes (Section 10257, supra, is such) must be given a liberal construction and that substantial compliance is sufficient "unless vehement call is made (for strict compliance) by the act".

In Ex Parte Brown, 297 S.W., l.c. 447, it is stated:

"When a fair interpretation of a statute which directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provision

to be essential to the validity of the act or proceeding, then such statute is mandatory."

Section 10257, supra, requires of candidates certain things. These are (1) Filing his written declaration at least sixty days before the primary, which declaration shall, (2) state his full name, (3) residence, (4) office for which he proposes as a candidate, (5) his party, (6) and that if elected, he will qualify.

There can be no doubt but that the first five of the above are absolutely essential. The purpose of said declaration is to enable the county clerk to correctly include the candidate's name and the office he is contending for on the proper party ballot. Without this information, the county clerk cannot intelligently prepare the ballot. Further, the statute provides that, "the name of no candidate shall be printed upon any official ballot", unless he comply with the statute.

Thus, we have the statute vehemently calling for said information and providing the result if it is not forthcoming, and must construe said statute, insofar as it pertains to these provisions, as mandatory and as calling for strict compliance.

The declaration before us is faulty in at least one particular in that it does not state the office for which the declarant desires to become a candidate. It merely states that he declares "himself to be a candidate for Justice of the Peace". The envelope containing said declaration attempts to supply the missing information, having thereon "Buffalo J.P.", thus indicating that declarant desires to become a candidate for Justice of the Peace of the Municipal Township of Buffalo.

Unless this saves the declaration, it is faulty on this ground alone, and declarant is not entitled to have his name printed on the official primary ballot.

In *Hunter v. United States*, 134 Fed. 361, 362, it is stated:

"The Standard Dictionary defines 'envelope' as 'a case or wrapper, usually of paper, with gummed edges

for sealing, in which a letter or like may be sent through the mail or inclosed for any purpose."

In United States v. Huggett, 40 Fed. 636, 640, it is stated:

"'Envelope' might be conceded to mean the outside surface of a letter not enclosed in a jacket or like covering known as 'envelopes'."

The envelope covering this declaration, applying the above by analogy, is no part of the declaration, but is only the wrapper used to shield the contents from all except the addressee. The statute (Section 10257) contemplates that the information required of the candidate be given over his own signature. That which is on the envelope is not thus given and it can hardly be contended that if declarant had failed to sign his declaration, he would be entitled to have his name on the ballot. That which is on the envelope then is not over the declarant's signature and stands in the same position as the whole declaration would if unsigned.

Thus, for two cogent reasons, the envelope cannot be considered as part of the declaration to supply the necessary information.

Having reached this conclusion as to the sufficiency of the declaration itself, there is no need to consider the other questions involved. However, to avoid any confusion, we will say that the first question is to be answered in the affirmative. Carpenter v. Roth, 192 Mo. 658.

CONCLUSION

Therefore, it is the opinion of this department that the failure of a candidate for Justice of the Peace to state in his declaration the particular municipal township

Hon. Edward V. Long

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June 8, 1938

in which he desires to become a candidate is fatal to his declaration, and the county clerk should not cause his name to be printed on the official primary ballot.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

CITIES: Cities of the fourth class must publish financial statement in legal publication.

July 5, 1938

7-5



Mr. A.E. Long
City Clerk
Rolla, Missouri

Dear Sir:

This will acknowledge receipt of your letter of June 24, 1938, requesting an opinion upon the following question: May the city financial statement be published in the Rolla Advertiser, a free-circulation paper, or must the same be published in a newspaper complying with the provisions of Section 13775, Laws of 1937, page 432?

Section 13775 provides in part as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the postoffice as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time."

This section requires all public advertisements and orders of publication required by law to be made must be published in a newspaper complying with the provisions of said section.

Mr. A.E. Long

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July 5, 1938

From your letter, it is apparent that the Rolla Advertiser is not a legal publication within the terms of this statute, because it does not have a list of bona fide subscribers who have paid or agreed to pay a stated price for a subscription for a definite period of time.

Section 6965, R.S. Missouri, 1929, requires that the Board of Aldermen in cities of the fourth class shall semi-annually publish a statement of the receipts, expenditures and indebtedness of said cities. Thus, a financial statement is one required by law to be made and must be published in a newspaper which conforms to the provisions of Section 13775, Laws of 1937, page 432.

CONCLUSION

Therefore, it is the opinion of this department that the statement required to be published in cities of the fourth class by Section 6965, R.S. Missouri, 1929, must be published in a newspaper which fully complies with Section 13775, Laws of 1937, page 432.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

SHERIFFS: Section 11791 R.S. Missouri 1929, construed as to when a person is in custody of sheriff undergoing examination preparatory to his commitment; Sheriff entitled to \$1.25 per day for his services and \$1.25 per day for the board of such persons, provided the number of days shall exceed one.

September 9, 1938

Mr. A.H. Lock
Circuit Clerk
Osage County
Linn, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion from this Department, which request is as follows:

"In preparing criminal cost bills for submission to the County Court of Osage County and to the State Auditors Office, the following proposition arises:

An affidavit is filed before a Justice of the Peace and a State Warrant issued to the Sheriff. The Sheriff goes out and arrests the defendant and brings him to the County Jail and locks him up and then forthwith goes to the Justice of the Peace and informs him that the defendant has been arrested and is in jail. The Justice of the Peace says that he will see the Prosecuting Attorney and arrange for a day for a preliminary hearing. The Prosecuting Attorney is not at hand and when he comes around the Justice of the Peace is not at hand and so in one way and another several days drag by before any action whatever is taken in the case. Then a date is set for the hearing and the Sheriff continues to keep the prisoner in jail until the date of hearing. After the hearing a commitment is issued and the prisoner thereafter held by virtue of the commitment. Prior to the preliminary examination no commitment is issued and the prisoner is held by the sheriff by virtue of the State Warrant pending the preliminary examination.

September 9, 1938

The sheriff claims that he is entitled to the fee of \$1.25 per day for custody of prisoner during the time that he is required to hold the prisoner under the warrant and prior to the time the commitment is issued. We would like to know whether or not this is a proper charge. If the Sheriff is entitled to it we would like to see him have it and at the same time if he is not entitled to it, we do not want to certify an item of cost that is not proper.

No doubt the proper procedure would be for the magistrate to determine at once, when the prisoner is brought in just what day the preliminary examination can be held and thereupon to issue a commitment to the sheriff committing the prisoner to jail until that date to await examination. But that is not done and through no fault of the Sheriff no commitment is issued and the prisoner is retained by the Sheriff under the warrant until the date of the preliminary.

The statute under which the Sheriff claims that he is entitled to \$1.25 per day for custody of the prisoner is Section 11791, R.S. 1929.

The case of State ex rel. vs. Allen, 187 Mo. 560, supports the proposition that the Sheriff should be allowed this fee. See also State ex rel. vs. Dickmann, 170 Mo. 67; State vs. Wofford, 116 Mo. 220; Thomas vs. St. Louis County, 61 Mo. 547. From these cases we are under the impression that the charge is a proper one, but we would like to have the question passed on by your department before certifying the fee bills.

In this case, after the warrant was issued and the defendant arrested no entry was made in the docket of the Justice of the Peace committing the prisoner, nor was any commitment issued. The prisoner was held by virtue of the warrant until the day of the preliminary.

Also, if the Sheriff is entitled to the sum of \$1.25 per day for custody of the prisoner during that period is he also entitled to collect from the County the sum of 75 cents per day for board of the prisoner during the same days."

I.

The portion of Section 11791 R.S. Missouri 1929, which applies to your first question reads as follows:

"The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe-keeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents

per mile for every mile necessarily traveled in going to and returning from one county to another, and the guard employed, who shall in no event exceed the number allowed the sheriff, marshal or other officer in transporting convicts to the penitentiary, shall be allowed the same compensation as the officer."

Your first question requires an answer to this question, "When is a person, against whom a complaint charging him with a felony has been filed, in the custody or under the charge of the Sheriff undergoing an examination preparatory to his commitment?"

Section 3467 R.S. Missouri 1929, reads as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law." (Underscoring ours)

Section 3468 R.S. Missouri 1929, reads as follows:

"If the offense charged is a bailable one, the magistrate who issued the warrant shall, at the request of the person arrested, take from him a recognizance in such sum as may seem to be sufficient and proper, with sufficient sureties for his appearance at the next term of the court having jurisdiction of the offense."

Section 3473 R.S. Missouri 1929, reads as follows:

"The magistrate before whom any such person shall be brought shall proceed, as soon as may be, to examine the complainant and witnesses produced in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offense charged, and other matters connected with such charge which such magistrate may deem pertinent."

Section 3474 R.S. Missouri 1929, reads as follows:

"A magistrate may adjourn an examination of a prisoner pending before himself, from time to time as occasion requires, not exceeding ten days at one time, and to the same or any different place in the county, as he deems necessary; and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause shown by said prisoner, said magistrate shall allow such an adjournment on the motion of the prisoner. In the meantime, if the party is charged with an offense not bailable, he shall be committed; otherwise he may be recognized, in a sum and with sureties to the satisfaction of the magistrate, for his appearance for such further examination, and not to depart without leave of said court, and for want of such recognizance he shall be committed."

Section 3476 R.S. Missouri 1929, reads as follows:

"When such person fails to recognize, he may be committed to prison by an order under the hand of the magistrate, stating concisely that he is committed for further examination on a future day, to be named in the order, and on the day appointed he may be brought before the magistrate, by his verbal order to the officer who made the commitment, or by his order in writing to a different person."

We have set forth the foregoing statutes to show what the procedure is in a case such as you outline in your letter of inquiry. It will be seen that the warrant delivered to the sheriff upon the filing of a complaint charging a person with a felony commands the sheriff forthwith to take the accused and bring him before the justice. The sheriff's duties are clear. When the accused is brought before the justice, the justice should proceed with the examination forthwith or should set a date for the examination, and at the same time the justice should, if the offense is bailable, take a recognizance from the accused for his appearance at the time of such examination. If the offense is not bailable or if the accused fails to furnish proper sureties, the justice should commit the accused to jail to await the examination. Of course, if the accused is willing that the examination proceed upon his being arrested and brought before the justice, the justice would proceed with the examination and either discharge the accused or order him held to answer charges in the court having jurisdiction to hear and determine the offense charged. Likewise, in the latter case, if the offense is bailable, the justice should take a recognizance from the accused in accordance with Section 3486 R.S. Missouri 1929. If the offense is not bailable, or if sufficient bail is not offered, the accused should be committed to jail to await trial in the Court having jurisdiction to try the case.

September 9, 1938

The question therefore is "during what part of the foregoing proceedings is the accused in the custody of and under the charge of the sheriff within the meaning of Section 11791?"

That part of Section 11791 under discussion has been before the Court several times but in each case the facts were different from the other cases, and in all of the cases the facts were different from the facts submitted in your letter.

In the case of Thomas vs. County of St. Louis, 61 Mo. 547, the marshal of St. Louis County was claiming that where he arrested a person under a capias and that person failed to give bail and he placed him in jail he was entitled to One Dollar for committing the person to jail in addition to the fees for arrest. In the course of the opinion the Court said, l. c. 548:

"It is the duty of a sheriff acting under a capias to arrest and safely keep the person therein named, and to have the body of such person when and where he shall be commanded by such writ; and the statute makes it the duty of all jailors to receive from the sheriff or other officers all persons who shall be apprehended by them for offences against this State. When a prisoner is arrested under a capias, he is held thereunder until he has been either bailed, committed or discharged; and until such prisoner is either bailed, committed or discharged, any imprisonment of him in the county jail is at the discretion and for the protection of the officer executing the writ, as well as to secure the body of such prisoner, and is not a committing of such person to jail, within the meaning of the statute; and for the safe-keeping of any person in his custody undergoing an examination preparatory to commitment, he is entitled to a per diem allowance, where the number of days such person is so held exceeds one. (Wagn. Stat. 626, Sec. 14.)"

It is to be noted that in the foregoing case the Court said "When a prisoner is arrested under a capias, he is held thereunder until he has been either bailed, committed or discharged; and until such prisoner is either bailed, committed or discharged, any imprisonment of him in the county jail is at the discretion and for the protection of the officer executing the writ, as well as to secure the body." At first blush this might appear to mean that the prisoner is held under the warrant until the preliminary is over, and during all that time he is held in the custody of the sheriff. However, the statutes heretofore quoted require that the sheriff take the prisoner forthwith to the magistrate who issued the warrant and that the magistrate should either hold the examination then or continue same to a future day and either commit the prisoner to jail to await the hearing or take his recognizance for his appearance at such future examination. Therefore, if the proper steps are taken after the arrest of a person charged with a felony he would be bailed, committed or discharged, upon his being brought before the magistrate who issued the warrant.

In view of the procedure just outlined we do not think the language in the foregoing case can be construed to mean that the prisoner is in the custody of the sheriff under the capias from the time he is arrested until the preliminary examination is over with in cases where the preliminary is set over to future dates, and especially is this true when that point was not being definitely passed upon by the Court in the foregoing case.

In the case of State vs. Wofford, 116 Mo. 220, a person against whom a complaint had been filed was arrested and brought before the justice who had issued the warrant. When he was brought before the justice his examination was set over to a future date and he was committed to jail to await trial. The examination was continued from time to time thereafter and the charge was finally dismissed. The marshal and jailer of Jackson County undertook to charge \$1.25 per day from the time the prisoner

was arrested until the case was dismissed on the theory that the accused was in his custody and under his charge undergoing an examination preparatory to his commitment during all that time. In the course of the opinion the Court said, l. c. 224:

"After this order was made and the cause continued, the prisoner was not undergoing an examination within the meaning of that provision of the statute which allows to sheriffs, marshals and other officers \$1.25 per day, for every day he may have a prisoner under his charge undergoing an examination. If the order of commitment was complied with the prisoner was then within the prison walls, and the statute has no application to such case."

And again, l. c. 226, the Court said:

"It is difficult to perceive how the prisoner could have been undergoing an examination, while confined in jail during the intermission of the continuances of the case. To entitle the relator to the fee claimed he must have had the prisoner under his charge as marshal while undergoing examination, and the mere fact that he was in his custody as jailor does not entitle him to it, for during such time it is impossible that he could have been undergoing an examination which required his presence in court."

In the case of State ex rel. vs. Clark, 170 Mo. 67, the fees in question were again before the court. In that case the Sheriff of St. Louis had arrested a man under a warrant on October 30th, after the Court out of which the warrant had issued had adjourned for the day. On the following

day, October 31st, the Sheriff produced the prisoner before the Court and he was then committed to await trial. The sheriff claimed \$1.25 for each of the two days he held the prisoner before he was committed. The only defense to the claim was that the sheriff had kept the prisoner, during the time he had him in his custody, in a jail furnished by the City of St. Louis, and that police paid by the City guarded the jail. The Court allowed the fees for the two days. In the discussion of the case the Court referred to the case of State vs. Wofford, supra, and said, l. c. 78:

"The relator in that case clearly failed to bring himself within the terms of the statute relied on and, therefore, was properly denied the fees claimed. This case is, therefore, in perfect harmony with Thomas vs. County of St. Louis, supra, and is essentially different from the case at bar, in this, that in this case the officer executed the capias on October 30, 1901, the court had adjourned for the day and the judge had gone, so the prisoner could not be brought before the court on that day. The relator was, therefore, charged with the duty and responsibility of safely keeping the prisoner until the next day, October 31st, when he was produced in court, his examination proceeded with and completed, and he was then by the court committed to jail to await trial, and was afterwards tried and found guilty. Thus the prisoner was in the custody of the relator, as sheriff of the city of St. Louis, on October 30th and 31st, 'while undergoing an examination preparatory to his commitment.' The relator is, therefore, clearly within the provisions of the statute and is entitled to the fees

claimed, two dollars and a half, unless he has lost or been deprived of those statutory fees, by reason of the city paying for the police, and furnishing a calaboose for the police, one part of which is set apart for the sheriff's prisoners, who while in such calaboose are guarded and kept by the police."

It will be noted that in the foregoing case the Court said that the court which issued the warrant had adjourned on the 30th, at the time of the arrest, so that the prisoner could not be brought in court on that day, and that the sheriff was therefore bound to hold him until the next day. We think that this case clearly implies that the sheriff must take the prisoner to the court issuing the warrant just as soon as he can, and that from the time he arrests the prisoner to the time the prisoner is produced before the magistrate, the prisoner is "in his custody and under his charge while undergoing an examination preparatory to his commitment."

In the latter case of State ex rel. vs. Allen, 187 Mo. 560, the Court in passing upon what the holding was in the case of State ex rel. vs. Clark, supra, said, l. c. 563:

"It was held in that case that until the court ordered the prisoner committed to jail to await an examination by the committing magistrate or to await the action of the grand jury, the prisoner was in the sheriff's custody, and therefore, the sheriff's claim for the fees charged fell within the letter of the statute allowing one dollar and twenty-five cents per day to the sheriff for keeping the prisoner 'while undergoing an examination preparatory to his commitment.' (Sec. 3248 R.S. 1899.)"

September 9, 1938

We believe that the holding as gleaned from all the above cases is as stated in State ex rel. vs. Allen, supra, which in effect is that between the time of an arrest upon a warrant issued by a magistrate upon a complaint charging a felony, and the time the prisoner is produced before such magistrate, such prisoner is in the custody of and under the charge of the officer while undergoing an examination preparatory to his commitment.

The foregoing rule is based upon the assumption, however, that the statutes governing such cases are complied with. In the case you inquire about, the sheriff clearly did not do what the law and the warrant directed him to do. Had he taken the prisoner directly to the justice as he should have done, the prisoner would have been either bailed, committed or discharged forthwith. Up to that time he would have been entitled to \$1.25 per day if more than one day necessarily elapsed. However, we do not think that the sheriff by not following the law can extend the time during which the fee of \$1.25 applies. If such were the case, it would be to the advantage of the sheriff to delay producing the prisoner before the justice. You say in your letter that through no fault of the sheriff the preliminary trial was delayed. However, if the sheriff produces the prisoner before the justice forthwith, upon his arrest, the justice will either hold the examination, admit the prisoner to bail or commit him for further examination. Compensation allowed public officers is for performance of their duties and not for failure to perform such duties.

The fee being considered is evidently provided for the safekeeping of the prisoner between the time of his arrest and the time the justice either disposes of him upon an immediate examination or commits him to jail or recognizes him to appear at a further examination. For instance, if an arrest is made late on Saturday the sheriff cannot produce the prisoner before the justice before the Monday following and during that time he would be charged with the safekeeping of the prisoner for which he would be entitled to \$1.25 per day. It might then occur that on Monday the examination would be started and that would last a day or so, in which case the fee of \$1.25 would be due the sheriff from the time of the arrest up to the time the examination was concluded.

CONCLUSION

It is therefore the opinion of this Department that the sheriff who arrested a person under a warrant issued by the justice of the peace upon a complaint charging such person with a felony should take such prisoner forthwith before the magistrate who issued the warrant to be there dealt with according to law. If the magistrate proceeds at once with the examination then the sheriff is entitled to \$1.25 per day for the safekeeping of the prisoner for the time intervening between the arrest and the time the examination is concluded, provided more than one day intervenes. If the magistrate does not proceed at once with the examination but continues same to a future date, then, of course, the prisoner will either be committed or recognized to await the examination at a future time, in which event the sheriff would be entitled to \$1.25 per day for the safekeeping of the prisoner from the time of the arrest to the time of the order committing him to jail or admitting him to bail, provided more than one day elapsed between said times.

II.

The second part of your question seeks an opinion as to what is the proper allowance for board of a prisoner during the time the sheriff is entitled to the One dollar and twenty-five cents per day as set forth in the first part of this opinion. In other words, what is the proper amount to be allowed for the board of a prisoner in custody of the sheriff while undergoing an examination preparatory to commitment.

Section 11794 R.S. Missouri 1929, reads as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

The foregoing section is a general statute providing for allowance for board of prisoners. However, that part of Section 11791, supra, which pertains to the particular class of prisoners being considered in this opinion, to-wit, prisoners in custody of an officer while undergoing an examination preparatory to their commitment, provides as follows:

"The sheriff or other officer who shall * * * have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe-keeping and maintaining any such person, shall be allowed * * * one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, * * *. One dollar and twenty-five cents per day, mileage same as officer, shall be allowed for board and all other expenses of each prisoner."

The compensation allowed the sheriff for "transporting, safekeeping and maintaining" the accused is One dollar and twenty-five cents for every day he may have such person under his charge, when the number of days exceeds one. This compensation is for the sheriff for his services. On a casual reading the word "maintaining" might be taken to mean "provide support for", and therefore the fee of One dollar and twenty-five cents mentioned would thereby include pay for the sheriff's services and the board of the prisoner. However, the word "maintain" has several meanings. For instance, Webster's New International Dictionary gives one definition of "maintain" as follows:

"To keep possession of; to hold and defend; not to surrender or relinquish."

The meaning of the word "maintain" depends upon the context where it is used. After providing for the compensation of the sheriff in such cases, Section 11791, supra, provides:

"One dollar and twenty-five cents per day, * * * shall be allowed for board and all other expenses of each prisoner."

Here then is a special provision for board of the particular prisoners undergoing examination preparatory to commitment. It is separate from the compensation allowed the sheriff for his services in safekeeping the prisoners. The Supreme Court has held that the compensation of \$1.25 provided for the sheriff in such cases is separate from the allowance for mileage and board of the prisoners. In the case of State ex rel. vs. Clark, 170 Mo. l. c. 76, 77, the Court said:

"The rule there announced that an officer is entitled to the statutory allowance per diem for the safe-keeping of any person in his custody while undergoing an examination preparatory to commitment, where the number of days such person is so held exceeds one, has ever since been regarded as the correct interpretation of the statute. This is wholly separate from the statutory allowance for the mileage and sum allowed for the board of the prisoner. It is the compensation allowed the sheriff for the care, expense and risk incident to the safe-keeping of the prisoner."

It will be seen therefore that in the case of the particular prisoners under discussion there is a special provision for their board and other expense of \$1.25 per day. Section 11791 is a special statute insofar as the board of these particular prisoners is concerned, and therefore is to be construed as prevailing over the general statute governing board of prisoners, under the well known rule of construction that where special and general statutes relate to the same subject matter, the special statute will prevail as far as the particular subject matter comes within its provisions. (State ex rel. vs. Smith, 67 S.W. (2) 50).

September 9, 1938

CONCLUSION

It is therefore the opinion of this office that a sheriff who has in his custody a person undergoing an examination preparatory to his commitment more than one day, is entitled to One dollar and twenty-five cents per day for the board and other expenses of such person, in addition to the fee of One dollar and twenty-five cents allowed the sheriff for the safe-keeping of such person.

Respectfully submitted,

HARRY H. KAY,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:MM

COUNTY COURTS:
COUNTY FAIRS -
PURCHASE OF LANDS, ERECTION
OF BUILDINGS AND APPROPRIATIONS
OF MONEY FOR:

County Court may purchase lands, erect
buildings and appropriate public funds
to county fair associations by following
the procedure set out in Section 12490,
RSMo 1929, and Sections 12508 and 12509,
Laws of Missouri 1931, page 133.

September 16, 1938 9/19

Honorable Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Sir:

In compliance with your telephone conversation, we are submitting an opinion on the following questions:

- "1. Whether or not the County Court of Pike County has power to use funds to purchase land and to construct buildings thereon to be used for fair purposes.
2. Does the County Court have the authority to make a contribution out of county funds to a non-profit corporation engaged in holding and operating fairs?"

In approaching your question, we are not unmindful of the limitation of the powers of the county courts when they are performing public duties.

In the case of Bayless v. Gibbs, 251 Mo. 492, 1. c. 506, in speaking of the limitations of such powers, the court said:

"This court, in numerous cases, has repeatedly held, that the county courts of the respective counties of the State are not the general agents of the

counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void."

As to the authority of a county court to use county funds to purchase land and construct buildings thereon to be used for county fair purposes, and as to the authority of such court to appropriate public funds to a non-profit fair association, the only statutes we find giving the court such authority are as follows:

Section 12490, R. S. Mo. 1929, provides as follows:

"The county court of any county in which there shall be a regularly organized county agricultural and mechanical society, county fair, county corn growers' association, county poultry association, county stock growers' association, or any other organization or incorporated society having for its object the holding of county fairs or the advancement of agriculture or its allied industries may, if it be deemed expedient, appropriate out of the county treasury for the benefit of any such society a sum not exceeding three hundred dollars in any one year; and the money so appropriated shall be drawn by the treasurer of the society on proper warrant: Provided, said money shall be awarded by the board of directors or other proper officials in premiums or expended by them in the purchase of premiums, to be known as 'the _____ county court premiums,' to be awarded according to the rules,

regulations and by-laws of the society: Provided further, that in all counties in this state having seventy thousand inhabitants or more, the county court of such county may, if it be deemed expedient, appropriate out of the county treasury, for the benefit of any such society, a sum not exceeding one thousand dollars, to be used as in this section above set out, or in any other manner that said board of directors may deem best."

By this section the court is only authorized to appropriate a sum not exceeding three hundred dollars to the fair associations named therein. No authority is granted by this section to purchase land or to erect buildings for such associations.

However, by Sections 12508 and 12509, Laws of Missouri, 1931, page 133, the county courts are given more authority in respect to aiding fair associations than is given by Section 12490, supra. These sections are as follows:

"Sec. 12508. That in all counties of this state in which the constitutional limit is not levied for county purposes, it shall be the duty of the county court, upon the filing of a petition signed by not less than 300 resident taxpayers and qualified electors of such county, to call an election to submit to the qualified voters thereof, a special levy of not more than two mills and not less than one-third mill on the dollar (\$1.00) valuation, which levy, together with all other levies for county purposes, shall not exceed the constitutional limit of levy for the county affected, for the purpose of encouraging, promoting and improving the live stock, poultry, agricultural, horticultural, mechanical fabrics and fine arts, products and articles of domestic industry, and the

exhibition of such stock, poultry articles and commodities, at the district or county fair held in such county. If a majority of the voters voting at said election shall be in favor of such proposition, then it shall be the duty of the county court at its next regular term thereafter to make said levy, one-half of which levy shall be set aside by the county court and distributed ratably to the exhibitors of the oldest district or county fair held in said county, for the purpose of paying premiums to exhibitors of the articles and commodities in sections 12508 to 12512, inclusive; the other one-half of which levy may, in the judgment and discretion of the court, be used for the purpose of purchasing grounds and/or erecting suitable building for such fair purposes; but if grounds for said purposes are owned by the county, or be leased or otherwise secured or obtained for such uses, then such other one-half of such funds may be used by the court in erecting such building; and if it be the discretion and judgment of the court that said other one-half of said levy be not used for such grounds or buildings, then the whole of the levy may be used for paying such premiums: Provided, however, that if such petition for such an election ask that one-half of such levy be devoted to the acquiring of such lands and/or erecting of such buildings, then the proposition submitted shall contain provision for such devotion; and if such majority favor such proposition, then it shall be the duty of said court so to expend and use the proceeds of such one-half of said levy. The surplus remaining out of the proceeds of any levy made under sections 12508 to 12512, inclusive, in any year, shall in the hands of the county treasurer constitute a fund

for the purposes of sections 12508 to 12512, inclusive, and may be used either as premiums offered or advertising for exhibits to be made under any provision of sections 12508 to 12512, inclusive."

"Sec. 12509. It shall also be the duty of the county court in every such county to apportion the proceeds of the levy made pursuant to section 12508 hereof, and in accordance with the provisions of said section 12508, among the several objects and subjects in said section 12508 mentioned, and to offer suitable premiums in each class thereof to the full amount available from said levy. All such premiums shall be offered for exhibits made at the largest and oldest public fair held in such county, such exhibits shall be in place at such fair at least twenty-four hours before the opening thereof to the public, and remain in place until midnight of the last day of such fair."

By this section, one-half of the levy authorized is to be used to pay premiums of the fair and the other one-half for purchasing grounds and/or erecting suitable buildings. However, if the county owns, leases or otherwise obtains lands suitable for fair purposes, then it may use said one-half of the tax for the erecting of buildings for fair purposes. This section makes it discretionary with the county court whether or not it will use one-half of the levy for grounds and/or erecting buildings unless the petition for the submission of the proposition to vote the levy provides that one-half of said levy be used for lands and/or the erection of buildings, in which case the county court must use one-half of the levy for lands and/or erecting buildings.

September 16, 1938

CONCLUSION

From the foregoing, we are of the opinion that the county court may appropriate money from available funds in the county treasury not exceeding three hundred dollars in any one year for the premiums or to be expended for premiums, to be known as "_____ county premiums." Such appropriation should be made to the board of directors or other proper officials of the fair organization named in said Section 12490, supra.

We are further of the opinion that by the provisions of said Sections 12508 and 12509, Laws of Missouri, 1931, page 133, the county court may use one-half of the levy authorized by said sections to buy lands and to erect buildings thereon unless the petition for the election authorizing such levy requires that one-half of same be used for acquiring fair grounds and/or erecting buildings, in which case the county court must use said portion of the levy for lands and/or erecting buildings. We are further of the opinion that one-half of the levy and any moneys not used for said lands and/or erecting buildings should be set aside and distributed by the county court to the oldest exhibitors of the county or district fair to pay the premiums designated by said section. Only the moneys derived from the levy authorized by said Section 12508, Laws of Missouri, 1931, page 133, may be used for the purposes set out in said section, and no part of the levy authorized for current county expenses may be expended for fair grounds and/or buildings for a fair.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

COUNTY COURTS:
SCHOOL FUNDS:
MANAGEMENT OF LANDS PUR-
CHASED UNDER FORECLOSURE:

County courts may lease, rent, or
manage lands purchased under fore-
closure of school fund mortgages
and shall sell the same at earliest
date practicable.

October 10, 1938



Hon. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This is in reply to yours of recent date request-
ing an official opinion from this department based upon
the following letter:

"Will you please give me an opinion as
soon as convenient on this proposition:

"The County Court owns a piece of property
which they were compelled to purchase
under a School Fund mortgage foreclosure.
Does the County Court have the authority
to permit Fair Building to be erected on
this ground? There would be no additional
expense or money which the County Court
would advance. The land would be improved
with sewer and water mains and the property
would be more valuable to the County Court
after such improvements than it would be-
fore. The title at all times is to remain
in the County Court. Should the County
Court be compelled to dispose of this
property without these improvements it
would be compelled to do so at a loss.

"We are still making every effort to put
this Fair proposition across here and it
seems that this might be the only way that
we can do so without involving the County
Court. I will appreciate your opinion at
your earliest convenience."

From your request, it appears that the county court has become possessed of certain lands under foreclosure of school fund mortgages by virtue of the provisions of Section 9256, R. S. Mo. 1929, which is as follows:

"Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expense thereof, shall become part of the school fund out of which the original loan was made."

In discussing the relation of the county court to the school funds and its powers and duties in relation thereto, the court in the case of Ray County, to the use of the Common School Fund v. Bentley et al., 49 Mo. 1. c. 242, said:

"* * * The county is not the owner of the fund; the title is simply vested in it as trustee, for convenience, to carry out the policy devised by the law-making power for the appropriation and distribution of the fund. In the care, management and control of the fund, the County Court acts purely in an administrative capacity, not as the agent of the county, but in the performance of a duty specifically devolved upon it by the laws of the State. There is nothing judicial in the exercise of its functions in this respect. The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. It acts directly in obedience to State laws, independently of the county. Where it acts for and binds the county, it exercises its authority by virtue of power derived from the State government, and it obtains authority from no other source.
* * *."

And in the case of Morrow v. Pike Co., 189 Mo. 610, 1. c. 622, Judge Lamm in his opinion on this question, said:

"* * * the public school fund does not belong to the county in a technical sense. It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the lawmaking power in relation to the fund * * *."

When the Ray County case, supra, was in court the county court was not authorized to purchase lands at foreclosure sales of school fund mortgages, but Section 9256, supra, authorizes such purchase for the protection

Oct. 10, 1938

of the school fund. However, this section provides that when the county court makes such a purchase, it may appoint an agent to rent out, lease or otherwise manage such land, in the discretion of the court. This section requires the court to sell the land as soon as practicable when in the judgment of the court it would be advantageous to the school districts interested in the fund which has been invested in the land. By this provision the lawmakers have not intended that the county court hold the land any longer than it can sell it at a price which would be advantageous to the districts.

Your letter indicates that it is the intention of the county court, if permissible, to authorize the Fair Association to erect buildings on the school lands purchased by the county court under foreclosure of school fund mortgages. This seems to be an arrangement which is more or less permanent in nature, and unless such a plan is only temporary, the court would not be authorized to rent or lease the lands for that purpose because it would interfere with the court in its duties of selling this land as soon as practicable when in the judgment of the court it would be advantageous to the school districts to which the land belongs.

CONCLUSION

Since the buildings which the Fair Association desires to erect on the school lands are not temporary structures, we are of the opinion that the county court would not have authority to lease or rent such lands to the Fair Association for that purpose. By Section 9256, supra, it is the duty of the court to dispose of this land at the earliest date practicable and advantageous to the school districts owning the land. Such a contract with the Fair Association would interfere with the early disposition of the land and would be illegal, we think.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

INFORMATION -- Form of for lottery.

October 26, 1938

Honorable Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Sir:

We have your request for an approved form of indictment for operating a suit club.

I am enclosing copy of an opinion written by this office on March 19, 1936 to the Honorable Barker Davis, Prosecuting Attorney of Lewis County, Canton, Missouri. In the Emmerson case cited therein, you will find that the court approved the information. From the original files we have copied that information, caption omitted, and attached it hereto, and in our opinion it will meet all the requirements for an indictment for operating a suit club, which is a lottery.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE
Enc.

TAXATION: When owner must reimburse purchaser of property at sale for delinquent taxes, for improvements.

October 28, 1938

Honorable Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Mo.



Dear Mr. Long:

This department wishes to acknowledge your request for an opinion dated October 25, 1938, which reads as follows:

"Please give me an opinion on Section 9956c, Laws of 1933, page 425, relative to the situation where a piece of property is sold for taxes by the Collector in due form. You will note the last line of this section reads as follows:

'No compensation shall be allowed for improvements made before the expiration of two years from the date of sale for taxes.'

"As I understand this, the purchaser of a tax certificate is entitled to possession of the property after one year and if improvements are made during the second year and before he gets his deed he is entitled to compensation for the reasonable value of such improvements if the property is redeemed. In view of this last sentence to this paragraph as set out above it is rather confusing so please give me your interpretation of this section."

Section 9954a, Laws Mo. 1933, page 434, provides when the purchaser of a tract of land at a sale for delinquent

taxes shall get possession, in part as follows:

"The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time after one year from the date of sale be entitled to the immediate possession of the premises so purchased during the redemption period provided for in this act, unless sooner redeemed; ***

Section 9956a, Laws Missouri, 1933, page 437, provides when the owner or occupant of any land sold for taxes must redeem, in part as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, *** "

Section 9956c, Laws Missouri, 1933, pages 437-438 provides that premises shall not be restored to persons redeeming until improvements made by the purchaser are paid for, as follows:

"In case any lasting and valuable improvements shall have been made by the purchaser at a sale for taxes, or by any person claiming under him, and the land on which the same shall have been made shall be redeemed as aforesaid, the premises shall not be restored to the person redeeming, until he shall have paid or tendered to the adverse party the value of such improvements; and, if the parties cannot agree on the value thereof the same proceedings shall be had in relation thereto as shall be prescribed in the law existing at the time of such proceedings for the relief of occupying claimants of lands in actions of ejectment. No compensation shall be allowed for improvements made before the expiration of two years from the date of sale for taxes."

October 28, 1938

Under the above first two sections, the owner, occupant or persons having an interest must redeem the property within two years after the sale for delinquent taxes, but the purchaser may take possession of the premises at any time after one year from the date of the sale.

Assuming the purchaser takes possession after one year and makes improvements under the latter section, the premises are not to be restored to the owner until he has paid or tendered to the purchaser the value of such improvements. However, if such improvements are made before the expiration of two years from the date of the sale for taxes, the owner receives no compensation.

At first glance, the two sentences in the latter section seem to be in conflict. However, same must be considered in light of Section 9956b, Laws Missouri, 1933, page 437, which provides who may redeem lands:

"Infants, idiots, insane persons and persons in confinement may redeem any lands belonging to them sold for taxes, within two years after the expiration of such disability, in the same manner as provided in the preceding section for redemption by other persons."

From the foregoing, we are of the opinion that if a purchaser who takes possession of property after one year from the date of sale makes improvements, and the owner comes in and redeems within two years under Section 9956c, supra, the purchaser is not entitled to be reimbursed for improvements. However, if, after two years from the date of the sale, improvements are made, and infants, idiots and persons in confinement come in within two years after the expiration of their disability and redeem the property, then the value of the improvements made by the purchaser must be reimbursed him.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

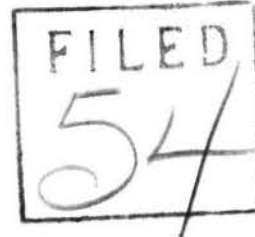
APPROVED:

HIGHWAY PATROL:
PARKING CARS ON
SHOULDERS OF THE
HIGHWAY:

Highway patrolmen in performing their duties in regulating movement of traffic may prohibit parking on shoulders of highways, and persons so parking may be prosecuted for obstructing the highway, under Sec. 7932, R. S. Mo. 1929.

November 2, 1938

Honorable Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Sir:

This is in reply to yours of the 25th wherein you request an opinion from this department based upon the following statement of facts:

"Please give me an opinion as to whether or not a member of the State Highway Patrol has the authority under section 8203-0, Laws of 1931, page 230, to forbid the parking on the shoulder and bank of a State Highway when in their opinion the parking of such a number of automobiles creates a traffic hazzard. Would the placing of sign by them on the shoulder of said Highway saying, 'No Parking', be construed as a reasonable direction of the Patrol in regulating the movement of traffic. And if a person has parked on such shoulder in violation of this sign or instruction of the Patrol would he be guilty of a misdemeanor as provided in said section."

The State Highway Patrol Act, which is found in Laws of Missouri, 1931, page 230, in Section 12 thereof, sets out the duties of patrolmen, which are as follows:

"It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight, and speed of

commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution. It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes."

This section requires the patrolmen to regulate the movement of traffic on the highways and to enforce thereon the laws of the state relating to the operation and use of vehicles on the highways.

Your request is directed at those who park cars on the shoulders of the highways. The patrolmen desire to prohibit this parking and claim they have authority to do so by virtue of the provisions of the foregoing statute which authorizes them to regulate the movement of traffic and to enforce the laws of the state relating to the use and operation of vehicles on the highways.

We do not think that the State Highway Patrol Department would be authorized to make a rule prohibiting parking on the shoulders of the highways and file charges against a person who violates such rule, unless we have some penal statute which authorizes the punishment for the violation of a rule of the State Highway Patrol. In other words, the State Highway Patrol is only a ministerial body and it must look to the statute for its powers and duties. It is not a lawmaking body and therefore can not make rules or laws pertaining to the highways or the motor traffic of this state and prescribe a punishment for the violation of such rule or law.

In our research on your question we find a statute which we believe would be applicable to a case where cars were so parked on the shoulders of a highway that they obstructed and endangered the free passage of traffic thereon. We refer to Section 7932, R. S. Mo. 1929, which is in part as follows:

" * * * Any person or persons who shall willfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road or right of way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right of way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment. * * *"

In the case of State v. Campbell, 80 Mo. App. 110, 113, the court in speaking of unauthorized obstructions to the highway, said:

"But any unauthorized or unreasonable obstruction of a highway which necessarily impedes or incommodes the use thereof, is a public nuisance at common law. Elliott on Roads and Streets, 476 and cases there cited. Bishop's Crim. Law, sec. 531; Wharton's Crim. Law, sec. 1274. Any encroachment upon any part of the highway, whether upon the traveled part thereof or on the sides comes clearly within the idea of nuisance. Every person has a right to go over

or upon any part of the highway, and the fact that from notions of economy, or otherwise, the public authorities having the same in charge have not seen fit to work the whole of it, does not alter or change the right. A traveler has the right to go anywhere on the right of way outside of the beaten track of the highway if he so chooses, and any obstacle placed in the way of his doing so is an infringement and obstruction of a public right, and an annoyance and therefore a public nuisance.

"The obstacle must however, be of such a character and kind as to operate as an obstruction to public travel, or to public rights, or to endanger the safety of persons traveling there, or as to offend and annoy those who come in contact with it. Wood's Law Nuis., sec. 248; Wharton's Crim. Law, sec. 1473."

And in the case of State v. Turner, 21 Mo. App. 324, an indictment was found against a person based on the following clause, which is now in Section 7932, supra: "or shall obstruct said road or highway in any other manner whatsoever." As to an offense based on this clause, the court said, l. c. 326:

"Here, however, the statute creates no new offence, but merely enlarges an offence indictable at common law. 2 Bishop on Crim. Law, sect. 1273, note 6, and sect. 1284.

"If there was no statute on the subject, the indictment would have been good at common law. The State v. Appling, 25 Mo. 315; The State v. Rose, 32 Mo. 560.

"In view of the general rule that statutes should be construed with reference to the subject matter, the objects which prompted their enactment, and the mischief they were intended to remedy, the general clause in this statute should be construed as referring to any other obstructions of a highway indictable

at common law. It would be a forced and irrational construction to hold that the statute provided for the punishment of one, who, by throwing brush into the highway, partly obstructed the unlimited use thereof, and yet permitted one to go scathless who, by digging a pit therein, endangered the safety of the traveling public."

From the reasoning applied by the courts in the two foregoing cases, if a person parks his car on any part of the highway in such a manner that he partly obstructs the unlimited use of such highway to the traveling public, and as a result thereof endangers the lives and property of such travelers, then he has violated the provisions of said Section 7932, supra, which prohibits "obstruction of the highway in any other manner," and may be arrested and charged with the commission of such offense, and, if found guilty, punished as provided by said Section 7932, supra.

The State Highway Patrol Department, in the performance of its duties, may place "No Parking" signs on the highway, but the person violating such "No Parking" rule could not be prosecuted for such act because there is no statute providing for the patrolmen to make such a regulation, and there is no statute providing a penalty for the violation of such a rule even if the patrolmen would make the rule. However, if the facts justify it, that is, if such parking is such an obstruction that is prohibited by said Section 7932, supra, then the patrolmen may obtain the same results by proceeding under said Section 7932.

CONCLUSION

From the foregoing, it is the opinion of this office that the State Highway Patrol may not establish "No Parking" zones on the shoulders of the state highways and prosecute a person for the violation of such regulation. As there is no law that prohibits a person from traveling on the shoulders of the improved highways, an obstruction to such highway could

Nov. 2, 1938

be created not alone by stopping on the slab or improved part of the highway, but under some circumstances an obstruction to the free passage of the traveling public on the highway could be created by parking on the shoulders of such highway, especially on a curve or where there is a probability of the travelers having to travel on the shoulders of the highway under extraordinary circumstances. Therefore, if the parking of a motor vehicle on the shoulders of an improved highway would, under the foregoing circumstances, obstruct the traffic and endanger the free passage of the traveling public, then such person could be informed against by the patrolman or any other person having knowledge of such offense, charging them with the obstruction of the public highways as is provided by said Section 7932, supra, which is a misdemeanor and punishable by fine and/or imprisonment in the county jail.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

TWB:HR

TAXATION:

Damages on dog tax must be paid as proved
from March first until March first.

November 18, 1938

11-19



Mr. Edward V. Long
Prosecuting Attorney of Pike County
Bowling Green, Missouri

Dear Sir:

This will acknowledge receipt of your opinion
request of November 9, 1938, which reads as follows:

"In the election yesterday the voters of this County passed the Dog Tax Proposition. Please advise me whether or not that when the County Court meets between the 1st and 15th of March, 1939, as designated in Section 12874-b, Laws of 1937, page 224, are they to consider the claims for stock damage for one year prior to that date or from the date of the passage of this law.

Please give me the form for the passage notice that the County Court is required to give upon the passage of this law, as set forth in Laws of 1921, page 679."

Article 12, Chapter 88 of the Revised Statutes of Missouri 1929, applies to the assessment of a tax upon dogs being subject to the local option proviso as set out in Section 12881 in said Chapter. The proviso in Section 12881 reads as follows:

"Provided that upon the filing of petition signed by one hundred or more householders of any county and presented to the county court at any regular or special session thereof more than thirty days before any general election to be had and held in said county, it shall be the duty of the county court to order the question, as to whether or not there should be adopted the law, creating a license tax on dogs, submitted to the qualified voter, to be voted upon at the next election. Upon the receiving of such petition it shall be the duty of the county court to make an order as herein recited, and the county clerk shall see that there is printed upon all ballots to be voted at the next election the following:

For creating a license tax
on dogs---

Yes.

No.

(Erase the word you do not
wish to vote.)

The returns of said election upon said subject shall be opened, canvassed and certified, as the returns for general elections. If the majority of the votes cast upon the subject be in favor of license tax on dogs, the county court shall spread the result of such election upon its records and give notice thereof by publication in some newspaper printed and published in such county and such law shall become operative from the time such publication is made. (Laws 1921, p. 679, Section 10.)

Sections 12872, 12873, and 12874 of Article 12, Chapter 88 R. S. Mo. 1929 was amended by the Session Laws of 1937 page 224 by enacting new sections known as 12872, 12873, 12874, 12874A, 12874B, and 12874C. The original

chapter 88 of the Revised Statutes of Mo., 1929 did not contain the provisions for the payment of loss of live stock or poultry caused by dogs. The 1937 Session Laws provided for the payment of the actual value of the live stock or poultry killed by dogs out of the fund collected by a tax upon dogs. The amendment of the Session Laws of 1937 did not amend the local option proviso as set out in Section 12881 R. S. Mo. 1929. Under Section 12881, the law did not become effective until the local option vote was taken and the tax created by an election held at any general election.

Section 12874A Session Laws of 1937, page 226 reads as follows:

"No owner or custodian of live stock or poultry which has been injured or killed by dogs shall be entitled to receive any portion of the county dog license fund unless within ten days after suffering such loss or damage he, with two other credible freeholders of the county, not kin to him by blood or marriage or not in his employ, make written application supported by affidavit to the county clerk on blanks furnished by the county clerk, stating: (1), that he is a resident of the State of Missouri, and that he has resided in said county for more than thirty days next preceding the date of the injury or killing of his live stock or poultry; (2), that he was the owner or custodian on said date of said live stock or poultry; (3), the legal description of the premises on which said live stock or poultry was injured or killed; (4), a complete description as to the number, weight and color of said live stock or poultry; (5), the market value thereof on the date of such injury or killing. The county clerk shall file all such applications and affidavits so received by him to be examined and passed upon by the county court.

Provided, that no claim shall be considered or paid for the destruction of live stock or poultry by a dog or dogs belonging to the owner of said live stock or poultry."

Section 12874B Session Laws of Mo. 1937, page 226 reads as follows:

"The County court shall between the 1st and 15th days of March of each year hereafter meet in session to consider and examine said applications and affidavits covering losses over a period of one year, which said year shall be from the 1st of March of the year prior to the meeting of said court to the last day of February of the same year on which it meets. The court shall examine carefully each application and affidavit which has been filed before the first day of March, and after hearing all evidence in the matter shall pass such judgment as the Court may deem equitable. Whenever the county court meets pursuant to the provisions of this article each member shall receive his mileage and per diem out of the county dog license fund."

In your request you ask whether or not the year referred to and designated in Section 12874B should be considered the year prior to the 1st day of March when the County Court meets in accordance with this section or whether it means one year prior to the date of the passage of this law. Section 12874B is not ambiguous and the statute plainly reads:

" * * * which said year shall be from the 1st of March * * *"

Sections of a chapter of the statutes should be read together and it will be noticed that Section 12874A Supra, provides that the loss or damage caused by dogs should be applied for, within ten days after suffering such loss or damage. It is obvious that no claim could be made on account of injury or damage sustained for a whole year previous to the first of March of 1939, at which time the county court shall meet for the examination of applications for damages under this chapter.

The law will not be in effect until the proper publication has been made by the county court as to the results of the election in accordance with Section 12881 R. S. Mo. 1929. Section 12874B Supra is very plain and not ambiguous. According to 59 C. J. page 952 it is said:

"The intention of the Legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning." citing Gendron v. Dwight Chapin & Co., (App.) 37 S. W. (2d) 486; Betz v. Kansas City So. R. Co., 284 S. W. 455, 314 Mo. 390; Grier v. Kansas City, C. C. & St. J. Ry. Co., 228 S. W. 454, 286 Mo. 523.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the applications for damages caused by dogs by the injury or killing of live stock or

poultry, must be heard during the period beginning the first of March and ending the fifteenth day of March each year and that the only applications to be examined would be applications for damages accrued from the first of March of the previous year to the last day of February of the year at which time the meeting of the County Court is held for the purpose of such examination. It was not the intention of the legislature that the period of one year should be a period of a year prior to the time of the passage of the law. The passage of the law and the time that it should take effect would be the date of the publication of the results of the election by the County Court.

In view of the fact that the law was not effective for one whole year previous to the first of March, 1939, and in view of the further fact that the claim must be filed within 10 days from the time of the loss or damage, it is the opinion of this department that the only applications that can be made for the first meeting of the County Court would be from the time of publication of the results of the election to the first day of March, 1939.

The following form for the publication of the results of the election would notify the owners of all dogs that the law is in effect.

NOTICE

State of Missouri)
County of Pike) ss

It is hereby certified that at the general election held on the proposition whether or not a license tax should be assessed on dogs, in Pike County, which election was held on the 8th day of November, 1938, in said County of Pike by the qualified voters thereof, the proposition for creating a license tax on dogs was carried by a majority of the votes cast upon the subject.

Now, therefore, the County Court of said County of Pike, pursuant to Section 12881 R. S. 1929, have spread the results of such election upon its records and hereby give notice thereof and proclaim that all dogs in Pike County are now subject to tax as set out in Section 12873 of the

Mr. Edward V. Long

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Nov. 18, 1938

Session Laws of 1937, page 225.

In witness hereof, the court has caused its seal to be hereunto affixed at the clerks office in said County of Pike this _____ day of November, 1938.

(Seal)

Attest

County Clerk

Judge of County Court

Judge of County Court

Judge of County Court

Respectfully submitted,

W. J. BURKE,
Assistant Attorney Gen.

APPROVED:

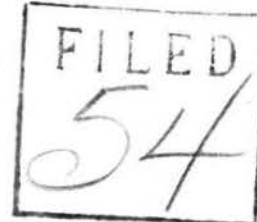
J. E. TAYLOR
(Acting) Attorney General.

WJB:WW

LOTTERY: "Job Day".

November 23, 1938

11-23



Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Mr. Long:

I have your request of November 21, 1938, for an opinion as to whether or not "Job Day" is in violation of the lottery laws.

An examination of this plan shows that it attempts, in a rather crude way, to employ someone to work for the theater. It appears that the application cards are filled in by persons desiring to participate in the content and are then placed in a container and one of the applications selected at random, and the person whose application is selected is thereby employed and paid Thirty dollars. This game has all the elements of "Bank Night", which was recently in State vs. McEwan (not yet reported) held to be a lottery by the unanimous opinion of the Supreme Court En Banc. In the recent case of State vs. Robb & Rowley United, Inc. 118 S.W. (2d) 117, a similar plan was to be camouflage in Texas, and the Texas Court of Criminal Appeals held the plan to be a lottery and a nuisance.

In this state a lottery is any scheme or device whereby anything of value is for a consideration allotted by chance. State vs. Emerson, 318 Mo. 633, 1 S.W. (2d) 109; State ex inf. vs. Globe Democrat Publishing Company, 110 S.W. (2d) 705.

Mr. Edward V. Long

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November 23, 1938

It is therefore the opinion of this office that the scheme of "Job Day" is a lottery in violation of Section 4314 R.S. Missouri 1929.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

RECORDER: If instrument is a recordable one under Section 11543 and is properly acknowledged recorder must record same regardless of other defects.

November 28, 1938



Hon. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Mr. Long:

We have received your letter of October 14, 1938,
which reads as follows:

"The Recorder of this County has
asked me to secure for him the
following ruling:

Does he have the authority
to refuse to record a refusal
to act as trustee in a mortgage
when such refusal has not been
notarized but has been witnessed
by two witnesses?

Does he have the authority to
refuse to record any deed which
is in his opinion improperly
drawn?"

We are enclosing a copy of an opinion written by
this office on January 26, 1935 and addressed to Lemuel
R. Mead, Recorder of Deeds, Marshall, Missouri. The holding
in the enclosed opinion is that when a deed is presented for
record and it bears no acknowledgment, then it is the duty
of the recorder to refuse to record the same; that no in-
strument, paper or writing which is not regularly proved
or acknowledged or which does not come within the purview of
Section 11543 R.S. Missouri 1929, should not be recorded.

Section 11543 R.S. Missouri 1929, reads as follows:

"It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; second, all papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government; third, all marriage contracts and certificates of marriage; fourth, all commissions and official bonds required by law to be recorded in their offices; fifth, all written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father, and maiden name of the mother of such child or children."

It will be noted that it is the duty of the recorder to record certain instruments which are "proved or acknowledged according to law." As to the meaning of the term "proved or acknowledged according to law" Section 3021 R.S. Missouri 1929, provides as follows:

"The proof or acknowledgment of every conveyance or instrument in writing affecting real estate in law or equity, including deeds of married women, shall be taken by some one of the following

courts or officers: First, if acknowledged or proved within this state, by some court having a seal, or some judge, justice or clerk thereof, notary public, or some justice of the peace of the county in which the real estate conveyed or affected is situated; second, if acknowledged or proved without this state, and within the United States, by any notary public or by any court of the United States, or of any state or territory, having a seal, or the clerk of any such court, or any commissioner appointed by the governor of this state to take the acknowledgment of deeds; third, if acknowledged or proved without the United States, by any court of any state, kingdom or empire having a seal, or the mayor or chief officer of any city or town having an official seal, or by any minister or consular officer of the United States, or notary public having a seal."

It follows that "proved or acknowledged" means that the same must be taken by certain designated courts or officers. Witnesses only will not suffice. Consequently any deed or instrument in writing affecting real estate, in order to be recordable, must be proved or acknowledged by a court or officer set out in Section 3021 supra. For the purposes of this opinion we are not deciding but we are assuming that an instrument drawn by a trustee by which he refuses to act as a trustee in a deed of trust, sufficiently concerns "lands and tenements" to be recordable under the provisions of Section 11543.

You also ask whether a recorder has the authority to refuse to record any deed which is in his opinion improperly drawn. We said above that a recorder must refuse to record an instrument if it is not properly or regularly acknowledged or if it does not come within the purview of Section 11543. We assume then that this question relates to a situation where the acknowledgment is proper and regular and the instrument is a recordable one, but it appears to the recorder that the instrument is otherwise defective or is otherwise improperly drawn.

As far as we have been able to determine the Missouri courts have not passed on this exact question. However, other states have. In the case of Weyrauch vs. Johnson, 208 N.W. 706, the Supreme Court of Iowa said:

"We may observe that the county recorder is largely a ministerial officer. It is a matter of common knowledge that many instruments that are technically defective are recorded, and the record of such instruments may be insufficient to impart constructive notice. There seems to be no provision in the statute which clothes the county recorder with the judicial power to determine the legal validity and effect of every instrument tendered to him for record, or the effect of such recording. He cannot arbitrarily refuse to record instruments which are in proper form and eligible to record, under our recording acts, where a reasonable request for recording is made and the fee is duly tendered."

In the case of People ex rel. Consumers' Brewing Company of New York vs. Fromme, 54 N.Y.S. 833, the Court said:

"The duty of the register is to record or file in his office those instruments or papers which, by the laws of the state, are entitled to be recorded or filed. Whether, in the making or execution of such instruments, the parties thereto have made a valid instrument or not, is not his province to determine."

A perusal of the statutes relating to the powers and duties of a recorder show that he is largely a ministerial officer. There are no provisions in the statutes which clothe a recorder with judicial powers to determine the validity and effect of every instrument tendered to him for record. If the instrument is recordable and if the same is proved and acknowledged according to law the recorder has no alternative. He must record any such document when properly tendered to him even though he believes it to be otherwise defective.

CONCLUSION

When any instrument recordable under the terms of Section 11543 R.S. Missouri 1929 is properly presented to a recorder for record and the same is proved or acknowledged according to law the recorder must record it. However, such instrument must be proved or acknowledged and the signatures of two witnesses alone will not suffice. A recorder is largely a ministerial officer only and he has no authority to determine whether an instrument is otherwise defective or if it has been otherwise improperly drawn.

Respectfully submitted,

APPROVED:

J. F. ALLEBACH
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

JFA:MM

ASSESSORS:

TAXATION:

Personal property which assessor has failed to assess cannot be assessed after books have been turned over to collector.

December 22, 1938

Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"The assessor of this County has failed to assess personal property in something over 500 cases. This matter was not called to the attention of the Board of Equalization and was not discovered until after the books had been accepted by the Collector. Is there any way where the County Court or any officer has the authority at this date to make an assessment for this personal property which was not assessed by the Assessor?"

While Missouri has statutes which provide for the assessment of real property when the same has been omitted, Sections 9788, 9789, R. S. Missouri, 1929 (Mo.St. Ann. 9788, 9789, page 7896), the only provision that we have that deals with the question of failure to assess personal property, is Section 9810, R. S. Missouri, 1929 (Mo.St. Ann. 9810, page 7909) which provides that whenever "there has been a failure to assess the property in any county for any year or years," the assessor shall assess the property for such years. However, our Supreme Court has held this section to apply only when there has been a complete failure to assess



Mr. Edward V. Long

- 2 -

December 22, 1938

any of the personal property in a county during the year.
State ex rel. Timbrook, 144 S. W. 843, 240 Mo. 226.

We believe your question is answered by the statement in Hannibal ex rel. Bassen v. Bowman, 93 Mo. App. 103, 71 S. W. 1122, which is as follows:

"There is, therefore, no such thing as an equity in a county or in a city that will authorize an assessor, after he has completed his assessment and turned over his books to the proper officer and after his assessment has passed the boards of equalization and of appeals, to repossess himself of the assessor's books and enter therein personal property, which by accident or intention was omitted from the list furnished by the taxpayer and which escaped the notice of the assessor. He can only proceed at the time and in the manner pointed out by statute and to justify his assessment he must be able to put his finger on the statute that gives him the authority to make it * * * * *

In view of the above authorities, it will be seen that once an assessor has completed his assessment and the books have been turned over to the collector, that there is no way that personal property which has been omitted may be assessed.

CONCLUSION.

It is, therefore, the opinion of this department that where an assessor of a county failed to assess personal property and the assessment book has been turned over to the collector that there is no way in which personal property which has been omitted may be then assessed.

Respectfully submitted

APPROVED:

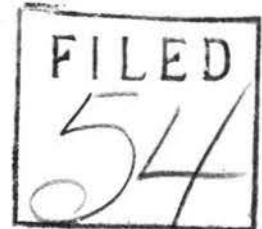
ARTHUR O'KEEFE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

LOTTERIES: "Somebody's Night"

December 29, 1938



Hon. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We have your request for an opinion as to whether or not "Somebody's Night" is a violation of the lottery laws.

We have examined the rules and regulations of "Somebody's Night" and advise that it is merely a copy of "Bank Night" in all its essential features and is a lottery. State vs. McNewan 120 S. W. (2nd) 1098.

We noticed that this "Somebody's Night" is being distributed by G. E. McKean as Manager, 3236 Olive Street, St. Louis, Missouri. This is the same salesman who sold "Bank Night" in this state. 92 S. W. (2nd) 141.

It is, therefore, the opinion of this office that "Somebody's Night" is a violation of the lottery laws of this state.

Very truly yours,

FRANKLIN E. REAGAN
Assistant Attorney General

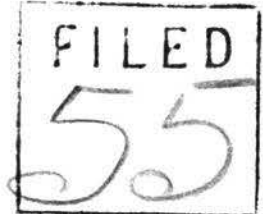
APPROVED:

J. E. TAYLOR
(Acting) Attorney General
FER:RT

ELECTIONS:) Last day for candidates to file for August Primary -
PRIMARY:) June 3, 1938.

June 7, 1938

Honorable Judson Luna
Clerk of the County Court
Ozark, Missouri



Dear Sir:

This is to acknowledge receipt of your letter dated June 4, 1938, in which you inquire as to whether a candidate who announced his candidacy for office in the local paper but did not file his written declaration of intention until June 4th, is entitled to have his name printed on the primary ballot for the Primary to be held in this State, Tuesday, August 2, 1938.

Section 10254, R. S. Mo. 1929, provides:

"The primary shall be held at the regular polling places in each precinct on the first Tuesday of August, 1910, and biennially thereafter, for the nomination of all candidates to be voted for at the next November election."

Section 10257, R. S. Mo. 1929, provides in part as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate,
* * *"

The general rule is, that where a statute requires that an act be performed a fixed number of days previous to

June 7, 1938

a specified day, the last day should be excluded and the first day included in making the computation. The primary elections will be held on Tuesday, August 2, 1938. It will, therefore, according to the above rule, be necessary for all candidates to have their declarations filed with the proper officials before midnight, Friday, June 3, 1938. If the candidate in question did not file his declaration of intention before midnight, Friday, June 3d, with the proper official, his declaration came too late, and the fact that he had previously announced in the local paper would not change the situation.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

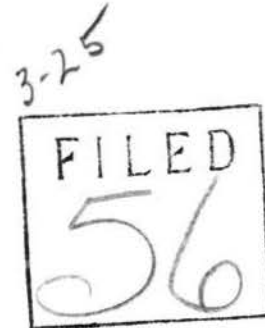
APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

BANKS & BANKING: COURT ORDERS IN SALES OF REAL ESTATE OF
LIQUIDATIONS : BANKS IN LIQUIDATION NEED NOT BE RECORDED
IN COUNTIES WHERE LIQUIDATION IS BEING HAD.

March 24, 1938



Honorable Douglas Mahnkey
Prosecuting Attorney
Taney County
Forsyth, Missouri.

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this Department on the following questions:

- (1) Should petitions and court orders for sale of real estate in liquidation of banks be recorded?
- (2) If they are recorded who should pay the bill?

For the answer to your question we refer you to Section 5330, R. S. Mo. 1929, which provides in part as follows:

"The commissioner is authorized, upon taking possession of the property and business of such corporation or private banker, to liquidate the affairs thereof * * * *. He may, upon an order of the circuit court or judge thereof in vacation * * * * sell or otherwise dispose of all or any of the real and personal property of such corporation or banker, In case any of the real property so sold is located in a county or city other than the county or city in which the application to the court or judge thereof in vacation for leave to sell the same is made, the commissioner shall cause a certified copy of such order and the application therefor to

March 24, 1938

be filed in the office of the recorder of the county or city in which such real property is located." (Underscoring ours).

We interpret this to mean that if the real estate is located in a county outside of the county where the liquidation is being had that in that event it is the duty of the Commissioner of Finance to file a certified copy of said order and the application therefor in the office of the recorder of the county or city where such real property is located. However, if the real estate is located in the county where the liquidation is being had there is no duty on the commissioner to file the certified copies of the order and application in that county. If the certified copies of the petition and order are filed in the county outside the county where the liquidation is being had, we think it is the duty of the commissioner to pay the filing expenses. However, if the purchaser of real estate, sold by the special deputy, desires to have a certified copy of the application and order of sale filed and recorded in the office of the recorder of deeds, of the county where the liquidation is being had, he may do so but there is no obligation on the commissioner to pay such expenses.

It is, therefore, our opinion that the Commissioner of Finance should file a certified copy of the order and the application in the county where the real estate to be sold is located if same is outside the county where the liquidation is being had, and it is his duty to pay filing fees therefor, and if the real property is within the county or city wherein the liquidation is being had there is no obligation on the Commissioner of Finance to have same filed and pay the fees therefor.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

CRH:LB

BANKS & BANKING:) Safe Deposit Companies may be incorporated
CORPORATIONS:) under the provisions of Article 7,
SAFE DEPOSIT COMPANIES:) Chapter 32, R. S. Mo. 1929.

June 3, 1938.

6-4



Honorable Russell Maloney
Corporation Supervisor
Office of Secretary of State
Jefferson City, Missouri

Dear Mr. Maloney:

We have an oral request for an opinion based
on the following:

The _____ Safety Box Company has presented
proposed Articles of Association drawn under the provisions
of Article 7, Chapter 32, Revised Statutes of Missouri,
1929, governing manufacturing and business companies, and
particularly under the thirteenth subdivision of Section
4940 thereof. The question to be determined is whether
a company may be incorporated under this article for the
purpose of conducting a safe or safety deposit company
business. Said section provides in part as follows:

"Corporations may be created under
this Article for any of the follow-
ing purposes:

* * * * *

"Thirteenth--For any other purpose
intended for pecuniary profit, or
gain not otherwise especially pro-
vided for, and not inconsistent with
the Constitution and laws of this
state: Provided, that nothing in
this section shall be construed to
authorize the incorporation of a
bond investment company or associa-
tion to issue bonds or debentures
based upon payments upon the install-
ment plan, nor any company which
savors of the character of a trust

company, bank, saving fund, building and loan or fiduciary company."

It has been contended that the following language of the thirteenth subdivision above precludes such corporations from being formed under Article 7, Chapter 32, R. S. Mo. 1929:

"nor any company which savors of the character of a trust company, bank, saving fund, building and loan or fiduciary company,"

for the reason that a safe deposit company savors of the above named companies.

It might be well in arriving at an opinion on this matter to trace somewhat the history of the laws pertaining to safe deposit companies in the State of Missouri and elsewhere.

According to Harvard Law Review, Vol. 9, published in 1895 (p. 131) it is said:

"The business of conducting public safe-deposit vaults is a comparatively new one in this country, the first of these institutions having been established but about thirty years ago. It was a natural development of the custom that formerly existed among banks of gratuitously according space in their vaults to customers having valuables for which they desired unusual protection.

"As soon as vaults were established by incorporated companies as separate institutions, the companies, in offering to the public the protection to be obtained from them, assumed toward their patrons distinct relations and liabilities peculiar to the business from its nature."

In 54 Corpus Juris, p. 1116, a safe deposit company is defined as follows:

"A company which maintains vaults for the deposit and safekeeping of valuables in which compartments or boxes are rented to customers who have exclusive access thereto, subject to the oversight and under the rules and regulations of the company; one whose purposes are to keep and maintain safe deposit vaults and safes and strong boxes for the safe-keeping of valuable articles and property of all kinds." Bouvier Law Dict. Vol. 3, p. 2979.

In Laws of Missouri, 1891, p. 100, trust companies were given the power to maintain safe deposit boxes, and the language therein used was carried through the various revisions of the statutes and now is found in Article 3, Chapter 34, R. S. Mo. 1929, Section 5421, subdivision 2, as follows:

"To receive upon deposit for safe-keeping personal property of every description; to guarantee special deposits, and to own or control a safety vault and rent the boxes therein." (Underseoring ours.)

Banks were given this power by Laws of Missouri, 1915, Section 66, page 134, subdivision 6, and the language therein used has been carried through the revisions and now is found in Article 2, Chapter 34, Section 5354, subdivision 6, R. S. Mo. 1929, as follows:

"To receive, upon terms and conditions to be prescribed by the bank, upon deposit for safe-keeping, bonds, mortgages, jewelry, plate, stocks, securities and valuable papers of any kind, and

other personal property, for hire, and to let out receptacles for safe deposit of personal property." (Underscoring ours.)

Under Article 5, Chapter 34, Revised Statutes of Missouri, 1929, it is provided for the incorporation of savings banks and safe deposit institutions, which article in the main provides for the creation of savings banks, and said article further gives the power to such institution to let out its vaults, boxes or other receptacles therein to others for the use and benefit of the bank. Incidentally, no institutions are incorporated under this article in this State.

In each of these articles, namely, relating to banks, trust companies and savings banks, the power is given to each of such institutions to conduct a safe deposit business but it is only a permissive right given to conduct such business and it is not an exclusive right. It was a right granted to banks and trust companies long after they had been given authority to conduct a pure banking and trust company business. Safe deposit companies in Missouri were incorporated and could be incorporated for that purpose under what is now Section 4940, supra, long before that power was given to banks and trust companies. The safe deposit business is a separate and distinct business and does not in any way savor of the character of a trust company, bank or saving fund, as provided in the thirteenth subdivision of Section 4940, supra. The fact that said banking institutions are given that right and power under their charters does not preclude separate institutions to be incorporated as separate corporations. And the further fact that these additional powers to maintain vaults for the deposit and safe-keeping of valuables in safe deposit boxes and compartments are given to banking institutions, is sufficient argument that they do not inherently belong to such institutions.

A bank is defined generally as "a moneyed institution, generally incorporated and of a quasi-public character, whose business it is to receive money on deposit,

cash checks or drafts, discount commercial paper, make loans, and issue bank notes." Corpus Juris S., Vol. 9, p. 28.

Webster's Dictionary defines "bank" as "an establishment for the custody, loan, exchange or use of money, and for the transmission of funds by drafts or bills of exchange."

Section 5402, R. S. Mo. 1929, says,

"The term 'bank' shall include any person, firm, association or corporation soliciting, receiving or accepting money or its equivalent, on deposit as a business, whether such deposit is made subject to check, or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing."

We are unable to see how a safe deposit company, formed for the purpose of renting out boxes in its vaults to persons in which to keep their especially valuable property and papers, savors in any way to a bank or trust company. We know of no rule of law or principle of public policy, either announced by the courts or the Legislature, that would prevent a company organized and incorporated under the provisions of Article 7, Chapter 32 and particularly under Section 4940 thereof, from conducting a safe deposit business. The administrative policy of the Corporation Department for a long period of time has been to permit safe deposit companies to be organized under the provisions of Article 7, Chapter 32, supra, relating to "manufacturing and business companies."

From the above and foregoing we are of the opinion that a corporation may be formed for the purpose

June 3, 1938

of conducting a safe deposit business under the provisions of Article 7, Chapter 32, R. S. Mo. 1929, and amendments thereto, governing manufacturing and business companies, notwithstanding any opinion which may have been rendered by this Department contrary thereto.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

Attorney-General

CRH:EG

CRIMINAL PROCEEDINGS : Prosecution of an Indian,
ward of Federal government
as any other citizen

June 22, 1938



Hon. Douglas Mahnkey
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Sir:

We have your request of June 18th for an opinion
on the following two questions:

First, Is an Indian, a ward of the Federal Government,
subject to the criminal laws of this State against writing
bad checks?

Second, Who has the right to parole a prisoner serving
a sentence imposed in the Justice Court?

I.

IS AN INDIAN SUBJECT TO THE CRIMINAL
LAWS OF THIS STATE?

This identical question appears to have been raised
and passed on in State vs. Big Sheep, 243 Pac. 1067. It appears
that the defendant, Big Sheep, while at the home of one Austin
Stray Calf, was charged with the illegal possession of peyote,
botanically known as Lophophora Williamsii. Objection was
made to the jurisdiction of the court on the ground that the
defendant, at the time and place mentioned in the complaint, was
an Indian, a member of the Crow Tribe, and that the acts alleged
to constitute the offense were done upon land within the Crow
Indian Reservation, the title to which still remained in the
United States. The Court held that the State had jurisdiction
of the prosecution of an Indian Ward of the Government for a
crime committed on land to which the United States had relinquished
title.

June 22, 1938.

The above general rule appears to be borne out by the following cases, especially where the offenses are committed off of Indian Reservations: United States vs. Sa-Coo-Da-Cat, (CC. Wis. 1870) Fed. Case No. 16212; State vs. Williams, 43 Pac. 15, 13 Wash. 335; In Re: Wolfe, 27 Fed. 606; State vs. Spotted Hawk, 55 Pac. 1026, 22 Mont. 23; State vs. Ta-Cha-Ha-Tah, 64 N.C. 614.

CONCLUSION

It is therefore the opinion of this office that an Indian, committing a crime in the State of Missouri, is subject to be prosecuted under the criminal code of this State.

II.

POWER TO PAROLE PERSONS CONVICTED IN THE JUSTICE COURT.

On August 16, 1937, in an opinion of this office to Honorable James L. Williams, Sheriff of Jackson County, Missouri, we had occasion to consider the authority of a justice and circuit judge to deal with offenders serving time under the sentence of the justice court. That opinion deals with the right of the justice to grant a stay of execution, commute sentences, paroles, etc., and we think it is decisive of the question presented by your letter. We are enclosing copy of that opinion herewith.

Respectfully submitted,

APPROVED:

FRANKLIN E. REAGAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

FER:MM
Enc.

CRIMINAL LAW:
FALSE PRETENSES:

The statute applying to obtaining property, etc., by false pretenses is not violated by obtaining such property by promises.

July 22, 1938

7-23



Mr. Douglas Mahnkey,
Prosecuting Attorney,
Taney County,
Forsyth, Missouri.

Dear Sir:

This is in reply to yours of July 13th, requesting an opinion from this department based upon the following letter:

"I have a problem and am seeking your advice. If it is not proper for me to ask you may say so and I will work it out the best I can.

Agent for a fake poultry remedy takes \$90.00 out of one community of farmers by representing to them that this is wonderful stuff and that he will buy all the eggs the hens lay and pay .12 cents over the market price for them and that he will send poultry man to cull the flock.

The 'Remedy' is nothing and he has not been seen since.

I am wondering if I might get a conviction under section 4304 R.S. Mo. 1929 or are promises alone insufficient?

He can be located by his license number. It is not so much a question of a conviction but whether or not an information can be drawn on this section with this set of facts."

July 22, 1938

From the statement of facts set out in your letter it appears that the agent to whom you refer, if he had violated any statute it is that one which makes it a crime for obtaining money, property or any valuable thing by false pretense or deception. The section of the statutes which covers this class of offenses is Section 4304, R. S. Mo. 1929, which is as follows:

"Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense, or by any other means or instrument or device, commonly called 'the confidence game,' or by means, or by use, of any false or bogus check, or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

Whether or not the crime has been committed would depend entirely upon the statement of facts made at the time the party received the money or property or valuable thing from the one to whom such statement is made.

If the agent, at the time of receiving the money from the farmers made a statement of fact, which statement was untrue, and the farmers relying on such statement, parted with their money, then the offense has been committed.

The agent's promise of what he would do in the future would not alone be sufficient to constitute the offense and upon which a charge could be based. Volume 25 Corpus Juris, page 594, section 15, lays down the rule

as it applies to promises and statement of fact which is as follows:

"While the crime is not committed by a mere false promise without a false statement of fact, a false statement of fact may become effective only by being coupled with a false promise. When this is the case the statement of fact and the promise may be considered as together constituting the false pretense and a conviction may follow, or, if the statement of fact and the promise can be separated and prosecutor relied in part on the former, the promise may be disregarded and accused be convicted on the statement of fact. The mere coupling of a promise with a false pretense does not relieve the false pretense of its false character, or remove from accused the consequences which the law attaches to false representations made with intent to deceive, and by which one is defrauded. Although the promise is coupled with a statement of an existing fact, yet if the property was obtained by relying on the promise as the inducement, the offense is not committed."

On the question of whether or not a promise alone is sufficient upon which to base a charge of obtaining property by false pretense, we find the rule stated in Volume 25 Corpus Juris, page 593, section 14:

"In general, a mere promise to do something, relating as it does to a future event, is not within the statute, however false or fraudulent the promise may be. And this is the rule although the defrauded party was induced by such promise to part with his property.* * * * *"

The above seems to be the rule that has been adopted by the Missouri courts. In the case of State v. Tull, 42 Mo. App. 324, l.c. 326, the principle is stated as follows:

July 22, 1938

"It is a familiar principle of criminal law that, to be guilty of what is known as a false pretense, the pretense must relate to an existing or past fact, and not to the future. 2 Bish. Crim. Law, sec. 415; State v. Evers, 49 Mo. 542. A promise to do something in the future has never been considered a false pretense.* * * * *

The portion of your request which states that the agent represented to the farmers that the poultry remedy "is wonderful stuff" seems to be the only statement of fact that was made in connection with the transaction. Just what he meant by that statement your letter does not reveal, and we are not sufficiently informed to state whether that is a sufficient statement of fact upon which to base a charge. We note from your letter that the agent stated that he "would buy all the eggs the hens lay and pay .12 cents over the market price for them and he would send a poultry man to cull the flock." This part of the statement is only a promise.

As stated by the above authorities the promises alone are not sufficient upon which to base a charge for the violation of said statute, but if the statement of fact made at the time the promises were made, and if such facts being relied upon by the farmers they paid their money to the agent, then the charge for obtaining money or property under false pretenses lies if such facts are untrue.

CONCLUSION

From the foregoing we are of the opinion that if the statement "wonderful remedy" constitutes a sufficient statement of fact and such statement as made by the agent about the poultry remedy is untrue, and that if the farmers, relying on such statement and the promises made at that time and in connection therewith, paid out their money, then the agent is liable to prosecution for obtaining money under false pretenses.

We are also of the opinion that if the farmers paid out their money to the agent only on his promise that

Mr. Douglas Mahnkey

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July 22, 1938

he would buy their eggs and cull their flock, then an action for obtaining money, property or any valuable thing by false pretense would not lie.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

TWE:DA

ELECTIONS- (Do not) Must have resided in county twelve months
PROSECUTING ATTORNEY) as prior to general election before name can
be placed on ballot.

September 9, 1938

9-14

Honorable Robert P. Maclay
Clerk of County Court
Washington County
Potosi, Missouri



Dear Sir:

We have your request for an opinion dated
September 8th, which request reads as follows:

"I have a question I am going to be
faced with in the near future which
I would like your opinion on.

"Between the first and the fifteenth
of July, 1938, one John Smith, at-
torney at law, moved into Washington
County, Missouri, from Crawford County,
Missouri. On or about the 31st day of
August, 1938, the Republican Central
Committee met here and nominated said
John Smith for prosecuting attorney
on the Republican ticket.

"Up to the present time his certificate
of nomination has not been filed in my
office, but no doubt will be in the
near future. John Eversole, the Demo-
cratic nominee, has informed me that
he expects to file his written objec-
tions to the nomination as soon as said
certificate of election is filed with
me under and by virtue of section 10247,
R. S. Mo. on the grounds that Smith
does not meet the requirements of a
prosecuting attorney as set out in
Section 11309, R. S. Mo., having resided
in Washington County less than one year
next preceding the date of the general
election at which he is a candidate for
office."

In answer to your request for an opinion, we call your attention to that portion of Section 11309, R. S. Mo. 1929, which provides in part as follows:

"At the general election ** there shall be elected in each county of this state a prosecuting attorney, ** who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office. *** "

The next general election will be held November 8, 1938, and under this statute it is necessary that any candidate for the office of prosecuting attorney must have been a bona fide resident of the county from November 8, 1937 to November 8, 1938. The term "bona fide resident" means residence within the county, with intent to make it the person's domicile. *Starr vs. Starr*, 78 Pa. S. Ct. 579, 583.

To become a bona fide resident, it is necessary that the person actually establish a residence, with an intent to make that his home. *Hess vs. Kimble*, 81 Atl. 363, 364, 79 N. J. Equity 454.

It is, therefore, apparent that John Smith, who has lived in Washington County since July, 1938, is not eligible to become a candidate for prosecuting attorney, and even if he received a majority of the votes cast in the general election of 1938, he could not obtain a certificate of election because of his ineligibility.

In *State ex rel. Thomas vs. Williams*, 99 Mo. 291, the city charter of St. Louis required candidates to have a residence of two years. In that case, the relator moved to St. Louis in September, 1887 and the election in which he was a candidate was held in April, 1889. The relator, among other things, was refused a certificate of election, and applied for a writ of mandamus to compel the recorder of voters of the city of St. Louis to issue him a certificate of election as marshal of that city. The Supreme Court decided that he was not entitled to a certificate of election because of his ineligibility.

It is now well established that the election of a disqualified person gives him no right to hold the office or claim a certificate of election, and mandamus will not lie in his behalf to compel the issuance of a certificate of election. Throop, Public Officers, Section 82; State ex rel. Snyder vs. Newman, 91 Mo. 445; State ex rel. vs. Coffee, 59 Mo. 67; State ex rel vs. Boal, 46 Mo. 528; State ex rel. vs. Meek, 129 Mo. 439; People vs. Sheffield, 47 Hun (N. Y.) 481.

Since the Legislature has seen fit to limit the election of prosecuting attorneys to those persons (1) duly licensed to practice law, (2) at least twenty-one years of age, (3) who have been a bona fide resident of the county for twelve months, these qualifications are mandatory and must be possessed by the person who offers himself as a candidate.

In State ex rel. vs. McSpaden, 137 Mo. 628, 1.c. 635, the Supreme Court said:

"Within the limitations imposed by the organic law, the legislature has the power to prescribe the qualifications requisite to office-holding, and it is not the proper function of any court to nullify any of them. The choice of the people for such an office must be confined to those persons who by law are designated as qualified to take the office and discharge its duties. The wisdom and good policy of such enactments are matters for the consideration of the lawmaking department of the government."

While the central committee of a political party has authority to fill vacancies on its ticket which exist after the holding of a primary, the filling of those vacancies must be done in accordance with the state law. Objections may be filed to the nomination of any person within three days. These objections in this case will be filed with the county clerk. In the event an objection is filed, it becomes your duty to forthwith mail a notice thereof to the

Hon. Robert P. Maclay

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September 9, 1938

candidate or candidates effected thereby. It then becomes your duty to pass upon the validity of such objections, and if a certificate of nomination is filed in your office, nominating John Smith for the office of prosecuting attorney, it becomes your duty, under the law, to refuse to place that nomination on the ballot for the November election, because of his lack of residence, as heretofore pointed out. In the event you should fail to so refuse to file such certificate of election, you will be subject to a mandamus order of the circuit judge. Section 10247, R. S. Mo. 1929.

It is, therefore, the opinion of this office that a person is ineligible to be a candidate for the office of prosecuting attorney unless he has lived within the county twelve months prior to November 8, 1938; that the filing of a certificate of nomination by a central committee to fill a vacancy is a nullity and of no force and effect, and should be ignored by you. A person who does not possess the necessary statutory qualifications is ineligible to become a candidate for that office.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

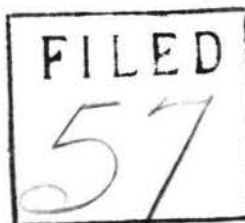
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE

RE: PROBATE COURTS. Statute does not authorize a fee to the Probate Court for finding no tax due in an estate.

January 8, 1938.



Mr. C. Logan Marr,
Prosecuting Attorney Morgan County,
First National Bank Building,
Versailles, Missouri.

Dear Mr. Marr:

This department is in receipt of your letter of January 3rd, requesting an opinion of this department as to the following:

"The question has been raised by the probate judge of our county as to how far he can go in making a report or finding in his records on each estate of every citizen of Morgan County, Mo., in regards to an inheritance tax. He requested that I get an opinion on the question.

In each case he makes a charge of \$5.00 for writing a finding in his records that there is no tax due.

For instance suppose that a widow woman makes application for a refusal of letters of administration on the estate of her deceased husband on the grounds that there is not sufficient estate to exceed the rights of the widow in her bounties and allowances, and the probate court so orders the denial of letters of administration. Does the probate judge have a right to enter a records making a finding of no inheritance tax due, and charge \$5.00 for the record?

In another instance the widow appeared before the probate court to prove and probate the will of her husband. She had five children, and the estate amounted, to between three and four thousand dollars. The exemptions amounted to \$45,000.00 in regard to the inheritance tax. There was no tax due the state. The widow after probating the will did not apply for letters testamentary because, all the debts were paid, nobody owed the deceased, all the heirs were of age, and had entered into an agreement to make distribution according to the will, and the widow and the heirs did not want any administration on the estate. Part of the estate consisted of real estate. The probate judge was of the opinion that he had a right to make a finding in his record that there was no inheritance tax due, and charge

the widow and the heirs \$5.00 for the report. These German people refused to pay the amount asked for the finding. The probate Judge wanted to make the estate pay the \$5.00. Is it his right or duty to make up this record and charge \$5.00?

In another instance, the deceased died intestate. The tangible property such as real estate does not exceed the exemptions allowed the survivors. No administration was had and there was no will. There is no evidence to show that the intestate left sufficient property to make an inheritance tax. Has the probate judge any authority to force and investigation, run up costs by appointing an appraiser, and on his report of no tax due, make a finding in the probate record of no tax due, and charge \$5.00?

Section 11732 R. S. No. 1929 is the governing statute relative to fees allowable to judges of probate courts for their services. This section is quite lengthy and it would serve no purpose in this opinion to set it out verbatim. It is sufficient to say that the only fees therein set out that could be at all applicable to the situation presented by you is the part of the section allowing to the probate court a fee of 2½ per cent of all inheritance taxes assessed, the fee to be allowed for extra work and duties in looking after and supervising the estates in his court.

It is, of course, axiomatic that no officer is entitled to fees of any kind unless provided for by statute and the law conferring such right must be strictly construed. Where the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim for compensation therefor. This principle of law is clearly enunciated in the early case of *State ex rel v. Adams*, 172 Mo. 1, wherein the court said:

"In order to maintain this proposition some statute must be pointed out which expressly or by necessary implication provides such compensation for such officer, for it is well settled law that his right to compensation for the discharge of the official duties is purely a creature of statute and that the statute which is claimed to confer such right must be strictly construed."

A mere application of these principles to the statute here involved determines the question presented by you. No provision is therein found giving any compensation whatever to the probate court for writing a finding in his records that there is no tax due in an estate. A charge of \$5.00 for making this finding is, in our opinion, not only unwarranted but unconscionable. If that practice were followed in every county in the state, the result would be that the probate courts would receive \$5.00 whenever a person died, regardless

of whether that person had property sufficient for administration or not. That this is wholly unauthorized is too clear for any question and it is the opinion of this department that the practice of making this charge should be stopped immediately.

Respectfully submitted,

JOHN W. HOFFMAN, JR., Assistant
Attorney General.

JWH: G

APPROVED

J E Taylor

Acting Attorney General

PENAL INSTITUTIONS:
MISSOURI TRAINING SCHOOL FOR BOYS:
AGE LIMIT:

Only male persons under seventeen years of age at the time of committance of act for which they are sentenced may be received at the Missouri Training School for Boys.

January 27, 1938



Mr. J. E. Matthews,
Director of Department of Penal Institutions,
Jefferson City, Missouri.

Dear Sir:

This is to acknowledge receipt of your request dated January 24, 1938 for an official opinion from this department which is as follows:

"Attached is a copy of a letter from the Superintendent of the Missouri Training School for Boys, at Boonville, relative to the boys sentenced to this Institution, who are over seventeen (17) years of age.

It seems that the Judges in the Circuit Courts are not paying any attention to the age limit of this Institution and these boys should be sentenced to the Intermediate Reformatory at Algoa.

We would appreciate an early opinion in this matter in order that these boys can be transferred to the Institution to which they belong.

In the past, it has been the practice of the Missouri Training School for Boys, when one has escaped, to carry boys on our rolls for one month and if not apprehended within that time, their name is dropped.

We would also like to have an opinion as to whether these names should be dropped or carried on for an indefinite time."

I

Upon an examination of the laws pertaining to the Missouri Training School for Boys, I find that the Legislature in 1933 enacted the following section which is found at page

331, Section 8350:

"Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary or committed to the Missouri Training School for Boys; and any boy under the age of seventeen years convicted of any other felony, either upon plea of guilty or upon trial, may be committed to the Missouri Training School for Boys. Any boy under the age of seventeen years convicted of a misdemeanor in any court of record, either upon the plea of guilty or upon trial, may, in the discretion of the court, be committed to the Missouri Training School for Boys. No boy under seventeen years of age convicted of a felony shall hereafter be committed to the county jail as a punishment for such offense. Any court having a criminal jurisdiction, in which any male person, between seventeen and twenty-five years of age, shall, upon a plea of guilty, or by the verdict of a jury, be convicted of a felony, and his punishment assessed at imprisonment in the penitentiary, may, in its discretion, at the same term at which such plea of guilty is entered or conviction occurs, and before such person is transferred to the penitentiary, commute the punishment to confinement, in the Missouri intermediate reformatory for such term as the court may deem proper, but not for a longer time than that fixed in the sentence to the penitentiary; but such court shall first ascertain and determine that said conviction or plea of guilty is the first conviction or plea of guilty of such person for a felony,

1/27/38

and that the previous conduct, habits and associations of the person so convicted or pleading guilty warrant such commutation."

By this section the legislature has provided that any male person under seventeen (17) years of age who is convicted of a felony punishable by imprisonment for a term in excess of ten years (10) in the penitentiary may be punished as any person over the age of seventeen (17) years, or, if a boy, he may be imprisoned in the penitentiary or Missouri Training School for Boys and the section also provides that any boy under the age of seventeen (17) years who is convicted of any other felony may be committed to the Missouri Training School for boys. This section also provides that any boy convicted of a misdemeanor may, in the discretion of the court, be sentenced to the Missouri Training School for Boys.

The section also provides that any court having criminal jurisdiction in which a male person between the ages of seventeen (17) and twenty one (21), is either convicted or pleads guilty and if a punishment is assessed at imprisonment in the penitentiary, may in its discretion and at the same term of such conviction or plea of guilty commute the punishment to imprisonment in the intermediate reformatory.

Prior to the act of 1933 the Laws of Missouri, 1929 at Section 8350 permitted courts to sentence male persons between the ages of seventeen (17) and twenty one (21) years to the Missouri Training School for boys, but by the act of 1933, Section 8350, supra, this provision was taken out of the act which applied to the ages of boys at the Missouri Training School so that as the law now stands it seems that only male persons under seventeen (17) years of age can be sentenced to the Missouri Training School for Boys.

Section 3188, page 1352, Volume 16 Corpus Juris, is as follows:

"***** the legislature of a state has, within constitutional bounds, the power to designate the punishment to be inflicted for crimes; and therefore as long as it violates no constitutional enactment it may make whatever provision it sees fit as to the place in which imprisonment for an offense shall be served.*****"

1/27/38

We find no provision of the Laws of Missouri which prohibits the legislature from designating the place of imprisonment for the violation of crime.

In the case of State v. Walker, 309 Mo. 103, l.c. 111, the court said:

"The purpose of the act of the legislature establishing the reformatory was to segregate youthful offenders and free them from associating with habitual criminals *****."

Section 8475 R.S. Mo. 1929 provides as follows:

"Transfers may be made under the following conditions:

a. As soon as the construction of the intermediate reformatory is to be undertaken, or as soon as its agricultural or industrial activities require laborers, the commissioners of the department of penal institutions shall have power, with the consent of the governor to transfer to the tract of land upon which the intermediate reformatory is to be located any or all inmates of the Missouri reformatory at Boonville and of the Missouri penitentiary, who at the time of their last conviction were between the ages of seventeen (17) and twenty-five (25) years and who are serving their first sentence for conviction of a felony.*****

b. The department of penal institutions shall have the power, with the consent of the governor, to transfer to the penitentiary any prisoner who subsequent to his committal to the intermediate reformatory, shall be shown to their satisfaction to have been, at the time of his conviction, twenty-five years of age or over, or to have been previously convicted of a felony; and may also transfer any apparently incorrigible prisoner, whose presence in the reformatory appears to be seriously detrimental to the well-being of the inmates of the institution.*****

1/27/38

It is further provided, that if in any case it shall be found by the department of penal institutions and the governor of this state, that a prisoner confined in the Missouri reformatory at Boonville, has been improperly sentenced to either of these institutions, and that such prisoner should have been sentenced to the intermediate reformatory, such prisoner may, with the consent of the governor, be transferred to the intermediate reformatory, to be and become an inmate therein, subject to the rules and discipline of such reformatory; and it shall be the duty of the general superintendent of said reformatory to receive such prisoner into said reformatory as may be so transferred, and properly care for such prisoner therein until such time as such prisoner may be lawfully paroled or discharged therefrom. In like manner, transfers may be made from the Missouri reformatory at Boonville to the intermediate reformatory of any offender who, subsequent to his commitment, shall be shown to their satisfaction to have been, at the time of his conviction seventeen years or more of age, but less than twenty-five and for the first time convicted of a felony.*****"

This section seems to provide properly for the transferring to the other penal institutions boys who have been improperly committed to the Missouri Training School for Boys.

CONCLUSION

From the foregoing statutes, it is the opinion of this department that the court is without jurisdiction to sentence to, and the commissioners of the department of penal institutions and the officials of the Missouri Training School for Boys are unauthorized to accept for confinement in said training school, any person of the age of seventeen (17) years or over at the time of the conviction of the offense for which they are sentenced, and in case such persons are sent to the said school, then by the provisions of Section 8475, supra, they may be transferred to the intermediate reformatory or penitentiary.

1/27/38

II

On your question as to how long the names of a person who escapes from the Missouri Training School for Boys should be carried on the rolls, we are assuming that you refer to the rolls upon which you make your requisition for the expenses of said school and for charges against counties for support of certain boys under the following section:

Section 8358 R.S. Mo. 1929 is as follows:

"There shall be paid to the state prison board the sum of fifteen dollars per month for the support, maintenance, clothing and all other expenses of each person committed to said reformatory, from the time of his reception into said institution until his discharge therefrom: Provided, that no payment shall be made for the time that any such person may be absent from the reformatory on probation, by permission of the board. All payments shall be made quarterly in advance; Provided, that all payments for the support of persons chargeable to a county shall be paid by such county in cash, and for that purpose the county court is authorized to discount its warrants, but the Missouri reformatory shall not receive any county warrants for the maintenance and support of any person committed to such institution."

From this section the state or county pays so much per month to the institution for the support of each person confined in the institution.

If the person escapes, there is not expense for his support, and no claim for his support should be presented.

CONCLUSION

It is, therefore, the opinion of this department that you should immediately drop the name of any person who escapes

Mr. J. E. Matthews

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1/27/38

from the Missouri Training School for Boys, off the roll which the institution uses in making its requisition for the support, maintenance, clothing and expenses of persons confined therein, and that the names of such escape should be replaced on the roll when he is apprehended. This opinion does not relieve such escape from being apprehended at any time and returned to the reformatory to serve out the term of his sentence.

Respectfully submitted,

TYRE.W. BURTON
Assistant Attorney General

APPROVED:

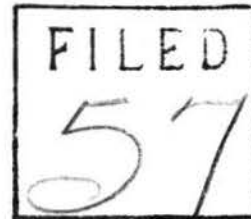
J. E. TAYLOR
(Acting) Attorney General

TWB:DA

CARRYING CONCEALED WEAPONS: A violation of Section 4029 R. S. Mo. 1929.
Pistol carried in cab of truck.

February 12, 1938

Mr. G. Logan Marr
Prosecuting Attorney
Versailles, Missouri



Dear Sir:

We have your request of February 10th for an opinion as to whether or not truck drivers engaging in the practice of carrying a gun on the floor or seat of a truck is a violation of any state law.

You will find this exact question answered and passed upon in State vs. Renard, 273 S.W. 1058, wherein the defendant was arrested while driving an automobile on Olive Street in St. Louis and was found to have a loaded revolver on the floor of the car at defendant's feet. The night was dark and the revolver could not be seen. The Court held, l. c. 1058:

"This was a concealment within the meaning of the statute. State vs. Conley, 280 Mo. 21, 25, 217 S.W. 29."

CONCLUSION

It is therefore the opinion of this office that the carrying of a revolver by a truck driver about the cab of his truck at night, in the dark, is a violation of Section 4029 R.S. Mo. 1929, prohibiting the carrying of concealed weapons.

Respectfully submitted,

APPROVED:

FRANKLIN E. REAGAN
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

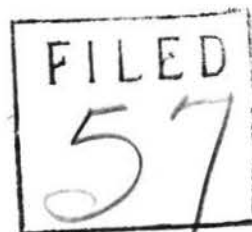
FER:MM

MISSOURI TRAINING) Costs of transportation of boys to be paid by
SCHOOL) state or county;

DELINQUENT) Costs of transportation to reformatory paid
by county.

February 15, 1938

Hon. J. E. Matthews
Director Department
of Penal Institutions
Jefferson City, Missouri



Dear Sir:

We have your request of February 12, 1938, for an opinion which is in part as follows:

"Many times the question of cost in bringing a boy here has arisen, whether or not the County or State pays for such cost. I am attaching copy of report from Mr. Highfill on the subject, and I would like to have an official opinion on this, in order that we will comply with the law."

This opinion is being written with particular reference to the juvenile act in counties of less than fifty thousand population.

We call your attention to Section 8357 R. S. Missouri 1929, which in part provides as follows:

"In all cases of conviction of felony, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the reformatory, the cost of the proceedings and the delivery of such person to the reformatory shall be paid by the county in which the conviction is had.* * *"

The question arises as to whether all persons committed to the reformatory (now the Missouri Training School for Boys) have been convicted as that term is used in the above statute.

Section 14159 R. S. Missouri 1929 provides that boys over the age of seventeen and under the age of twenty-one who are found delinquent in a court having jurisdiction of misdemeanors may be sentenced to the reformatory. In such a case all state rights guaranteed by the constitution to a defendant in a criminal trial must be preserved in this proceeding.

In dealing with boys under the age of seventeen, who may be convicted, we have three specific groups to deal with, (Section 8350 Laws of Missouri 1933, page 331), as follows:
(1) Boys convicted under the general law for a criminal offense, the minimum punishment of which is ten years in the penitentiary;
(2) Boys convicted of other felonies wherein the minimum punishment is less than ten years in the penitentiary; (3) Boys convicted of a misdemeanor.

In the first class above enumerated a boy under the age of seventeen may be tried for a criminal offense which carries a minimum punishment of ten years in the penitentiary. Under such circumstances it is optional with the trial judge to sentence such boy to the penitentiary or to the reformatory. In either event the boy has been convicted, and the cost of transferring him to the reformatory is to be paid by the state, 8357 supra, and his support is fixed at fifteen dollars per month, to be paid by the county, Sections 8358, 8359 R. S. Missouri 1929.

In the second class of cases, where the boy is convicted of a felony, carrying a minimum punishment of less than ten years in the penitentiary, he may be sentenced to the reformatory, 8350 supra. In this case the cost of transferring such boy to the reformatory is to be paid by the state under Section 8357 supra, while the support of such boy while in the reformatory is to be paid by the county, Sections 8358, 8359 supra.

In the third case, where the boy is convicted of a misdemeanor he may be sentenced to the reformatory, 8350 supra. In this case the cost of his transportation to the reformatory is to be paid by the county, 8357 supra, and his support while in the reformatory is to be paid by the county, Sections 8358, 8359, supra.

There is still another class of individuals who are committed to the reformatory under the juvenile act who are known as "delinquents". When a boy is tried in the juvenile court for delinquency, which acts of delinquency may or may not constitute a violation of a criminal statute, he can only be adjudged a delinquent, Section 14161 R.S. Missouri 1929. A person who is adjudged a delinquent under a juvenile act has not been found guilty of any criminal offense and there has been no conviction for either a felony or misdemeanor. Lang vs. Commonwealth, 226 S.W. 379, 383, 190 Ky. 29; Alexander's Administrator vs. Kentucky Bankers' Association, 35 S.W. (2) 287, 288, 237 Ky. 232. It therefore appears that a person who is adjudged delinquent in the juvenile court is never convicted of either a felony or a misdemeanor as the term conviction is used in Section 8357 supra. This appears sustained by a decision of the Supreme Court in Banc in State ex rel. vs. Rutledge, 13 S.W. (2) 1061, 1. c. 1064, wherein the Court pointed out that although the juvenile court has exclusive jurisdiction of boys under the age of seventeen, such boy may be tried for delinquency or may be tried for a criminal offense.

The cost of such juvenile hearings is taxed against the County, Section 14166 R. S. Missouri 1929. It is made the duty of the probation officer "to take charge of any child before and after hearing as may be directed by the court", Section 14173 R. S. Missouri 1929, and the support of such delinquent while in the reformatory is to be paid by the County, Section 14176, Section 8358 R. S. Missouri.

Under Section 14167 R. S. Missouri 1929, it is the duty of the juvenile judge to determine whether or not a boy is "delinquent" before ordering any commitment. The juvenile records should not recite that the boy under seventeen years of age is found guilty of a felony or misdemeanor but it should only recite that he is found to be delinquent within the meaning of the juvenile act. Such boy is not being tried for a criminal offense and is not accorded in such trial the benefits of certain

February 15, 1938

constitutional guarantees accorded to persons who are being tried for a crime. State ex rel. vs. Rutledge supra. The inclusion of any language in a commitment of a juvenile to a reformatory reciting that such delinquent has been found guilty of a felony or misdemeanor is surplusage and should be disregarded.

CONCLUSION

It is therefore the opinion of this office that the state shall pay the costs of transporting boys to the reformatory who have been convicted of a felony; that the county shall pay such costs of transportation for all who have been convicted of a misdemeanor, and shall also pay the costs of transporting all boys sent to the reformatory as "delinquents".

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

INSTITUTIONS:
MISSOURI TRAINING SCHOOL
FOR BOYS:

When male persons between 17 & 21 yrs.
may be committed.

Boys from 17 & 21 charged, tried &
convicted as delinquents in Section
14159 R.S. Mo. 1929 may be sent to
Missouri Training School for Boys.

February 17, 1938

Mr. J.E. Matthews,
Department of Penal Institutions,
Jefferson City, Missouri.

SUPPLEMENTAL OPINION

Dear Sir:

After rendering the opinion dated January 27, 1938, pertaining to the age limit of persons who may be admitted to the Missouri Training School for Boys, I find upon reading Section 14159 R.S. Mo. 1929, that there is one exception to the rule that I made in that opinion, and I am submitting the following as a supplemental opinion to the one to you dated January 27, 1938. Section 14159 R.S. Mo. 1929 is as follows:

"Whenever in the state of Missouri any minor of the age of seventeen years or over shall commit any of the acts constituting a delinquent child as defined in the statutes of this state, applicable to children under seventeen years, such minor may be caused to be brought by his or her parents or lawful guardian or by the probation officer or by any person interested in said minor, before a court of record having jurisdiction over misdemeanors, and tried in the same manner as a person charged with the commission of a misdemeanor. Upon the finding of delinquency, the court may proceed to make such order in the case as may seem to be for the best interests of said minor, either by commitment to any public institution, or to any private institution willing to receive such minor, or to the care and custody of any individual willing to care for said minor or said minor may be left in the care of his or her parents or guardian, subject to the supervision of the court under suspended sentence; or the court may proceed to make any other lawful disposition of the

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February 17, 1938

case."

And under Section 14161, I find the words "delinquent child" as defined to include:

"***** The words 'delinquent child' shall include any child under the age of seventeen years who violates any law of this state, or any city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters house of ill-repute or any place where any gambling device is operated; or any saloon or dramshop where intoxicating liquors are sold; or who is either habitually truant from any day school, or who, while in attendance at any school, is incorrigible, vicious or immoral. *****."

CONCLUSION

By virtue of the provisions of the foregoing sections, this office is of the opinion that any male person between seventeen and twenty one years of age who commits any of the acts constituting a delinquent child as defined in Section 14161, supra, and who is charged, tried and found guilty as a delinquent child under the provisions of Section 14159, supra, may be committed to any public institution.

We are further of the opinion that such minor convicted as aforesaid may be committed to the Missouri Training School for Boys.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SHERIFF:

Sheriff is entitled to payment for board of prisoners fixed by his local county court where he has charge of prisoners coming from another county that has no jail.

February 21, 1938

Mr. G. Logan Marr,
Prosecuting Attorney
Morgan County,
Versailles, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated February 14, 1938, for an opinion from this office which request reads as follows:

"Morgan County does not have a suitable jail, and prisoners are sent to Cooper County jail by virtue of section 8545.

The Circuit Court has entered an order of record, designating the Cooper County jail as the regular Morgan County jail.

In November 1937, the County Court of Morgan County, Mo. under section 11794, made an order fixing the board of prisoners in jail at 60¢ per day per man.

The County Court of Cooper County, Mo., has fixed the board of prisoners in Cooper County at 70¢ per day per man.

The sheriff of Morgan County, Mo., takes all his county and state prisoners to the Cooper County jail, and the jailor of Cooper county will not feed the prisoners from Morgan County at the rate of 60¢ per day per man, and then feed his own prisoners at 70¢ per day per man. From section 8545, the Cooper County jailor must take in the Morgan County prisoners brought over by the sheriff of Morgan County.

Does the County Court of Morgan County, Mo., have to pay the Cooper County rate



of \$70¢ per day per man, or does the 60¢ per day per man prevail, and that is all the court can pay the jailor of Cooper county?

If the county court of Morgan County, Mo. is bound by the 70¢ per day per man in Cooper county, can the county court of Morgan County, Mo. change their order of \$0.60¢ per day to 70¢ per day per man?"

Section 8527 R.S. Mo. 1929 reads as follows:

"It shall be the duty of the sheriff and jailer to receive, from constables and other officers, all persons who shall be apprehended by such constable or other officers, for offenses against this state, or who shall be committed to such jail by any competent authority; and if any sheriff or jailer shall refuse to receive any such person or persons, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in the discretion of the court."

Section 8533 R.S. Mo. 1929 reads as follows:

"Whenever any person, committed to jail upon any criminal process, under any law of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff or jailer shall provide such prisoner with food, for which he shall be allowed a reasonable compensation, to be fixed by law; and if, from the inclemency of the season, the sickness of the prisoner or other cause, the sheriff shall be of the opinion that fuel, additional clothes or bedding, medicine and medical attention are necessary for such prisoner, he shall furnish the same, for which he shall be allowed a reasonable compensation."

Section 8545 R.S. Mo. 1929 reads as follows:

"It shall be lawful for the sheriff of any county of this state, when there shall appear to be no jail, or where

the jail of such county shall be insufficient, to commit any person or persons in his custody, either on civil or criminal process, to the nearest jail of some other county; and it is hereby made the duty of the sheriff or keeper of the jail of said county to receive such person or persons, so committed as aforesaid, and him, her or them safely keep, subject to the order or orders of the judge of the court for the county from whence said prisoner was brought."

Section 11794 R.S. Mo. 1929 reads as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

This section as you will notice, provides that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court. The term "county court" means the county court where the prisoner is furnished with board. According to your request, the county court of Cooper County, Missouri, has fixed the board of prisoners in Cooper County at seventy cents per day per man and if the sheriff of Cooper County should charge a less amount than seventy cents per day per man, he would be violating that part of Section 11794 R.S. Mo. 1929, which forbids him accepting a price less than fixed by his own local county court.

Section 11795 R.S. Mo. 1929 reads as follows:

"It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of

January next thereafter, and it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills."

According to this section, it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of said clerk and the judge and prosecuting attorney in making and certifying fee bills. According to this part of Section 11795, it all goes on the theory that the allowance must be fixed by the local county court and certified by the local officers authorized thereby.

In the case of State ex rel. Saline County v. Price, 246 S.W. 572, the court held:

"The trial court held that sums received by the sheriff from the county for the board of prisoners in his charge as jailer were not fees for which the plaintiff can be held to account, as a part of his compensation allowed by the statute. Section 11036, R.S. 1919. Section 12551, R.S. 1919, provides that--

'The sheriff * * * shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible.'

In this capacity it became his duty to see that the prisoners confined there were provided with food, bedding, and medical attention. Section 11003 makes it the duty of the county court at the November term of each year to fix the fee for furnishing each prisoner with board for each day during the following calendar year. During the entire term of the defendant Price, the amount of this daily charge

was limited to 50 cents, and the sheriff or jailer was forbidden to make any contract for the boarding of prisoners for a less sum. * * *."

Section 11795 R.S. Mo. 1929, is identical with Section 11003 R.S. Mo. 1919 mentioned in the opinion of this case.

The legislature, in authorizing the county court to fix the sum to be charged for the board of prisoners, could not delegate the authority to the county court of Morgan County, Missouri, to fix the board of prisoners confined in the jail of Cooper County, Missouri.

In the case of State ex rel. Buckner v. McElroy, 309 Mo. 595, the legislature of this state attempted to pass an act which would place the control of several of the county buildings under the parole board which consisted of circuit judges of Jackson County, Missouri. This act was in direct violation and unconstitutional and was so held by the court. It was unconstitutional for the reason that it violated Section 36 of Article VI of the Missouri State Constitution which reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

The court in this case also held as follows:

"The gist of this case hovers around Section 36 of Article VI of the Missouri Constitution for 1875. This section reads: 'In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law.' By law these courts have been established so as to consist of a presiding judge (to be elected by the whole county) and two associate or district judges to be

chosen by the electorate of their respective districts. But what we want to emphasize is the fact that the court is of constitutional origin, and its jurisdiction fixed by the Constitution. In the language of the organic law such court 'shall have jurisdiction to transact all county * * * * business.' Other business may be added to its jurisdiction by law, but no law can take from it that which the Constitution expressly gives, i.e., that it shall transact all county business. By Section 2574, Revised Statutes 1919, such court is given control of all county property, both real and personal, and with it the added authority to purchase, lease and receive by donation any property, real or personal, for the county. Likewise we find the power to sell property belonging to the county, and to audit and settle all demands against the county. Much of this section has stood for many years, and is and was a legislative construction of the Constitution when it speaks of transacting county business. The law-makers understood that the transacting of county business meant the control of all county property, whether such property was in the nature of either penal or eleemosynary institutions. The law-makers would have just as much power to place the county jail, or the poor farm under the control of a parole board, as they would have to place the three institutions mentioned in the pleadings herein. Or, to broaden the field, the divers state eleemosynary and penal institutions of the State could as well be placed in a board of supreme or circuit judges. The management of county and state property, having no direct connection with the work of the judges, should not be placed in the hands of the judges. It has been ruled that courts can appoint agents and officers connected with the court and look after the property wherein the courts are held, and many things incidental to the workings of courts, but such is not

the case here. For that reason we do not discuss or pass upon such matters. Here the power is conferred, by the Constitution, upon the County Court of Jackson County to manage and control these institutions and no mere legislative act can thwart the Constitution. * * * * *

Section 8545 R.S. Mo. 1929 as set out above, does not mention anything about the sum or price to be charged for the board of a prisoner in the county to which the prisoner has been sent. In the case of Ransom v. Gentry County, 48 Mo. 341, 1.c. 343, the court held:

"The language of the statute also refers to the county where the prisoner is held in custody. The expense can only be incurred with the sanction of the judge of the court having criminal jurisdiction for his (the sheriff's) county, or any two justices of the county court of his county, and must be audited and paid as other county expenses.

This case was a case where a prisoner was indicted on a felony in one county and was removed by change of venue to another, not provided with a sufficient jail, the former county was held not liable for the guarding of the prisoner in the latter, when the cost arose from a failure of the county to provide such jail. The county failing to provide the jail was held to bear the expenses.

Statutes must be construed in their exact terms. In the case of State ex rel. v. Cobb, 55 S.W. (2d) 57, the court held:

"The rule is well stated, as follows:

'A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and

unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.' * * * *."

The court in the same case further held:

"* * * * In Lewis-Sutherland Stat. Const. vol. 2 (2d Ed.) p. 737, it is said:

'Where the omission is not plainly indicated and the statute as written is not incongruous or unintelligible and leads to no absurd results, the court is not justified in making an interpolation.' * * * * *"

59 Corpus Juris at page 961, sets out the following:

"In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used," citing Betz. v. Columbia Telephone Co., (App.) 24 S.W. (2d) 224.

In the case of Fischbach Brewing Company v. City of St. Louis et al., 95 S.W. (2d) 335, the court held:

"In determining the meaning and intent of a statute it is proper to consider the time of its enactment, the surrounding facts and circumstances, the purpose for which the law was enacted, the cause or necessity which induced its enactment, the prior condition of the law, the mischief sought to be remedied, contemporaneous and prior historical events which may have influenced the enactment; in other words, the judicial interpreters of the law should put themselves as near in the position of the makers of the law as possible in order to more correctly ascertain their intent in its enactment. Sutherland on Statutory Construction (2d Ed.) 456, p. 864, 471, p. 883."

It has been held that when a county court had made a valid order in reference to the board of prisoners, it has exhausted its power and cannot change that order. In the case of Mead v. Jasper County, 266 S.W. 467, the court held:

"* * * * The county court, having made a valid order which was within its power and duty to make at the November term and before January 1st, exhausted its power in respect thereto for that year and could not set same aside after January 1st, particularly if rights became fixed thereby for the ensuing year. In Bayliss v. Gibbs, 251 Mo. loc. cit. 506, 158 S.W. 594, it was said:

"This court, in numerous cases, has repeatedly held, that the county courts of the respective counties of the state are not the general agents of the counties of the state. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the state; and as has been well said, the statutes of the state constitute their warrant of authority, and when they act outside of and beyond their statutory

authority, their acts are null and void.'

In Saline County v. Wilson, 61 Mo. loc. cit. 239, it was said:

'County courts are only agents of their respective counties in the manner and to the extent prescribed by law. So long as they continue to tread in the narrow pathway allotted to their feet by legal enactment, their acts are valid, but whenever they step beyond, their acts are void.'

The general rule is laid down in 15 Corpus Juris, p. 470, where it is said:

'Where a county board or court exercises functions which are administrative or ministerial in their nature and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time and manner, it may modify or repeal its action; but in no event has such court or board the power to set aside or to modify a judicial decision or order made by it after rights have lawfully been acquired thereunder, unless authorized so to do by express statutory provision. * * * The same is the case after an appeal has been allowed, or where some special statutory power is exercised, the time and mode of the exercise thereof being prescribed by statute. Where the previous action of the board is in the nature of a contract which has been accepted by the other party, or on the faith of which the latter has acted, it cannot be rescinded by the board without the consent of the other party. Conversely, where the proposition has not been accepted or acted on by the other party, the board may restrict or rescind its action. In the absence of express statutory authority, a county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law. A county board or court may, however,

at the term or session at which an order is made, revise or rescind it, provided this is done before any rights accrue thereunder, but ordinarily they have no power to do such act subsequent to such term or session.'

Section 11002 contemplates that the sheriff himself will furnish the board for the prisoners under his care in the county jail. But the proviso that he shall not contract for the furnishing of such board for a price less than that fixed by the county court recognizes the fact that he may lawfully contract with others to furnish such board, the only limitation thereon being that he shall not be permitted to profit thereby. Sections 11002 and 11003 require provision to be made for the future, to wit, the ensuing year, and common fairness requires that the county court should not be permitted, through mere caprice or even while acting under entirely proper motives, to change its order to the detriment of the sheriff. Certainly, if respondent had elected to contract with a third person for the board of prisoners for the ensuing year on the price fixed in the order of December 1, 1922, it would constitute a grievous wrong to permit the county court to change its order. * * * * *

CONCLUSION

In view of the above cited authorities, it is the opinion of this office that the County Court of Morgan County, Missouri, must pay the sheriff of Cooper County, the rate of seventy cents per day per man as fixed by the County Court of Cooper County.

It is also the opinion of this office that the County Court of Morgan County cannot change their order fixing the board of prisoners in Morgan County at sixty cents per day until the November term of court of this year for the following year beginning January 1, 1939. The County Court of Morgan County is indebted to the sheriff of Cooper County in

Mr. G. Logan Marr

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February 21, 1938

the amount of seventy cents per day per man and can be paid in the same manner as debts created by the County Court of Morgan County.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

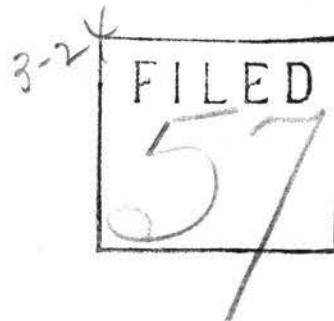
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

JURISDICTION : Right of trial court to entertain the setting aside of the verdict after case has been appealed.

March 22, 1938.



Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Referring to your letter of January 1st and January 16th last, relative to the case of State vs. Hotsenpiller, wherein you state that the defendant was convicted in the trial court and appealed, therefrom, to the Supreme Court on the 9th of October, 1937 and that by reason of the death of the court reporter, some fifty days after the case was appealed, a bill of exceptions has not been procured by the defendant, and wherein your letter of January 1st, you ask this department for an opinion on the following two questions, to-wit:

"1. Has the circuit court such jurisdiction as will permit him to enter an order directing a new trial of this case, after the appeal has been perfected to the point that the same is now pending in the Supreme Court of Missouri?

"2. After the trial, and the facts that Gus Le Compte the Court reporter lived fifty days, will the mere fact that the court reporter did not transcribe his notes for the appellant to put in the bill of exceptions, be sufficient alone to grant a new trial?"

It appears from your letter of January 16th, that the court, in an informal way, stated that he did not have jurisdiction. We take this to mean that the

court did not, or would not, entertain setting the verdict aside and giving the defendant a new trial. Hence, your first question may, in fact, be a moot one. However, we will answer the question, assuming it is still a live one, but will have to give you the answer in two ways, because we do not know whether or not the term, at which the defendant was convicted and the appeal taken, has finally adjourned.

If such term has finally adjourned, then the trial court would not have jurisdiction to entertain the setting aside of the verdict on the motion for a new trial. In the case of *Reed vs. Bright*, 232 Mo. l. c. 415, the court said:

"An appeal, except for limited purposes, divests the trial court of jurisdiction. In this case the term had ended. Under such circumstances the general rule is that the circuit court is divested of jurisdiction and the jurisdiction as to the judgment and the cause is vested in the appellate court."

If on the other hand such term is still in existence, then the case of *Hydraulic Press Brick Company vs. Bambrick Bros. Const. Co. et al.*, 211 S. W. l. c. 94, applies, wherein the court said:

"It is well settled that the circuit court has jurisdiction of a cause, and power to control and set aside its judgments and orders, during the term at which the judgment was rendered or the orders made, and the effect of the action of the trial court, in settling aside the judgment at the same term at which it was rendered, had the effect of vacating the appeal from that judgment, and when it entered up a new judgment at the same term during which the first

was entered, as appears by the certificate of the clerk, and as learned counsel for appellant practically admits was done, the appeal from this first judgment fell, and could be taken only from the final judgment, and it is from a final judgment alone that an appeal lies."

Relative to your second question, we cite you State vs. Thompson, 130 Mo., wherein the court said:

"The evidence has not been preserved in the bill of exceptions, the stenographer having died about a month after the trial without having transcribed his notes, owing to a long illness beginning soon after circuit court adjourned, and continuing down to the time of his death, and no one else can translate the stenographer's notes of the evidence.

"Upon these grounds, and upon the further ground that no other notes of the evidence were taken, either by defendant's or other counsel in the cause, we are moved, on behalf of defendant, to reverse the judgment and remand the cause.

"This we can not do. Notwithstanding the sickness of the stenographer, there was nothing to prevent defendant's counsel to have remembered and written down the substance, at least, of the testimony and have the same inserted in the bill of exceptions, because it is evident the evidence could not have been lengthy, and due diligence required of them when discovering the stenographer

March 22, 1938

was dangerously ill, to have preserved the evidence in some way. This might have been done if their memory failed, by calling on the witnesses who had testified at the trial."

Additional cases could be cited, illustrating the principle of law applicable, but we believe the aforesaid will suffice. However, it appears that the holding in the Missouri cases are based upon whether or not the facts and circumstances show due diligence on the part of the defendant.

We are not sufficiently advised, in the instant case, as to whether or not the defendant, by the exercise of due diligence, could have procured a transcript of the testimony and, hence, all that we are able to say is that, if the defendant, by prompt action, could have procured, from the reporter, a transcript of the testimony before the reporter became incapacitated or if the defendant, himself, could have made a resume of the testimony, which you would have agreed to as fairly setting forth the facts of the case, but the defendant has failed to do either one, then we do not believe that the defendant would be entitled to a retrial, due to a lack of a bill of exceptions.

Respectfully yours,

JAMES W. BUFFINGTON
Assistant Attorney General

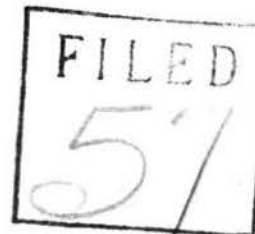
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JWB:LB

PROSECUTING ATTORNEY: Can bring civil suit for county or state
without order from county court.

April 2, 1938 4/4



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This will acknowledge yours of March 29, 1938,
which reads as follows:

"There are several officers of this county who are in default on their official bonds, for the reason they have collected certain fees by virtue of their office and failed to turn these fees over to Morgan County. Who should order suit on these official bonds, or is any order necessary?

"I am well aware of the duties imposed upon the prosecuting attorney by the statutes. But a prosecuting attorney usually has a party to represent and act for in court. He does not act for himself, and he is usually not the moving party to institute suit on his own discretion. It seems to me that in order to get cooperation, and to act for a moving party, that in the case of a suit on an official bond against a county officer to collect money coming to Morgan County, the County Court should make the necessary order for a suit upon such an official bond. The County Court audits and approves the monthly settlements of the county officers. The County court has been given the power to compromise and settle claims due the county. Sec. 12162

gives these powers. The statute provides among other things '.....to enforce the collection of money due the county; to order suit to be brought on the bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same.....'

"It appears to me that under this part of the statute, if I, as prosecuting attorney, brought suit on an official bond of a county officer, the civil suit could be demurred out of court because there was no order made by the county court in order to bring the suit on the bond."

Section 12162, R. S. Mo. 1929 provides, among other things, as follows:

"The county court shall have power ** to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; *** "

The foregoing section appears under Article 8, Chapter 85, which is entitled "County Treasurers, Funds and Warrants, and the title to the section is, "Power of county court -- auditing and settling claims."

Said article deals primarily with the fiscal affairs of the county. By this section, the Legislature granted to the county court the power to audit, adjust and settle all accounts to which the county is a party, and if on such audit, adjustment and settlement it is found that there is anything due the county or any delinquency, then the county court can order suit brought on the bond of the delinquent and require the prosecuting attorney to commence and prosecute the same.

However, we find other provisions in the law relating to suits in which the county is interested. Section 11316 reads in part as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; *** "

Section 11318, R. S. Mo. 1929 provides in part as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. **** "

All of these statutes have been on the books for many years. It is a familiar rule of construction that where two statutes are susceptible of a construction that will give force to both, they must be so construed. State ex rel. vs. Clayton, 226 Mo. 292. In view of this rule and of the fact that these statutes are of long standing, we think it incumbent upon us to construe them so as to give

force and effect to all of them unless they are in hopeless conflict.

Section 11316 says the Prosecuting Attorney "shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned." What does "commence" mean? Webster's New International Dictionary defines it as follows:

"To enter upon; to begin; to perform the first act of; as commence a lawsuit."

The same authority says that "begin" and "commence" are identical in meaning."

In the case of School District vs. Brand, 81 Pac. 473, the Supreme Court of Kansas, in discussing a provision of the law which authorized the director to cause a suit to be commenced, said this:

"To commence is to institute, and to institute is to commence."

In the case of Maud vs. Terrell, 200 S. W. 375, (Tex.) the court was discussing the meaning of a statute which said, "the collector shall commence an action to recover the amount of such tax." In discussing this expression, the court said: (1.c. 377)

"Upon its face this language would authorize the collector to file the suit, but it cannot be assumed that the Legislature so intended. It plainly means that he should cause the suit to be filed by the official charged by law with that specific duty. There is not much difference, as was suggested in the argument, between declaring it a duty 'to commence an action for taxes' and 'to sue for taxes.' If the former expression in the connection in which it is used is susceptible of the meaning, as it clearly is, that the

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person to whom the duty is confided shall merely cause the suit to be brought, the latter, used in a similar connection and found in the same chapter, is equally open to the same construction."

The foregoing case decided that while the language itself would authorize the collector to file the suit, yet the context wherein such expression was used in that particular statute indicated that the language meant to authorize the suit or cause the suit to be brought. Whether the meaning of the word "commence" in our statute is to actually bring the suit or to cause it to be brought is the same thing for the purpose of our discussion, since the officer, the prosecuting attorney, to whom this duty is entrusted, is an attorney and can actually bring the suit.

We think from the foregoing definitions and constructions of the word "commence", Section 11316 might well read, "The prosecuting attorney shall institute and prosecute all suits ***". There is nothing in this section which indicates that the prosecuting attorney must wait until the county court tells him to commence a suit. He is plainly charged with the duty of beginning and prosecuting actions in which the county or state may be concerned.

Section 31318, supra, requires the prosecuting attorney to represent generally the county in all matters of law. He therefore represents the county rather than the county court. He is charged with certain duties to be performed for the welfare of the inhabitants of the county and likewise the county court is charged with certain duties. An interesting discussion of the relation of the prosecuting attorney and the county court will be found in the case of State ex rel. vs. Wurdeman, 183 Mo. App. 28, wherein the court said (l.c. 32) :

"It is to be said, first, that under the statutes both the judges of the county court and the prosecuting attorney are elected by the people of the county and with a view of serving its inhabitants

in the discharge of the duties annexed by law to the respective offices of county court and prosecuting attorney. The office of the county court and of the prosecuting attorney are, of course, separate and independent and neither is necessarily subservient to the other. The county court consists of three judges, elected by the people, but its members are not required to be learned in the law, while one of the qualifications prescribed for the prosecuting attorney is that he shall be so learned. By statute, certain judicial duties and certain other ministerial and administrative duties are committed to the county court, while other statutes commit certain duties which appertain to the profession of a lawyer to the prosecuting attorney as the law officer of the county."

In the Wurdeman case, supra, the court quoted with approval the following from a Kansas Case (l.c. 34) :

"The county attorney is elected by the people of the county and for the county. He is the counsel for the county, and cannot be superseded or ignored by the county commissioners. His retainer and employment is from higher authority than the county commissioners. The employment of a general attorney for the county is not by the law put into the hands of the county commissioners, but is put into the hands of the people themselves."

And again at page 41 of said decision the court said:

"Obviously, if it be the official duty of the prosecuting attorney under the statute to thus appear, and one which he is sworn to perform, then its per-

formance on his part cannot depend upon the consent of the respondent county officer in the mandamus, and such county officer should not be permitted to defeat the prosecuting attorney in the performance of his official duty by withholding consent to put the interests of the county forward in his return.

It might be said in passing that this case was certified to the Supreme Court because of a dissent on the part of one of the judges, but an examination of the records in the clerk's office of the Supreme Court shows that the case was later dismissed. Therefore, we think the case is a controlling authority, since it has not been overturned by the Supreme Court.

The office of prosecuting attorney is an important office. An interesting discussion of the history of that office is found in the case of *State ex rel. vs. Lamb*, 237 Mo. 437. At page 451 of said decision, the court said:

"In a strict historical sense, the prosecuting attorney represents the State and exercises powers analogous to those exercised by the Attorney-General in England. As was said by the Supreme Court of Michigan: 'The prosecuting attorney is a very responsible officer, selected by the people and vested with personal discretion intrusted to him as a minister of justice, and not as a mere local attorney.' (*Engle v. Chipman*, 51 Mich. 524.)

"The sovereign power of government can only be exercised through its officers. Consequently, to each officer is delegated some of the powers and functions of government. Usually a discretion that is within the power granted to an officer cannot be controlled by other officers. It has been held, for instance, that mandamus will not issue

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to control the discretion of the Attorney-General as to whether or not he should institute quo warranto proceedings. (People v. Attorney-General, 41 Mich. 728.) A prosecuting attorney has discretionary power to institute or discontinue prosecutions. (1 Bish. New Crim. Proc., sec. 287.) "

In the case of Meador vs. Texas County, 167 Mo. 201, the question arose as to whether the county should compensate the prosecuting attorney for services performed by him in appearing and orally arguing a criminal case in the appellate court. He contended that he should determine when it was necessary for him so to do, and the county court contended that it should determine when it was necessary for him so to do. At page 204, the court said:

"This statute makes it the duty of the prosecuting attorney to represent the State in all criminal cases in the court of Appeals from his county, and it specifies that in the performance of that duty he shall make and cause to be printed, at the expense of the county all necessary abstracts of record and briefs. Those duties are required of him unconditionally. In addition to those absolute duties, the statute further declares that 'if necessary' he shall appear in court in person."

At page 205 the court said:

"The statute does not make either the prosecuting attorney or the county court the sole arbiter of that matter. The statute says he should go if necessary, and shall be paid a reasonable fee for his services. But the question of the necessity and that of the quantum meruit are open questions of fact to be tried on the evidence by the court which is to pass judgment on the claim when presented, ***. Was it necessary

in this case for the prosecuting attorney to attend on the Court of Appeals in person? That must be decided by the triers of the fact, like any other question of fact in the case."

It should be noted that Section 11316 is the authority under which the prosecuting attorney commences criminal actions also. No one would seriously contend that the prosecuting attorney must wait until the county court orders him to bring a criminal case. The only reason that the question might be raised as to the authority of the county court in civil matters is perhaps the fact that the Constitution (Article VI, Sec. 36) vests in the county court jurisdiction to transact all county business. The courts have repeatedly held that the county court is the fiscal agent of the county and in that respect a prevailing idea has grown up that the county court has a general supervisory power over other officers of the county. However, the Supreme Court of this state, in the case of *State ex rel. vs. McElroy*, 309 Mo. 595, quoted with approval the following definition of "county business": "All business pertaining to the county as a corporate entity." This has been held to include the power to control county property, county finances, etc.

Neither this constitutional provision nor any statute which we have been able to find vests any control in the county court over the prosecuting attorney. The duties are distinctly set out in the statutes, and he gets his authority from the same source that the county court does. The particular statutes we have been discussing make it the duty of the prosecuting attorney to institute civil and criminal suits in which the state or county may be concerned, and we do not think that the county court can interfere with his performance of that duty, which he took an oath to perform.

It is true that Section 12162 gives the county court the power in certain instances to require the prosecuting attorney to "commence and prosecute" such suits; but said statute does not say that the prosecuting attorney is without authority to bring civil suits on behalf of the county until he has been ordered so to do by the county court. It would seem that the people of the county have

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the added protection in this case of having the county court vested with authority to compel an action by the prosecuting attorney, so that if the prosecuting attorney should neglect to file such a case, the court could require him to do it, and the Supreme Court of this state, in the case of State ex rel. vs. Fulks, 296 Mo. 614, held that if the prosecuting attorney refused to bring such a suit after being ordered by the county court to do so, the county could employ private counsel to bring such action.

CONCLUSION.

It is, therefore, the opinion of this office that the prosecuting attorney has the authority to file civil suits upon the official bonds of county officers who are in default, without waiting for an order of the county court so to do.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

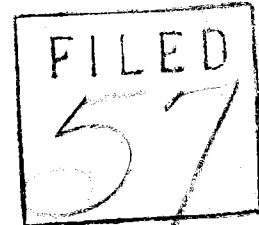
HHK:FE

MOTOR VEHICLES: Kansas resident with previous year's license may be prosecuted in Missouri after February 1st.

April 14, 1938

4-16

Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion which reads as follows:

"A resident of the State of Kansas who is temporarily residing in Versailles, has been operating a motor vehicle belonging to a third party, a resident of the State of Kansas. This operator of this motor vehicle has been operating the same with Kansas State License Tags for 1937. The deadline for Kansas tags 1937 expired on February 1st, 1938; so the Missouri State Highway bulletin states.

I do not have a copy of the Kansas laws, but the defendant informs me that he has until July 1st, 1938 to buy a Kansas license for the cars, provided a 50¢ per month penalty is paid in addition to the full license.

Sergeant Paul E. Corl advises me that this statement is true provided the car in Kansas is not operated but stays in the garage until the 1st day of July, 1938.

I have filed an information against the defendant under section 7768 which deals with the reciprocity law. Has this defendant violated the Missouri law, under this state of the facts?"

April 14, 1938

Section 7768 R. S. Missouri 1929, provides as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

This provision provides for reciprocity between Missouri and other states in regard to licenses for motor vehicles.

Black's Legal Dictionary defines "reciprocity" as

"Mutuality; interchange of favors between persons or nations".

The purpose of the above statute was to allow the use of the highways of this State by nonresidents without the payment of a license fee provided the motor vehicles were legally licensed in those states which grant similar privileges to the owners of motor vehicles licensed in this state. In other words, the State of Missouri out of deference and good will extended to nonresidents the right to use our highways if they were legally licensed in their own state and if their state granted the same privileges to citizens of Missouri.

April 14, 1938

It will be noted that Section 7768 supra provides that the nonresident owners must have registered their motor vehicle "for the current year".

While, as 17 C.J. page 411 points out, "current year" means "ordinarily the calendar year* * *the context may show an intention to refer to a year other than the calendar year".

We believe in the instant statute that the term "current year" refers to the time during which a motor vehicle license is legal and valid, i. e. the term of months during which the license may be used.

We must therefore look to the statute of Kansas to determine the duration during which a license is good. Chapter 8, Section 143 of the 1933 Supplement to Revised Statutes of Kansas 1923, provides as follows:

"The annual fees herein provided shall be due January first of each year and payable on or before February first in each year. If said fee is not paid by said date a penalty of fifty cents (50¢) shall be added to the fee charged herein, for each month or fraction thereof until paid:* * * *The owner of any motor cycle, motor vehicle, motor truck, motor trailer, semitrailer or electrically propelled vehicle who fails to pay the registration fee or fees herein provided on the date when the same becomes due and payable shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a penalty in the sum of one dollar (\$1) for each month or fraction thereof during which such fee has remained unpaid after it became due and payable; and in addition thereto shall be subject to such other punishment as is provided in this act."

April 14, 1938

The above Kansas statute provides that the registration fee is due and payable on February 1st, and if such license is not obtained then the person operating the motor vehicle becomes liable for prosecution for a misdemeanor. The fifty cent penalty obviously pertains to those who fail to secure their license before February 1st, and for such failure are taxed at the rate of fifty cents a month. It does not refer to cars that are in operation but rather to cars which are not operated until after the "dead line" of February 1st. Therefore, it will be seen that the party in question being amenable to the Laws of the State of Kansas was required to have his license by February 1st, or thereby become liable to be prosecuted for a misdemeanor and payment of a penalty. Under the reciprocity statute Section 7768 supra, this State grants privileges to nonresidents only if they are registered for the current year in their own state. The party in question at the time of his arrest was not registered for the current year in Kansas and had no right to operate the motor vehicle on the highways of that state. Therefore, the reciprocity statute does not apply and the person is amenable to the laws of Missouri dealing with persons who operate vehicles without licenses.

CONCLUSION

It is therefore the opinion of this Department that a resident of Kansas who uses the highways of Missouri after February 1st without having obtained a license for that year from the State of Kansas thereby becomes liable to prosecution in Missouri.

Respectfully submitted,

OLLIVER E. NOLEN
Assistant Attorney General

APPROVED:

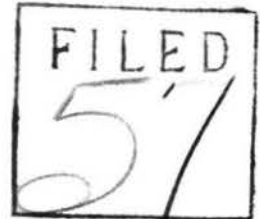
J. E. TAYLOR
(Acting) Attorney General

AO:MM

SCHOOLS:

A teacher may be employed who before teaching school under her contract will become legally qualified by the proper certificate although at time of employment was not legally qualified.

May 11, 1938



Mr. G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated May 10, 1938, for an official opinion from this office which request is as follows:

"The county superintendent of school of our county has asked me to write to you for an opinion on a school contract. A common school district had a regular meeting and duly elected a teacher to teach the district, and the board by proper entry entered the resolution hiring the teacher in the minutes of the school board. The teacher at the time of the meeting of the board did not have a teacher's certificate to teach in the county. In June the teacher was and is to take the examination for such a certificate so that she can fully comply with the law. This examination is to be held before the teacher must commence work under her teaching contract with the district. This the board knew at the time. It was the understanding that a formal contract would be entered into in writing between the board and the teacher just as soon as the teacher received her teacher's certificate.

Now the president wants to go on with the resolution as was unanimously adopted. The other two members of the board, want to set aside this resolution and hire another teacher that is 'legally qualified'. The question that the superintendent wants to know is, whether the school board is bound by the resolution calling for the contract with this prospective school teacher? Before this contract is formally executed in writing and before the teacher is required to commence her school, she expects to be qualified. All such teachers contracts are wholly executory and contingent. When does the qualifications commence, at the time the contract is authorized by the board, or at the time the contract is signed, or at the time the teacher is ready to commence teaching the school?

Section 9209, R.S. Mo. 1929 which refers to the employment of teachers was amended in 1933 by attaching a provision in reference to the board of education of first class high schools. Section 9209, Session Laws of Missouri, 1933, page 387, reads as follows:

"The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages

per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made. The board shall not employ one of its members as a teacher, nor shall the teacher serve as clerk of the district. All transactions of the board under this section must be recorded by and filed with the district clerk. Provided, that the board of Education of any first class high school may employ a superintendent either before or after the annual school election."

Among other things this section specifically sets out "employ legally qualified teachers for and in the name of the district;"

Section 9210, R.S. Mo. 1929, among other things states:

"The contract required in the preceding section shall be construed under the general law of contracts, each party thereto being equally bound thereby."

* * * * *

In the case of Bailey v. Jamestown School District No. 11, 77 S.W. (2d) 1017, the plaintiff who was a duly qualified school teacher made an application to the board of education for employment for the ensuing year. On the day of the application, she was selected by the board and employed at a certain salary for a certain term and a record was duly made on the minutes of the meeting of the board of education and she was duly notified. She also duly notified the board of her acceptance. No formal contract was signed and the board of education

employed another teacher in her stead and without a consent and over her protest. She brought suit against the Jamestown School District and was awarded a judgment for a period of eight months at the rate of sixty dollars (\$60.00) per month although she did not teach in that district or any other district. The Supreme Court in this state in affirming the judgment, said:

"* * * We conclude that the signed application of the plaintiff and the signed minutes of the board, coupled with admission that plaintiff was notified by the clerk, accepted the employment, stood ready to sign the usual form contract, which was not left unexecuted by any fault of the plaintiff, and the evidence that plaintiff at all times was ready, offering, and willing to perform the duties, presents facts that justified the finding of the court to the effect that there was a contract.

A contract is the agreement which the parties made and not the writing which evidences the agreement. *Edwards v. School District*, 221 Mo. App. 47, 297 S.W. 1001, 1002."

Section 9234, R.S. Mo. 1929, reads as follows:

"No teacher shall be employed in any school supported by the public funds, or any part thereof, until he has received a certificate of qualification therefor, signed by the county superintendent of the county, the state superintendent, or a certificate or diploma issued by the state university or some teachers college of this state entitling him to teach in the public schools."

And Section 9235, R.S. Mo. 1929 reads as follows:

"Any teacher who shall enter a public school in this state to teach, govern or discipline the same, before complying with the provisions of sections 9209 and 9234, shall forfeit all right, title and claim to any compensation therefor, and shall be deemed guilty of a misdemeanor and punished by a fine not to exceed one hundred dollars; and any director who shall indorse or encourage said teacher in such unlawful conduct shall in like manner be deemed guilty of a misdemeanor and punishable by a like fine."

In the case of Crabb v. School District No. 1, 93 Mo. App., page 254, the court held:

"* * * We do not think, taking sections 8021 and 8022, to be read together, they mean that the teacher must have a certificate of qualification at the time of making a contract to teach school in the future. The object of the statute is that the qualification may exist during the term of the employment. The language of the statute is that, 'no teacher shall be employed,' and has reference to the employment and not to the contract for employment. It means that he shall not be engaged in teaching without the required certificate, and the following section imposes a forfeiture and punishment if he does so."* * * * *

"But it is further contended that as the school term began on the fourth day of September, and plaintiff's

certificate in evidence issued to her by the State Superintendent of Schools, was dated the fifth day of September, she was not a qualified teacher at the beginning, and, therefore, she is not in condition to enforce said contract. Time, it is true, is a material essence of the contract in suit. But can it be said that the plaintiff's failure to have a proper certificate on the fourth day of September, when defendant's school opened, taken in connection with the fact that she received one on the next day dated the fifth of September, have the effect of forfeiting her rights under the contract? There are instances when time becomes of such material consequence, that a failure of a party to comply with his contract in that respect at the time agreed upon, works a forfeiture of his rights under such contract; but the courts are not swift to enforce forfeitures, and only do so in extreme cases.

If the defendant had been forced to employ another teacher by reason of plaintiff's failure to have a proper certificate on the fourth day of September, the case would perhaps have been different. The defendant's board knew that the plaintiff was to have a certificate to teach, for she exhibited a telegram from the state superintendent that one had been issued to her, which, however, when it came, was dated the fifth of September, one day after the school opened. If the defendant is to be permitted to exact the literal terms of the contract, and demands the

May 11, 1938

'pound of flesh' the plaintiff's rights under her contract are forfeited. But ought it to be permitted? It is good law that a party who commits the first breach of his contract is not in a condition to enforce it against the other contracting party. Doyle v. Turpin, 57 Mo. App. 84. The defendant's records introduced show that the defendant was the first to commit a breach of its contract. These records show that on the thirty-first day of August the defendant's board employed another teacher in place of the plaintiff and put it out of its power to comply with the contract. Under such circumstances it should not be permitted to deny plaintiff's right to recover because of her failure to have, for a single day, a teacher's certificate, for she substantially complied with her contract in that respect." * * * * *

Under this case, the court held that it was not necessary for the teacher to have a certificate of qualification at the time of making the contract to teach in the future, but such certificate must exist during the employment of the teacher. According to your letter of request, the teacher whom the board of education employed by resolution which was unanimously adopted, could qualify at the time of the beginning of school, she could be legally appointed by the school board. Under the above case of Bailey v. Jamestown School District No. 11, supra, the fact that the board of education unanimously adopted a resolution in employing this teacher was such an offer that the county could not retract the offer at this time and a legal contract had been made although the written contract had not been signed by the teacher and the president of the board as set out in Section 9209, supra.

In the case of Tate v. School District No. 11 of Gentry County, 23 S.W. (2d) 1013, the court found that where

a teacher on date of certificate of qualification as required by Revised Statutes of 1919, Section 11137, and received removal certificate on the date on which her term was to begin under contract with defendant school district, statute was sufficiently complied with, and the district cannot defeat its liability to pay her salary by showing that on the day of the contract she was not in possession of certificate of qualification to teach in county for full time of employment.

Section 11137, R.S. Mo. 1919, is the same section as Section 9209, R.S. Mo. 1929. In the case of Tate v. School District No. 11 of Gentry County, supra, the court also held:

"* * * * It has been consistently and repeatedly ruled that a proper and reasonable construction of the statute does not require that the teacher shall have, at the time of employment, a certificate which extends to the end of the term of employment, provided that, during the term of employment, such teacher has the proper certificate. School District v. Edmonston, 50 Mo. App. 65, 70; Crabb v. School District, 93 Mo. App. 254, 260; Hibbard v. Smith, 135 Mo. App. 721, 727, 116 S.W. 487."
* * * * *

In the case of Crabb v. School District, 93 Mo. App. 254, the Sections 8021 and 8022, respectively, of the Laws of 1889, are almost identically the same as Section 9234 and 9235, R.S. Mo. 1929.

CONCLUSION

In conclusion will say that it is the opinion of this department that in view of the decision in the case of Tate v. School District, Gentry County, supra, the school district, by the unanimous resolution of the school board, resolved

May 11, 1938

and elected the teacher to teach the district and the board, by proper entry, entered the resolution hiring the teacher in the minutes of the meeting of the school board, was such an offer to the teacher that cannot be retracted or avoided by reason of the teacher not having a qualified certificate at the time the teacher was employed. The teacher still may have the qualified certificate at the time of the commencement of school under the contract and cannot be avoided by the school district at this time.

According to the above authorities set out, it is also the opinion of this department that the qualification commences at the time of the beginning of the school term under any contract that she may sign, and, therefore, the qualification only commences at the time the teacher is ready to commence teaching school at the beginning of the school term.

It is also the opinion of this department that if the majority of the members of the board of education employ another teacher at this time in accordance with their resolution made by the two members of the board other than the president, the school district would not only be subject to pay the second teacher but also under the ruling in the case of Tate v. School District No. 11, supra, they would be subject to payment of the teacher first elected.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

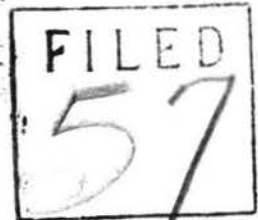
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

COUNTY COURTS: Cannot pay check charge on checks
given in payment of taxes.

June 4, 1938



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

We received your letter of May 5th, which read as follows:

"The Collector of Revenues has presented to the County Court a bill covering the year 1937 for amounts paid on out of the county and out of the state checks, known as a check charge of about 4¢ per check, which is an exchange charge for cashing foreign checks by the bank cashing the check. This amounts to about \$50.00 per year. Is this one of the incidental expenses of the office of Collector of Revenue, for which the county court should pay?"

If a taxpayer pays his taxes by check to the collector, he violates the terms of Section 9911 R. S. Mo. 1929. This Section provides, in part, as follows:

"Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes."

June 4, 1938

Since the statute provides that taxes "shall be paid in gold or silver coin or legal tender notes of the United States, or in national Bank notes" it follows, of course, that the collector can legally receive the amount of taxes due only in such a manner. If the collector had followed the law in this respect, this check charge would not have been incurred. Consequently, your inquiry can be stated in this manner; is the county liable and can it pay for certain charges which came into existence through the failure of the collector to collect taxes in the form and manner specifically prescribed by statute? We do not think that any such charges can legally be paid by the county court.

The effect of Section 9911, therefore, is that such an expense was never to be contemplated and that the counties should never be called upon to pay such an item. This is an expense that should never exist. It could not, therefore, ever be considered as an expense of the county in any sense, in connection with its authorized business.

We are not attempting to pass on the question as to where the liability for such a check should fall, under the circumstances. We are only saying that the county court cannot be held liable for, nor can it legally pay any such charges brought into existence through the violation of the express terms of the statute.

CONCLUSION

A county court is not authorized to pay a check charge paid by the county collector in cashing checks in payment of taxes. Such a check constitutes an illegal demand against the county which the county court is unauthorized to pay, because Section 9911 R. S. Mo. 1929 provides specifically that all taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

POTATO INSPECTION:--Meaning of term "shipper".

June 7, 1938

6-8



Honorable Jewell Mayes
Commissioner of Agriculture
Jefferson City, Missouri

Dear Mr. Mayes:

We have your request for an opinion which is as follows:

"Article 19, Chapter 87, Section 12644, Revised Statutes of Missouri, 1929, (amended indirectly as to titles in 1933), says that 'the fees covering potato inspection under this Article shall be paid by the shipper to an authorized representative of the Commissioner of Agriculture'.

We shall appreciate your early opinion, defining the meaning of 'shipper', as used in Section 12644, in order that interested parties may be accordingly informed prior to the forthcoming 1938 potato shipping season."

This opinion turns solely upon the meaning of the term "shipper". The term has been defined to mean the consignor. N.Y. Central R. Company vs. Singer Manufacturing Company, 131 Atl. 111, 114. A person who forwards freight over a railroad is a "shipper". United States vs. Lehigh Valley R. Company, 222 Fed. 685, 686. The term has been extended so as to allow recovery of damages by consignee, and means the owner or person for whose act the carriage of the goods is undertaken. Compagnie, Generale & Transatlantique vs. American Tobacco Company, 31 Fed. (2) 663, 667.

Hon. Jewell Mayes

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June 7, 1938

Section 12643 R. S. Missouri 1929, imposes upon the "shipper" the duty of notifying the Commissioner of Agriculture of the "shipper's" intention to ship.

It is therefore the opinion of this office that the term "shipper" means the owner or person who authorizes the transportation of potatoes by common carrier or otherwise. It is the person who makes the contract, express or implied, with the carrier for the shipment of potatoes.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

PAROLES: Time remaining to be served under a parole where there is a second conviction during such time.

June 9, 1938.

6-13

Honorable J. E. Matthews, Director,
Department of Penal Institutions,
Jefferson City, Missouri.



Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office as to whether one John Hughes, convict No. 35135, now confined in the Missouri State Penitentiary, is entitled to a discharge therefrom based upon the facts set forth in a letter from the Penal Board to you, which you attach to your letter, and which facts, so far as pertinent to the question here, we quote as follows:

"Hughes was sentenced May 8, 1929, from Jackson County, to serve 5 years for Grand Larceny, and was paroled by Governor Caulfield September 20, 1930. Under the law his full time would have expired May 7, 1934, and, under the terms of his parole he was subject to re-incarceration for any violation of same up to the expiration of the full time of his sentence. His three-fourths time under this sentence expired February 12, 1933.

"On March 24, 1933, he was again convicted of Burglary and Larceny and was sentenced to serve 5 years from that date. He served the 7/12 of this sentence, under Reg. #42734, and was then required to begin serving the remainder of his term under #35135, and this time has not expired.

June 9, 1938

"It may be of interest to note that at the time he was paroled the requirements of the Board in cases of broken paroles was that full time should be served. About June, 1934, the Board changed the parole requirement from full time to three-fourths time, and since that time if one has not violated his parole prior to the expiration of the three-fourths time he is automatically released. If this rule had been in force when Hughes was paroled he would not now be serving.

"The only question involved here seems to be the authority of the Board to fix the terms of a parole, with the consent of the Governor, at full time instead of three-fourths time."

In addition to the above facts, there appears from a notation attached to your correspondence the following:

"Parole revoked 6-16-33. Returned under #42734" (Hughes' number under the second or last conviction).

It further appears from our investigation of the parole files in the office of the Secretary of State that one of the conditions of the Governor's parole was that the parole was without benefit of the provisions of the three-fourths law.

Under the Constitution and statutes of this state, the Governor is the only one given the power to pardon and prescribe the conditions of a parole granted by him to anyone who is confined in the penitentiary at the time.

The Supreme Court of this state in the case of State v. Asher, 246 S. W. 1. c. 193, has held that the term or word "pardon" as used in the Constitution and statutes comprehends and is to be construed as including the term "parole". Hence, the Governor of this state is authorized to parole with such conditions and under such

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restrictions as he may think proper. One of the conditions attached to the parole in question is that Hughes was deprived of the benefit of the three-fourths rule provided for under Section 8442 of the 1929 statutes.

The authority of the Prison Board under the 1929 statutes and the Board of Probation and Paroles as created out of the 1937 Act is limited to making recommendations to the Governor concerning a parole, and the Governor is the only one authorized to grant and fix the terms. Hence, any rules made by the Board which might conflict either with the Constitution or statutory power of the Governor to grant a parole and fix the conditions thereof would be invalid.

From the two concluding paragraphs in the above quoted letter, we believe the writer thereof misconceives the question at issue here. In our judgment, in view of the valid conditions attached to Hughes' parole, the question is merely, has John Hughes served the time for the Larceny conviction for which he was sentenced on May 8, 1929? It is shown by the facts above that up to the time Hughes was paroled under the first sentence he had served one year, four months and twelve days, for which he is entitled to credit on his five-year term, thus leaving three years, seven months and eighteen days remaining of the five-year term to be served by reason of the conditions of his parole.

In our opinion, the following two cases are controlling here. In the case of *Ex parte Jacobs v. Crawford*, 308 Mo. 302, among the questions presented was the Governor's authority to prescribe the conditions of the parole and the alleged right of the paroled person to have deducted from his sentence the elapsed time between the granting of the parole and its revocation. The court said (l. c. 305-306) as follows:

"The power of the Governor in respect to pardons and paroles is declared in Section 8, Article V, of our Constitution. The first sentence of said section reads as follows: 'The Governor shall have power to grant reprieves, commutations

and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.'

"It will thus be seen that the Governor has the right to fix the conditions when he paroles a convicted person. All the power that the General Assembly has in the matter is to legislate concerning the manner of applying for pardons. Section 4144, Revised Statutes 1919, merely reiterates the language of the Constitution concerning the power of the Governor to grant pardons upon such conditions and under such restrictions as he may think proper."

The case of Ex Parte Lee, 287 Mo. 231, presents facts which are strikingly similar to the facts in question here, the facts in the Lee case (page 232) being as follows:

"The petitioner states that he is unlawfully detained in the Penitentiary; that he was convicted of a felony in the Circuit Court of Jackson County, August 2, 1915, and sentenced to a term of five years in the Penitentiary; that on April 24, 1917, he was paroled by the Governor; that on October 8, 1917, he was convicted of a felony in the Circuit Court of Jasper County and sentenced to a term of five years in the Penitentiary and was received there on November 13, 1917; that on November 20, 1917, the Governor revoked his parole; that on December 28, 1920, the prison authorities discharged him under the merit system from the Jasper County sentence, but are now illegally restraining him under the Jackson County sentence,

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aforesaid; that upon the revocation of his parole said sentences became concurrent and he is now entitled to his discharge."

In the above case the petitioner's contention that his sentences, upon revocation of his parole, became concurrent was answered by the court (page 233-234) as follows:

"By Section 12543, Revised Statutes 1919, the Governor is authorized to grant commutations, paroles and pardons. Certain it is that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence within the meaning of Section 2292, and having been charged, tried and convicted of another offense while so at large 'the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held.' In other words, the sentences are cumulative."

Hence, in the instant case, Hughes being convicted of a second offense while at large under his parole, the unserved part of his five-year term under the first offense did not commence to run until his discharge under the second offense.

In passing, we note that your records show that Hughes was required to serve the unexpired part of his first sentence commencing at the time of his discharge under the second conviction. In this we believe you are in error. That is to say, Hughes' second sentence should have been held in abeyance until he served his sentence under the first conviction. The same situation arose in the case of *Ex Parte Lee*, supra, wherein the court said as follows (page 234):

"It seems, however, that the Board of Prison Control made its records show that the petitioner was held under the conviction and sentence of the Jasper County Circuit Court from the time he was received under that sentence; that after the

June 9, 1938

time he was entitled to his discharge from that sentence, the prison records show that he has been held under his first conviction to serve out the remainder of his term, dating from his parole. Under the provisions of Section 2292, the sentence for the conviction in the Circuit Court of Jasper County began at the expiration of the first sentence. The petitioner, however, has not been prejudiced by the mistaken views of the Board of Prison Control and can take no advantage of their erroneous system of bookkeeping. The law fixes the sequence of the terms of imprisonment. (Ex parte Jackson, 96 Mo. 116, 120.)"

Section 2292, referred to above, is now Section 12969, R. S. Mo. 1929, and you will see by this section that a second sentence, pronounced during the unexpired part of the first sentence, should be held in abeyance until the first sentence is fully complied with. We give you this for future reference.

CONCLUSION.

In view of the fact that at the time Hughes was discharged from the second conviction, to-wit, on or about February 24, 1936, there remained three years, seven months and eighteen days, or approximately such time, to be served by Hughes under his first sentence, he will not have complied with such first sentence until on or about the 12th day of October, 1939, and hence he is not at this time entitled to a discharge.

Yours very truly,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR

FISH AND GAME:

Commercial fishing in the Osage
River at points formed by the Lake
of the Ozarks.

June 30, 1938

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FILED
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Mr. G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

Dear Sir:

This is in reply to yours of June 23 requesting an
official opinion from this department based upon the follow-
ing letter:

"The Bagnell Dam has backed the water
from the Osage River into the Big and
Little Gravois Creeks, and the Big and
Little Buffalo Creeks in Morgan County,
Mo, large distances from the original
mouth where these streams did empty
into the Osage river.

I want an opinion as to whether these
original non-navigable fresh water
streams are part of the Osage River
from their originals mouths to the
660 contour line; that is the place
where these creeks have been flooded
with the back water, forming the Lake
of the Ozarks. This 660 contour
varies, and there has been a drop to
as high as 22 feet below the 660 foot
contour line; so that the back water
fluctuates in these streams to a great
extent.

By virtue of section 8273 of the 1929
statutes of Missouri, commercial fisher-
men with hoop nets and trammel nets of

June 30, 1938

a 2 inch mesh has invaded these streams from the mouths of these streams on up. They catch rough fish for the market. Their trammel nets often reach nearly across these fresh water creeks. These fishermen always in so far as we can learn, return to the water all game fish caught in these nets. Right now the Little Buffalo creek is infested with the nets and hoop nets. These commercial fishermen contend that these arms of the Lake of the Ozarks are part of the Osage river, and is the Osage river, and they can use these nets by virtue of section 8273. These parties contend that these creeks now are navigable, and are considered a part of the Osage river by the reason of the ruling of the War Department and the Bureau of Navigation of the Federal Government; that the Federal government has assumed jurisdiction of the creeks as being a part of the Osage river. I am not vouching for the truth of these statements.

I have quite a few complaints from residents around Stover, Mo., against the commercial fishermen. These complaints state that this illegal fishing with these nets has ruined the fishing for game fish in the Little Buffalo Creek. If these creeks are not parts of the Osage river, then it would seem that the use of these nets for commercial fishing would be illegal. These fish are not caught for their own consumption or table use."

Your request particularly goes to the question of the rights of the public to fish upon that part of the Osage River which backed up into the various creeks entering said river when the Lake of the Ozarks was formed. Under Section 41 at page 28 of Title 33 of the United States Code Annotated entitled "Navigation and Navigable Waters", we

find that the navigable part of the Osage River is set out as follows:

"The Osage River in the State of Missouri above the point where the south line of sections 15 and 16 in township 40 north, of range 22 west, of the fifth principal meridian, and in the county of Benton, State of Missouri, crosses said river, is declared not to be a navigable stream, and shall be so treated by the Secretary of War and by all other authorities."

Section 8273, R.S. Mo. 1929 provides as follows:

"The use of seines, hoop nets and trammel nets, is hereby permitted, in the Mississippi, Missouri and Osage rivers, during the months of January, February, March, June, July, August, September, October, November and December of each year, with seines and nets, the mesh of which shall not be less than two inches square; * * *"

From this section the above named fishing articles may be used in the Osage River during the months stated therein.

In our research upon this matter we find that the fishing privileges, whatever they may be, extend to the general public and do not distinguish commercial fishermen from any other parties who desire to fish and, therefore, this opinion will apply to the public in general who desire to fish.

The rights of the general public to fish in navigable waters are set out in 26 Corpus Juris, page 602, Sections 17 and 18 which are as follows:

"Fishing implies a reasonable use of the waters and shore line of navigable streams, and as a general rule all the members of the public have a common

and general right of fishing in public waters, such as the sea and other navigable or tidal waters, and no private person can claim an exclusive right to fish in any portion of such waters, except in so far as he has acquired such right by grant or prescription. This rule applies notwithstanding the title to the bed of such a stream is in the riparian owner, and notwithstanding his ownership of the abutting upland carries with it the right of access to deep water. It has been held that the right of fishing is incident to the right of navigation. The right of fishing on the high seas, without the territorial limits of any state, is a right common to all mankind, and cannot be granted or restricted by any particular nation.

It is generally held that, in the absence of a special legislative grant, the right of fishing in large fresh water lakes and ponds is a public right; and under some statutes and colonial ordinances the right to take fish from a great pond of more than a specified area is a public right which every inhabitant who can obtain access to the pond without trespass may exercise so long as he does not interfere with the reasonable exercise by others of these and like rights in the pond, and complies with any rules established by the legislature or under its authority. But the right of fishing in such ponds may be appropriated by the legislature or by local governments, such as towns, acting under its authority; and under some statutes such a pond may be leased to private individuals for the purpose of fish culture, the lessees having the exclusive right of fishing there-

in. An owner of land abutting on one of such lakes or ponds has no greater rights than others to fish in front of his land, except to the extent that he is given greater rights by statute, or acquires them by grant or prescription.

The right of fishing in the 'Great Lakes' and in their contiguous bays is a public right just as much as if those waters were subject to the ebb and flow of the tide; and the public rights of fishing are not limited to the particular portions thereof which are navigable."

As stated in your letter the 660 contour line is the place to which the various creeks have been flooded on account of the back water forming the Lake of the Ozarks and on the question of whether or not that portion of the lake formed by such back water is navigable, we find no Missouri authority on this point but in the case of *Mendota Club v. Anderson et al.*, 78 N. W. 185, 1.c. 190, the Supreme Court of Wisconsin in a case in which a similar question was involved, said:

"* * * That dam was a permanent structure, designed to be such, and has so remained for nearly half a century. There is no claim that it was an unlawful structure. Although an artificial structure, which considerably increased the depth, the extent, and breadth of the waters on the premises in question, yet the public had the right to navigate such waters after they were so increased in volume, the same as though they had always remained in that condition. *Whisler v. Wilkinson*, 22 Wis. 546; *Volk v. Eldred*, 23 Wis. 410; *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 697; *Smith v. Youmans*, 96 Wis. 103, 70 N. W. 1115, and cases cited by Mr. Justice Pinney on page 110, 96 Wis., and page 147, 70 N. W. Certainly, persons

navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam. The question as to whether a riparian owner may rightfully fill in or build out to navigable water, suggested by counsel, is not here involved.* * * * *

In 45 Corpus Juris, page 445 on the question of to what water the public rights extend, we find the rule stated as follows:

"The right of navigation extends over the entire surface of the water, notwithstanding its extent has been increased through a raising of its level by artificial means. It is not confined to the main channel, but extends to the water between high and low water marks, subject to legitimate uses of the land thereunder by the owner thereof; and also extends to a new navigable channel formed by the stream, and to a stream as improved by straightening and deepening. So where the shore line is moved back, the water let in is as much public water as is any other part of the water of the river.* * * * *

From your request it appears that it is the general public who is complaining about this fishing and the rights of riparian owners are not in question, therefore, we will not touch that point in this opinion.

And in the case of Village of Pewaukee v. Savoy et al., 79 N. W. 436 Supreme Court of Wisconsin held:

"If a person artificially raise the level of the waters of a navigable

Mr. G. Logan Marr

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June 30, 1938

lake so as to flood his own lands, the public rights in the lake will be correspondingly extended so long as such artificial condition exists."

CONCLUSION

From the foregoing authorities it is the opinion of this department that that part of the Osage River which, on account of the forming of the Lake of the Ozarks, has backed up into the streams which entered into said river to the 660 contour line is navigable and is considered a part of the Osage River so far as the general public is concerned and all of the fishing rights in connection therewith.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB DA

COUNTY COURTS:

OFFICERS:

The County Court is not authorized to pay attorney fees for defending the Collector in a civil suit charging official wrongdoing of the Collector. The defense of the suit is a personal matter and the County is not concerned.

July 8, 1938

Mr. G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.



Dear Sir:

This will acknowledge receipt of your request dated May 3, 1938, for an official opinion from this department, which is as follows:

"Herein is exhibit 'A', the petition filed against O. C. Roark, and exhibit 'B', the separate answer of O. C. Roark as Collector of Revenue of Morgan County, Mo. Mr. E. R. Evans filed a general denial the petition herein.

"This case is still pending on the docket and has not been heard yet.

"Mr. Roark had to hire an attorney to represent him, and this attorney, Mr. Bolinger filed this answer exhibit 'B'. Mr. Roark paid \$25.00 out of his own pocket, to Mr. Bolinger, as attorney fees. Mr. Roark presented a bill to the County Court for a refund of this \$25.00 Mr. Roark personally paid out for attorney fees.

"The County Court requested an opinion from my office if the County was liable for this attorney fee? I could find no law that the County was liable to

July 8, 1938

pay for an attorney for the collector under the Jones-Munger Law. It was my opinion that the County did not owe the fee. Mr. Roark presented his side of the case and the County Court requested that I get an opinion from the Attorney General.

"Mr. Roark has been threatened with several just suits as this by this plaintiff and other parties. This plaintiff filed another just such a suit, and the same is now up on appeal. These sales were made under the Jones-Munger Law, and under the law and the facts of this case, it is my opinion that this suit is a most frivolous suit, without any merits. Yet Mr. Roark is called upon to defend the same as a county official, and protect the funds in his care.

"Mr. Roark argued with the County Court that it was an unreasonable burden on him to expect him to hire his own attorney in these cases, since he was a county officer and was acting to protect the funds of the county. The Jones-Munger Law, evidently abolished the office of tax attorney for the collector, and failed to provide a substitute plan. I am in sympathy with Mr. Roark, and would like to see him reimbursed for these attorney fees, if there is any law for the county to allow the same. This is a precedent that we did not want to establish unless it was the law."

Your question involves the powers of the County Court.

The County Court is provided for by Section 36 of Article VI of the Constitution of Missouri, which states:

July 8, 1938

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law."

It has been held by the courts of this state that the County Court has no equitable nor common law power, but its powers are derived from the statute.

In *State ex rel. v. Johnson*, 138 Mo. App. 306, 1. c. 314, the court said:

"The county courts of Missouri are creatures solely of statutory origin and have no common law or equitable jurisdiction (*State ex rel. v. Madison County Court*, 135 Mo. 323, 1. c. 326)."

Section 12162, R. S. Mo. 1929, sets forth the power of the County Court with reference to auditing and settling claims, and among other things provides:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; * * *."

The courts have construed the above section as authorizing the county to employ attorneys to represent the county in the recovery of county funds in instances where the county attorney refused to bring suit after being ordered to do so by the County Court.

Illustrative of the same is *State v. Fulks*, 296 Mo. 634, 247 S. W. 129. However, that was a case where the county itself was directly interested and on the refusal of the prosecuting attorney to file suit on behalf of the county for the recovery of several thousand dollars, the

July 8, 1938

county employed other attorneys who did bring the suit and who did recover the money. On appeal it was contended that the case should be reversed because the suit was prosecuted by someone other than the prosecuting attorney. In that case the Attorney General appeared as part of counsel for the county, his advent into the case being upon the filing of an amended petition. The court held that under that state of facts the case should not be reversed on account of the fact that the prosecuting attorney had not prosecuted the case for the county.

That case, however, is not authority for the employment of outside attorneys by the county to represent and defend the County Collector when he is sued on account of alleged wrongful acts on his part as Collector in the sale of lands for delinquent taxes under the Jones-Munger law.

In the Fulks case the county was directly interested. In the matter under consideration here the county is not directly interested. A judgment, if recovered, against the Collector would not be payable out of county funds, but must be paid by the Collector or his bondsmen if he has violated any of his official duties and recovery is had against him on that account.

In such instances as the Legislature intended the county to have authority to employ attorneys and to pay them out of the county funds, the Legislature has so indicated that power. Illustrative of this is Section 11179, R. S. Mo. 1929, which provides as to accreted lands that the county court may employ surveyors to survey such accreted lands, and may employ attorneys to represent them in such suits pertaining thereto,

"and shall pay such surveyors and attorneys reasonable compensation for their services, to be paid out of any funds arising out of the sale of such lands and islands, or out of the general revenue fund of the county as may be agreed upon at the time such surveyors and attorneys are employed."

Section 11318, R. S. Mo. 1929, prescribing the duties of the prosecuting attorney, provides:

July 8, 1938

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, * * *."

This section requires the prosecuting attorney "to give his opinion, without fee, in matters of law in which the county is interested," but in the instant matter the county is not interested in whether a judgment is recovered against the collector or not. The recovery of a judgment against the collector could not affect the county.

The allowance of fees or costs to any officer is denied unless the statute may be definitely pointed to authorizing such allowance. This principle is announced in State ex rel. Troll v. Brown, 146 Mo. 401, 1. c. 406, where the court said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed."

It could not be contended that the collector is entitled to an attorney fees as a part of his compensation. The statute definitely prescribes the amount of compensation the collector is entitled to, and attorney fees are not part of such compensation.

We know of no statute which authorizes the county court to pay out the county public funds in payment of attorney fees to an attorney who is employed by the county collector in defending the county collector in a civil suit brought by another against the collector, and absent such definite statutory authority conferred upon the county court, the county court has no authority to pay such attorney fees. The public funds of the county must be expended on behalf of the county as such. They must be expended in the furtherance of public matters and then so authorized by statute.

July 8, 1938

They cannot be expended in payment of the personal obligations incurred by an official in employing his own attorney to defend himself in a civil lawsuit.

CONCLUSION

It is our opinion that the collector of the revenue who has been sued by another for damages for wrongfully selling real estate in the collection of the delinquent taxes, and who employs an attorney to defend himself in such lawsuit, is not entitled to have the county court pay such attorney fees, nor is the county court authorized under the law to pay such attorney fees.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

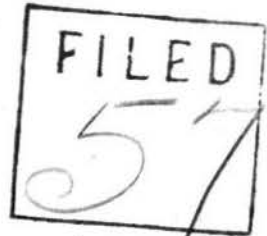
J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

GAME AND FISH: Drum fish are not perch.

July 14, 1938

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

We acknowledge your request of July 9,
1938 for an opinion, which request reads as follows:

"No person shall take, capture or
kill when taken from the waters of
this state, in any one day, more
than fifteen white perch
. . . .', quoting from section 8275
of the 1929 statutes of the State
of Missouri.

"The Fish and Game Department and
the Game Warden therein have taken
the interpretation, that the 'white
perch', mentioned in the above creel
limit means and applies to fresh water
drum. Fresh water drum such as is
found in all our streams are supposed
to be these white perch. It has al-
ways been the common understanding
that drum fish are rough or non-game
fish, and not subject to regulations
in any way; other than limitations
that might exist in favor of rough
fish of any kind.

"Commercial fishermen selling in this
county have been arrested in other
counties for having in their possession
more than fifteen drum. There is no
question but that drum can be sold at
any time, but the department holds

July 14, 1938

that drum fish are white perch, and not more than fifteen can be in the possession of any person at any one time.

"I would like to have an opinion as to whether drum fish are the same kind of fish as white perch, and subject to this limitation."

Section 8275, R. S. Mo. 1929, which is a section under the preservation of fish and game Article, mentions each and all of the fish that are to be protected under that Article. It does mention white perch and limits the possession of white perch to the number of fifteen, but nowhere in the section does it mention the drum fish.

In your request you state that the Fish and Game Department has interpreted that drum and white perch are of the same species and that they are arresting commercial fishermen for having more than fifteen drum in their possession. According to the Standard Library of Natural History, Volume III, page 612, in describing a perch, it is stated:

"It runs up to about five pounds in weight, and is carnivorous, eating most kinds of fish small enough for its swallow, including the fry of its own species, which are in some waters an excellent bait."

Encyclopaedia Britannica, Volume IX, page 41, describes the species of the white perch as "Morone Americana."

VOL III Page 618

The Standard Library of Natural History states the following about the "drum":

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"One of the most of the family of (Meagres) is the species to which the name of drum has been given, from the extraordinary noise which it produces, though some other kinds emit similar noises."

"These sounds," Dr. Gunthrie writes, "can better be expressed by the word 'drumming' than any other. They appear to be very frequently heard by persons in vessels lying at anchor off the coast of the United States, where these fishes are very common. The precise method by which these sounds are produced is not known. Since they are accompanied by a tremulous motion of the vessel, it seems most probable that they are due to the beating of the tail of the fish against the bottom of the boat, to get rid of the parasites with which that part of their body is infested."

"The drum attains a length of more than four feet and a weight of over a hundred pounds."

As noticed by these authorities, the perch is of the "Morone Americana" and the drum is of the species of "Meagres." The drum makes a drumming sound and the perch does not make such a particular sound. In comparing the two fish, especially as to the species and the sounds made by the fish, it is without question that the drum is a different fish than the perch.

Sections of the Article for the preservation of fish and game must be strictly construed, and as the Article on the preservation of fish does not mention drum, that section of the Article does not apply to the drum fish.

In the case of State vs. Artz, 11 S. W. (2d) 1074, an attempt was made to convict the defendant for

July 14, 1938

refusing to allow game wardens to inspect pelts which he had in his possession, under a statute which only permitted the warden to inspect and count fish, birds and animals. The court held that the statute must be strictly construed and held that inasmuch as the statute did not provide for the inspection in counting pelts, the defendant was not violating the law which said it was a misdemeanor not to allow the game wardens to inspect and count fish, birds and animals.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the fish known as the drum should be considered as rough fish and is not protected under the fish and game act of the statutes. It is also the opinion of this department that commercial fishermen may have in their possession more than fifteen drum at any one time.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:FE

CONTRACTS:

Construction of contract for water softener
at Intermediate Reformatory, Alcoa.

July 27, 1938

7-27



Mr. J. E. Matthews,
Director of Penal Institutions,
Jefferson City, Missouri.

Re: Water Softener
Intermediate Reformatory, Alcoa

Dear Mr. Matthews:

This department is in receipt of your recent letter together with a copy of the specifications and blue prints as follows:

"The contractor for the installation of Water Softener at the Intermediate Reformatory, Mr. Herbert Wolcott, of Columbia, Missouri, states that the contract does not specify the necessary pipe, valves and fittings for connecting the water softener tanks with the proportioning device for hard and soft water, and contends the Penal Institution should furnish this pipe. The Penal Institution contends this is covered in the first paragraph of the specifications, stating:

'There shall be furnished for installation where shown on the plans, water softening equipment of the zeolite or base exchange type, with suitable accessories; and automatic proportioning device for bypassing hard water to provide a mixture of hard and soft water having a controlled hardness of 3 grains per gallon for

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delivery to the distribution system.'

The plans as submitted by Mr. Wolcott for this installation are attached to this set of specifications.

Further, the specifications, under 'Controls,' last paragraph, state:

'Pipe and fittings required to connect the hydraulically operated control valves to the softener tank shall be provided.'

We contend the only pipe necessary for us to furnish will be the pipe necessary to bring the hard water to the softening device and the outlet pipe for the soft water from the proportioning device to the system.

We enclose copy of the specifications and copy of the plans.

Please give us your opinion as to who should furnish the pipe in question."

Referring to the first paragraph of the specifications as set out in your letter, we find nothing which would require the contractor to furnish the necessary pipe, valves and fittings for connecting the water softener tanks with the proportioning device for hard and soft water. It is merely provided that there be furnished water softener equipment with suitable accessories and automatic proportioning device for by passing hard water.

"Suitable accessories" cannot be construed to include pipe and fittings.

The term "accessory" is defined in Funk & Wagnalls New Standard Dictionary as:

"Aiding the principal design, * * * contribution; supplemental; additional."

In other words, what is meant by "suitable accessories"

Mr. J. E. Matthews

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July 27, 1938

as used in the above specifications are such instruments designed to be attached to or used in connection with the water softener equipment to add to its utility.

Further evidence that pipes and fittings were not meant is found in the specific mention in the specifications as to what pipes and fittings are to be furnished, and as pointed out in your letter they consist of:

"Pipes and fittings required to connect the hydraulically operated control valves to the softener tank shall be provided."

The above pipes and fittings are not a part of the controversy because they are particularly specified.

You state that the only pipe necessary to be furnished the contractor is only such pipe as is necessary to bring the hard water to the softening device and the outlet pipe for the softener from the proportioning device to the system. With this, however, we cannot agree.

From an examination of the specifications and blue prints we are of the opinion that the contract does not require the contractor to furnish the necessary pipe, valves and fittings for connecting the water softener tanks with the proportioning device for hard and soft water and, therefore, the same should be furnished by the penal institution.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney General

J. W. BUFFINGTON
(Acting) Attorney General

MW:DA

LIQUOR CONTROL ACT:

A householder cannot brew in his own home for home use or have in his possession by transporting in his car for his guests and himself, any intoxicating liquor, which includes home brew of alcoholic content of more than 3.2 per cent, as it violates terms of Sec. 8, Laws of 1933-34, Extra Session, p. 80.
July 28, 1938

7-29



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This Department is in receipt of your letter of July 27th, wherein you make the following inquiry:

. "Is it contrary to the Liquor Control Act for a householder to make home brew for his own home use and for his own personal consumption, where the alcoholic content of the home brew is more than 5% by weight?

"Is it contrary to the Liquor Control Act for a person who makes home brew of more than 5% by weight to transport this home brew in his car to the Lake for his and his guests' consumption on an outing? This home brew is not sold but given away to immediate guests."

As the same sections of law will be applicable to both questions which you present, we shall treat both collectively.

The Act of 1933-34, Extra Session, Laws of Missouri, 1933-34, pages 77 to 95, inclusive, under Section 17, page 83, defines "intoxicating liquor" as follows:

"The term 'intoxicating liquor' as used in this act, shall mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt, or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations or mixtures for beverage purposes, containing in excess of three and two-tenths (3.2) per cent of alcohol by weight."

Therefore, the term "intoxicating liquor," as used throughout the Act, includes the home brew as mentioned in your letter, as the same contains 5%, or more than 3.2% as mentioned in the statute.

We think the statute which governs the situation which you present is Section 8 of the Act, page 80, which is as follows:

"No person shall possess intoxicating liquor within the State of Missouri unless the same has been acquired from some person holding a duly authorized license to sell the same under this act, or unless the said intoxicating liquor is had or kept with the written or printed permission of the Supervisor of Liquor Control, and the package in which intoxicating liquor is contained and from which it is taken for consumption has, while containing such intoxicating liquor, been labeled and sealed with the official seal prescribed under this act and the regulations made hereunder: Provided further, that nothing in this act shall be so construed as to prevent the natural fermentation of fruit juices in the home for the exclusive use of the occupants of the home and their guests."

July 28, 1938

Conclusion.

It would therefore appear, due to the terms of Section 8, supra, that a householder or a citizen cannot brew in his own home for home use or may not have in his possession by transporting the same in his car for his guests and himself, any intoxicating liquor, which includes home brew of an alcoholic content of more than 3.2 per cent, for free use and consumption, as it violates the terms of Section 8; the only exception being when written or printed permission is granted by the Supervisor of Liquor Control or that the beverage be the natural fermentation of fruit juices in the home for the exclusive use of the occupants and their guests.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney-General

OWN:EG

CRIMINAL LAW: Justice Courts have no jurisdiction to sentence defendants on graded felonies, but Prosecuting Attorney may file a lesser charge on his own information and belief.

August 17, 1938

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

This is to acknowledge receipt of your request for an opinion under date of August 13, 1938, which is as follows:

"The justice of the peace has been making affidavits charging defendants with felonies in driving cars while intoxicated or writing bogus check with no money in the bank. This enables a warrant to be issued, and served, and the party held in custody until the case can be heard on a preliminary hearing. At those hearings in which I am generally present, the defendant waives the same and desires to plead guilty and either pay a fine or go to jail. It has been my practice to file a misdemeanor information cutting the original felony charge down to a misdemeanor by just ignoring the affidavit, and fixing a punishment of either a fine or jail sentence. In this way the matter is disposed of and the docket of the circuit clerk is not cluttered up. Many of these parties are non-resident traveling salesmen or tourists who must be on their way from Morgan County. For instance, if a party is charged with driving a car while intoxicated, and the preliminary hearing is waived and the party desires to plead guilty, I file an information, charging the party with driving a car while in-

August 17, 1938

intoxicated, in the justice court and the punishment is generally \$25.00 fine and the costs and six months in jail, with the understanding that if the fine and costs are paid, the justice will grant a stay of execution for six months, provided they enter into a personal recognizance for six months to guarantee their appearance. Many of them are non-residents and we never see them again. These crimes are graduated offenses in which the punishment might be anything from a fine up to a prison sentence.

"The circuit court meets here only three times a year and it is a very convenient way to dispose of much criminal business. When I file an information charging a defendant with driving while intoxicated, in a justice court, and they plead guilty and are punished, their driver's license are revoked. For that reason the question has been raised whether as prosecuting attorney, I can ignore the affidavit, and on my own information and belief file an information charging the defendant with a misdemeanor so the justice of the peace can handle the case, and thereby reducing the charge from a felony to a misdemeanor in punishment. I would like to have an opinion on this procedure."

Section 3504, R. S. Mo. 1929, reads as follows:

" * * * the verification by the prosecuting attorney may be upon information and belief. * * *"

Section 3446, R. S. Mo. 1929, reads as follows:

"All proceedings upon the trial of misdemeanors before justices of the peace shall be governed by the practice in criminal cases in courts of record, so far as the same may be applicable, and in respect to which no provision is made by statute."

Section 3415, R. S. Mo. 1929, reads as follows:

" * * * and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a justice of the peace in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or accompanied by such complaint."

Under the above sections, the prosecuting attorney can file an information in the justice court upon his own information and belief.

In the case of State v. Ransberger, 106 Mo. 135, 1. c. 145, the court in holding that a prosecuting attorney may file an information in the justice court upon his own information and belief, said:

"If the prosecuting attorney must have actual knowledge of the commission of an offense before he can file an information, he would necessarily be a competent witness, and we would thus inaugurate the practice of the same person preferring the charge as an officer and then going on the witness stand to prove it. This is another practice that would and could not be tolerated for a moment. Experience proves that the less actual knowledge of an offense the prosecuting attorney has, the more he is disposed to be impartial, and stand indifferent between the accused and the state, and the more he personally knows about the crime, the more he is disposed to inject into the prosecution his personality, his feelings and his spite."

Also, in the same case, the court said:

"It is not imperative on the prosecuting attorney to file an information on the mere filing of a complaint with him by one having knowledge that an offense has been committed, but in such case, as in others, he should have knowledge, that is, be reasonably convinced, not only that an offense has been committed, but that the accused committed it."

In the case of State v. Crider, 184 Mo. App. 77, 1. c. 80, the court said:

"Appellant also challenges the information because, as he says, it is 'not based upon the knowledge, information or belief of the prosecuting attorney as contemplated by law.' But the statute does not require that the source of the prosecuting attorney's information be made to appear. (Sec. 4968, Rev. Stat. 1909). The information is not faulty on this ground. (See State v. Ransberger, 106 Mo. 146, 17 S. W. 290.)"

In the case of State v. Rotter, 193 Mo. App. 110, 1. c. 113, the court said:

"It is argued the court should have quashed the information on defendant's motion, for the reason it failed to disclose that it was founded upon the affidavit of defendant's wife, the prosecuting witness, and is not verified by her; but obviously this argument is without merit, for it appears the prosecuting attorney verified the information under his oath in accordance with the statute. It is true Lillian Rotter, defendant's wife, lodged an affidavit with the prosecuting attorney, charging defendant with the offense of wife abandonment, and it is true, too, that this affidavit is not mentioned in the information. But be that as it may,

the information is in all respects sufficient, in that its verification conforms to the statute.

"The statute (section 5057, R. S. 1909) provides:

"All informations shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information; the verification by the prosecuting attorney may be upon information and belief."

* * * * *

"The only purpose of the statutes in requiring the information to be supported by affidavit of some persons other than the prosecuting attorney is to afford a guaranty of the good faith of the prosecution. The affidavit, when filed, it is said, is not parcel of the information, but is separate and apart from it, or in addition thereto. (See State v. Brown, 181 Mo. 192, 79 S. W. 1111.) Manifestly, after the affidavit of the prosecuting witness was lodged with the prosecuting attorney as a guaranty of good faith of the prosecution, it was competent for him to disregard it further and proceed to inform against defendant through the office of an information signed and verified by himself as prosecuting attorney according to his information and belief."

Section 5057, R. S. Mo. 1909, mentioned in the above case, is now Section 3504, R. S. Mo. 1929.

Section 4471, R. S. Mo. 1929, reads as follows:

"The term 'felony,' when used in this or any other statute, shall be construed to mean any offense for which the offender, on conviction, shall be liable by law to be punished with death or imprisonment in the penitentiary, and no other."

Justices of the peace have no jurisdiction to impose sentences on an information filed in the justice court upon a graded felony, in view of Section 4471, supra.

In the case of State v. Brown, 267 S. W. 864, the court in holding graded felonies were felonies upon which the county jail sentence would be imposed, said:

"Defendant was convicted in the circuit court of the city of St. Louis of the crime of carrying concealed weapons, and was sentenced upon the verdict of the jury to imprisonment in the workhouse of said city for six months. His appeal was properly lodged here, for the reason that the crime for which he was convicted, as defined by section 3275, R. S. 1919, is punishable by imprisonment in the penitentiary, and is therefore a felony. Section 3712, R. S. 1919."

Appeals from sentences imposed in graded felonies, under the case of State v. Brown, on account of their being considered as felonies only, must be appealed to the supreme court of the state from the circuit court, and not to the court of appeals. Justice courts have jurisdiction in imposing sentences upon misdemeanors only, and not graded felonies. The prosecuting attorney can only file an information on a misdemeanor in the justice court, and not upon graded felonies.

In your request you state that you have filed informations in the justice court charging the defendants with driving while intoxicated, and when they plead guilty they are punished by having their driver's license revoked in addition to the payment of a fine and jail sentence. Under

the above authorities, it would be impossible to file an information in the justice court on the charge of driving while intoxicated or drawing a check upon a bank in which the defendant did not have an account, but, as stated in your request, it would be proper to file an information on a misdemeanor only, such as careless driving or drawing a check with intent to defraud.

Section 18, Session Laws 1937, page 377, reads as follows:

"The commissioner shall forthwith revoke the license of any operator, registered operator or chauffeur upon receiving a record of such operator's, registered operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

"1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle;

"2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;

"3. Any felony in the commission of which a motor vehicle is used."

Section 7783, R. S. Mo. 1929, paragraph (g), reads as follows:

"Driving in intoxicated condition:
No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."

Section 7786, R. S. Mo. 1929, paragraph (c), reads as follows:

"Any person who violates paragraph (a) of section 7781, paragraph (a) of section 7782 or paragraph (f) or (g) of section 7783 shall be deemed guilty of a felony and on conviction thereof shall be punished by imprisonment in the peni-

tentiary for a term not exceeding five years or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars (\$100.00) or by both such fine and imprisonment."

Under these sections in reference to driving while intoxicated, the charge is specifically classified as a felony, and a justice of the peace would have no jurisdiction to sentence or fine a defendant on such a charge.

CONCLUSION

In view of the above authorities, it is the opinion of this department that an information on a misdemeanor can be filed in the justice court by the prosecuting attorney on his own information and belief. Under the ruling in the case of State v. Rodder, supra, he, in his discretion, may ignore the complaint or affidavit filed on a felony charge in the justice court and on his own information and belief file a misdemeanor information on a charge of a lesser degree which is included in the felony charge. It is also the opinion of this department that an information on a misdemeanor must be filed before the justice of the peace would have jurisdiction to assess a punishment on a lesser charge included in the affidavit or complaint previously filed on the felony charge. Under no circumstances can a justice of the peace assess punishment on a plea of guilty to the complaint or illegal information filed on a graded felony. The prosecuting attorney can ignore the affidavit or he may rely upon the affidavit for his own information and belief in filing the information on the misdemeanor in the justice court.

Honorable G. Logan Marr

-9-

August 17, 1938

It is also the opinion of this department that it is mandatory to revoke a driver's license for the commission of acts set out in Section 18, Sessions Laws 1937, but under Section 17 a driver's license may be revoked by the commissioner of motor vehicles for some other violations upon recommendation of the justice of the peace.

Respectfully submitted,

W.J. BURKE
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

WJB:HR

PENAL BOARD: No statutory reward payable for the recovery of escaped convicts who are found dead.

August 25, 1938



Hon. J.E. Matthews, Director
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated August 16, 1938, which reads as follows:

We would like very much for you to give us an opinion relative to paying a reward for an inmate, who escaped from the Intermediate Reformatory, at Alcoa, and was found floating in the river.

On Wednesday, June 15th, inmate Charles Campbell, Register No. 2703, escaped from the Reformatory while at work at the rock crusher. On June 18th, the body of this inmate was taken from the Missouri River, at Gasconade, Missouri, by Mr. Royal T. Tate, an employee of the United States Engineering Department at Gasconade. Positive identification was made by the comparison of fingerprints.

The Board does not know whether this reward should be paid since Section 8500 of the 1929 Statutes states 'Whenever a convict shall escape from the Intermediate Reformatory it shall be the duty of the Board to take all proper measures for the apprehension of such convict and for that purpose it shall offer to pay a reward not exceeding \$50.'

Under this section of the Statutes, it is not clear to us whether a body found floating in the river was apprehended."

Section 8437, R.S. Missouri, 1929, dealing with the penitentiary, provides as follows:

"Whenever any convict shall escape from the penitentiary, it shall be the duty of the board to take all proper measures for the apprehension of such convict; and for that purpose it shall offer to pay a reward, not exceeding one hundred dollars, if such convict be apprehended outside of Cole county, and twenty-five dollars if such convict be apprehended in Cole county, for the apprehension and delivery of such convict; such reward shall be chargeable to the state."

Section 8500, R.S. Missouri, 1929, dealing with the Intermediate Reformatory reads exactly as quoted in your letter.

Our opinion must turn on the legislative intent as expressed by words and phrases of said statutes. What did the legislature intend in providing a reward for the apprehension of escaped convicts?

The Missouri penal institutions are maintained for the confinement and punishment of offenders of the criminal code. When one who escapes a penal institution is running at large, this convict not only defeats the ends of justice, but while at large, is a threat to the peace and order of society. For this reason, the legislature has authorized the penal board to take measures for the apprehension of an escaped convict, even to the offer of a reward, hoping to incite a diligent search.

The word "apprehension" as used in connection with criminals and these reward statutes is defined by Noah Webster as follows:

"Seizure; seizing or taking by legal especially criminal process; arrest; as the felon, after his apprehension, escapes."

In the case of *Cummings v. Clinton County*, 181 Mo. 162, 1.c. 171, 99 S.W. 1127, the court said:

"It is true that the words used in the statute are "apprehension and arrest", while in the reward paper, the word "apprehension" alone is used, but their meaning is substantially the same and it is generally so understood."

Criminal process cannot be served or execution run on a dead body. A dead body cannot be arrested. The penal board could have no interest in the dead body of a convict in performing their duties. Dead bodies floating in the river belong to the relatives or friends or are properly turned over to the State Anatomical Board.

Section 9129, R.S. Missouri, 1929, provides as follows:

"Superintendents or wardens of penitentiaries, houses of correction and bridewells, of hospitals, insane asylums and poorhouses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers in whose custody the body of any deceased person, required to be buried at public expense, shall be and are hereby required immediately to notify the secretary of the board of distribution, whenever any such body or bodies come to his or their possession, charge or control, and shall thereafter dispose of such body or bodies, as the secretary of the state board may direct: Provided, that at any time before said body or bodies have actually been distributed, as provided in this article, any relative or friend

of any such deceased person or persons, shall have the right to take and receive the same from the possession of any person in whose charge or custody it may be found, for the purpose of interment; Provided, that when a claim is made for such body or bodies by any person, not a relative of such deceased person or persons, the expense of the interment shall be borne by the person making such claim. The school or college securing such body shall pay all necessary expense incurred in the delivery thereof, including cost of notice to secretary, which notice shall be by telegraph, when necessary. A correct record of all such bodies, name and date of death, shall be kept in a book kept for that purpose with the county clerk of the county in which such person died, or the city health commissioner of St. Louis city, and such record must be furnished said county officer by person or persons reporting said bodies to the state anatomical board."

To be entitled to recovery of a reward for the apprehension of a criminal, one must establish a substantial compliance with all the conditions of the offer, and in *Smith v. Vernon County*, 188 Mo. 501, l.c. 506, 87 S.W. 949, the court said:

"To be entitled to recovery, one claiming a reward for the return of lost or stolen goods, or the mere apprehension, or the apprehension and conviction of a criminal, or for information leading to either, must establish his substantial compliance with all the conditions of the offer of reward."

August 25, 1938

CONCLUSION

We are of the opinion that the recovery of a dead body floating in the river which turns out to be a body of an escaped convict upon whom a reward was offered for his "apprehension" is not a substantial compliance with the conditions of the offer as authorized by the legislature. Under such circumstances, the reward cannot be legally paid because the death of the offender made it a physical impossibility to arrest him and bring him to justice.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

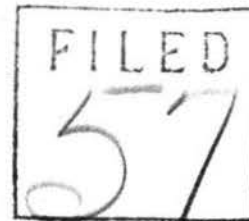
WOS:VAL

ELECTIONS:

Certificate of nomination which is not
acknowledged is faulty and should not
be accepted by the county clerk.

September 24, 1938

9-27



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This department is in receipt of your opinion request dated September 13, 1938, which reads as follows:

"The enclosed copy of a petition was filed with the County Court of Morgan County, Mo, as provided for in section 10241 of the 1929 statutes. The purpose of this petition was to have William West run for office on the Independent Ticket. The County Court wanted to know if this petition was in proper form so as to justify the printing of the election ballot of the general election of November 1938, to include William West as an independent candidate. The attempt is to nominate William West as candidate for Presiding Judge of Morgan County, Missouri. Nowhere in the petition does the certificate of nomination state as to what office Mr. William West is running for. He is running for the presiding judge of what? The petition in five places nominates William West as the Presiding Judge of Morgan County, Mo.

I infer from reading this petition that William West desires and the petitioners want him to run for Presiding Judge of the County Court of Morgan County, Mo. Now the question is, has this office of presiding judge of the County Court been sufficiently defined in this petition to

authorize the County Clerk to print the name of William West, as independent candidate for presiding judge of the County Court of Morgan County, Mo.?"

The certification of nomination which accompanies your request is signed by a number of persons but the residence of none of the signers is listed nor are any of the names acknowledged.

Section 10232, R. S. Mo. 1929 provides as follows:

"Any primary election as hereinafter defined, held for the purpose of making nominations to public office, and also electors to the number hereinafter specified, may nominate candidates for public offices to be filled by election within the state. Such nomination shall be made by filing a certificate of nomination, executed with the formalities prescribed for the execution of an instrument affecting real estate."

Section 10233, R. S. Mo. 1929 provides as follows:

"The certificate of nomination, which may consist of one or more writings, shall contain the name of the person nominated, his residence, occupation, and the office for which he is nominated, and also the name and residence of each signer. The certificate may also designate by a name the party or principal which such nominee shall represent."

Section 10234, R. S. Mo. 1929 provides in part as follows:

"* * * * * For all other nominations to public offices, certificates of nomination shall be filed with the clerks of the county courts of the respective counties wherein the offices are to be filled by the electors."

Section 10241, R. S. Mo. 1929 provides as follows:

"The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent. of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made; provided that said signers shall declare in said certificate that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

The nomination of public officers otherwise than by primary election is recognized in State ex rel. Preiss v. Seibel, 295 Mo. 607, 1. c. 624:

"* * * If electors resident within a district or political division of the State, to a number equal to one per cent. of the entire vote cast at the last preceding election in the State, county or other political division, desire to nominate one or more candidates for public offices, to be filled by election, the right to nominate them and have their names printed on the ballots is guaranteed in the manner prescribed by this section of the statutes. * * * * *

Section 10233, supra, provides that the name and residence of each signer shall be contained in the certificate of nomination. The attached certificate fails to meet this requirement in that the residences of the signers are missing.

However, we do not have to base our opinion that this certificate is deficient upon this ground alone. It will be noted that Section 10232, supra, provides that a certificate of nomination shall be "executed with the formalities prescribed for the execution of an instrument affecting real estate."

September 24, 1938

We quote from the case of State ex rel. O'Malley v. Lesueur, 103 Mo. 253, changing the statute numbers to comply with the sections of the Revised Statutes, 1929:

"Turning to section 3014, R. S. 1929 we find that those formalities (for the execution of an instrument affecting real estate) consists not only in the deed being executed, but in its being acknowledged, while section 3026 provides that a certificate of such acknowledgment shall be indorsed on the conveyance, and section 3027 prescribes how it shall be authenticated, and section 3029 what such certificate shall contain.

"In the present instance * * * the certificate never was in fact acknowledged; so that it was incomplete within the purview of the law, and the secretary might well have refused to file said certificate on this ground alone.* * * * *

In view of the above authorities the question whether the certificate sufficiently states what office the candidate is nominated for becomes of little consequence since the certificate is faulty on other grounds.

CONCLUSION

It is, therefore, the opinion of this department that a certificate of nomination which is not acknowledged according to the requirements of an instrument affecting real estate is faulty and should not be accepted by the county clerk to be placed upon the ballot.

Respectfully submitted,

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

AO:DA

TAXATION:

DELINQUENT SALES:

Holder of second certificate of purchase of delinquent lands sold for taxes must immediately pay amount provided by statute in order to retain his rights of priority over the holder of the first certificate of purchase, and failure to do so forfeits such rights to the holder of the first certificate.

October 18, 1938

Honorable Thomas A. Mathews
Prosecuting Attorney
St. Francois County
Farmington, Missouri

11-10



Dear Sir:

This is in reply to yours of recent date wherein you submit a question based upon the following statement of facts:

"On November 4, 1935, one Johnson, under the tax law of Missouri 1933, became the holder of a certificate of purchase of certain real estate offered for sale for delinquent taxes. Under Section 9957, 1933 laws, page 438, says the holder of the original certificate of purchase is not entitled to a collector's deed until two years from the date of the certificate of purchase, and therefore, in this instance Johnson could not have secured a collector's deed until November 4, 1937.

"November 1, 1937, this same land was offered for sale for delinquent taxes for the years 1936 and 1937, and the same was bid in by one Jones, who was issued a subsequent certificate of purchase by the collector. On November 4, 1937, Johnson tendered to the collector the full amount of the taxes, costs, etc. in connection with the November 1, 1937 sale, and demanded a deed from the collector.

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"Missouri Law of 1933, Section 9957C, says any purchaser that shall suffer a subsequent tax to become delinquent and a subsequent certificate of purchase to be issued on the same property included in the certificate, such first purchaser shall forfeit his rights of priority thereunder to the subsequent purchaser.

"According to this law, undoubtedly Johnson forfeited his rights of priority.

"However, this law requires that such subsequent purchaser (Jones) shall at the time of obtaining his certificate redeem said first certificate of purchase outstanding by depositing with the County Collector the amount of said first certificate with interest thereon to the date of said redemption and the amount so paid in redemption shall become a part of said subsequent certificate of purchase, etc., etc.

"A subsequent certificate was issued by the collector to Jones, but Jones failed at that time to deposit with the collector the amount of the first certificate with interest. Shortly afterwards, the first certificate holder, Johnson, discovered this fact and tendered to the collector of taxes and costs of every kind and still demanded his deed, which was refused by the collector. Jones was notified of such offer of payment by the first certificate holder, Johnson, and afterwards did deposit with the collector the amount of the first certificate over the objection of the first certificate holder. Afterwards Jones, the second certificate holder, needing cash, withdrew his deposit from the collector, and there is no deposit there now. The first certificate holder still offers to pay the collector all taxes and costs, and demands a deed from the collector by reason of his first certificate

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of purchase and says he is entitled to his deed for the reason that Jones, the subsequent purchaser, did not comply with the law by depositing with the County Collector when he should have done so, the amount of the first certificate with interest, and that there is no deposit with the collector at this time."

From a reading of the Jones-Munger Act pertaining to sales of delinquent lands for taxes, it seems that the lawmakers intended that the purchaser at such sales should pay the amount of his bid immediately.

Section 9953c, Laws of Missouri, 1933, page 433, provides as follows:

"Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; * * *."

Section 9953d of said Act provides as follows:

"After payment shall have been made the county collector shall give the purchaser a certificate in writing, to be designated as a certificate of purchase, which shall carry a numerical number and which shall describe the land so purchased, each tract or lot separately stated, the total amount of the tax, with penalty, interest and costs, and the year or years of delinquency for which said lands or lots were sold, separately stated, and the aggregate of all such taxes, penalty, interest and costs, and the sum bid on each tract. * * * ."

Section 9954 of said Act, page 434, provides as follows:

"It is hereby made the duty of the county collector, at the time he sells

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lands for taxes unpaid and delinquent, as is directed in this act, and after the purchasers of land under such sales have made payment of the amount of their bids, respectively, to indorse upon and annex to each certificate to be given to the purchaser by the county collector, as required by this act, his written guaranty, signed by him, warranting that the taxes due upon the tract, lot or lots, piece or parcel of land, which, or a portion of which, are named in such certificate. * * *

In the case of Maxwell v. Dunham, 297 S. W. 1. c. 97, the court in discussing when a sale is completed, said:

"The law is well settled in this state that, when a sale is made for cash, the transaction is not complete until the purchase price is paid, and until then no title passes to the purchaser unless the seller waives payment."

Under the foregoing provisions of the law relating to delinquent sales, the collector is under no circumstances authorized to waive payment in cash at the time the sale is made.

Vol. 61 C. J., page 1211, Sec. 1635, states the rule as follows:

"A tax sale must be made on the basis of a payment in cash."

And in the same volume, Sec. 1636, the rule is further stated:

"To acquire title under a tax sale the purchaser must pay the amount of his bid, to the officer authorized to receive it, within the time limited by statute for that purpose."

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From the foregoing authorities and sections, it is evident that the purchase price of lands sold for taxes must be paid immediately, and if it is not so paid there is no sale.

In the case of Carter v. Munzesheimer, 272 S. W. 279, the court said:

"The purchaser's title did not become perfect until and unless his bid was accepted and the payment made, although there was a valid judgment, execution, and sale; and the burden of proving this fact was upon the purchaser. Manifestly, the title claimed by the purchaser was not legally effective if there was failure of compliance with the bid, for the law is well settled that the bidder acquires no title to the property purchased before and until the moment of payment of the purchase price bid."

Your letter also indicates that the highest bidder for the delinquent land sold for taxes for the years 1936 and 1937 paid the amount of his bid and a certificate was issued to him by the collector as required by law. It further appears that at that time the purchaser at the second sale did not deposit with the collector the amount of the certificate, with interest, owned by the first purchaser.

Section 9957c, Laws of Missouri, 1933, page 440, provides as follows:

"Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which

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such holder makes demand for deed, and any purchaser that shall suffer a subsequent tax to become delinquent and a subsequent certificate of purchase to issue on the same property included in his certificate, such first purchaser shall forfeit his rights of priority thereunder to the subsequent purchaser, and such subsequent purchaser shall at the time of obtaining his certificate redeem said first certificate of purchase outstanding by depositing with the county collector the amount of said first certificate with interest thereon to the date of said redemption and the amount so paid in redemption shall become a part of said subsequent certificate of purchase and draw interest at the rate specified in said first certificate but not to exceed ten percent per annum from the date of payment. Said holder of a certificate of purchase permitting a subsequent certificate to issue on the same property, shall, on notice from the county collector, surrender said certificate of purchase on payment to him of the redemption money paid by the subsequent purchaser."

Under the provisions of this section, the party who owned a certificate of purchase for delinquent lands sold at a prior tax sale forfeited his rights of priority by permitting such lands to be sold at a subsequent sale. The second purchaser of the lands acquired prior rights to such lands provided he deposited with the county collector the amount of said first certificate with interest thereon to the date of such second sale or the date when such certificate is redeemed.

It also appears from your request that the second purchaser made this deposit but later withdrew it. Said Section 9957c is a tax statute and one in which a forfeiture operates against the person holding the first certificate of title and the provisions of said section should be strictly

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construed. While we do not find where the second purchaser had authority to withdraw his deposit made for the redemption of the first certificate, yet since he has done that, he has failed to comply with the provisions of said Section 9957c, supra, and therefore cannot acquire the rights of priority given by said section.

Vol. 55 C. J., page 513, Section 506, states the rule which is applicable to your question, as follows:

"An intentional and deliberate failure to pay constitutes a material breach, which may give rise to a right to damages or rescission on the part of the seller."

In this particular case, applying the foregoing rule, the failure of the highest bidder at the second sale to deposit and leave deposited with the collector the amount of money necessary to take up the first certificate of purchase, with interest thereon, as provided by Section 9957c, supra, operated as a forfeiture of his rights and would authorize the collector to rescind the contract made at the second sale.

The purchaser at the second sale failed to meet the requirements of the statute by depositing the necessary amount of money and thereby lost his priority rights over the first certificate holder and lost his rights of having the second certificate issued to him. Then the holder of the first certificate of purchase may obtain a deed to the delinquent lands by virtue of the provisions of Section 9957, Laws of Missouri, 1933, page 438, which is as follows:

"If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the

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name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however, to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold. In making such conveyance, when two or more parcels, tracts, or lots of land are sold for the non-payment of taxes to the same purchaser or purchasers, or the same person or persons shall in anywise become the owner of the certificates thereof, all of such parcels shall be included in one deed."

CONCLUSION

From the foregoing, we are of the opinion that the person making the highest bid for the delinquent lands which were offered for sale at the second sale, by failing to pay or by withdrawing the amount of money required by statute to be paid or deposited, loses his rights of priority over the holder of the first certificate of purchase of such lands. We are further of the opinion that the holder of the first certificate of purchase, upon making the payments required by the statute, at the end of two years from the date of the issuance of such certificate, is entitled to have a deed to the delinquent lands issued to him by the collector, provided that the holder or owner or any person interested in such lands has not redeemed them during said two-year period.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

ANIMALS

TAX ON DOGS: License tax on dogs must be paid on or before February 1st.

November 30, 1938



Mr. E. S. Matteson
Extension Animal Husbandman
College of Agriculture
Columbia, Missouri

Dear Mr. Matteson:

This is in reply to yours of recent date wherein you requested an opinion from this department based on the following letter:

"Last spring I had some correspondence with you relative to the so-called dog law which was going to be voted on in some of the different counties in Missouri this fall. A number of these counties did submit this proposition to the voters and it carried. The information I would like to have at this time is when would this go into effect, and what would be the tax year on these dogs? This and any other information you can give me will be appreciated."

It seems from your letter that the question you have submitted is as to what date the county dog licenses shall be paid. This only applies to counties which have adopted the county dog law tax. The county assessor is required to make his assessments of property, real and personal, in the county as of June first of each year. He must have his forms completed by December 31st of the year. This requirement comes under the general law as to assessment of property. Section 12881, R. S. Mo. 1929, provides as follows:

"The assessors for taxation purposes in each county and city of this commonwealth shall annually, at the time of assessing property as required by law, make diligent inquiry as to the number of dogs owned, harbored or kept by any person so assessed. The assessor shall annually, on or before the thirty-first day of December, make a complete report, on a blank form furnished by the county clerk or license collector, setting forth the name of every owner of any dog or dogs, how many of each sex are by him owned or harbored, and if a kennel is maintained by any person such fact shall also be stated. It shall be the duty of the assessor, at the time of making the assessment, to notify the owner of such dog or dogs that he must obtain a license for the same as provided for in this article; but the neglect or failure so to notify such owner shall not relieve the owner from his duty to obtain such license."

By this section it seems to be the duty imposed upon the assessor to notify the owner of a dog that he must obtain a license for him. This is to be done at the time the assessor makes the assessment. However, this statute provides that should the assessor fail to so notify the owner, it does not relieve the owner from the criminal responsibility for failure to obtain a license for the dog, nor does it relieve him of the duty to obtain a license. Section 12881 also provides:

"If the majority of the votes cast upon the subject be in favor of license tax on dogs, the county court shall spread the result of such election upon its records and give notice thereof by publication in some newspaper printed and published in such county and such law shall

become operative from the time such publication is made. (Laws 1921, p. 679, Sec. 10)"

By this part of said section, when the proposition to license dogs in the county has carried and the results of the election are published, then the law becomes effective at once.

Section 12880 provides a penalty for failure to list and pay the tax on the dog. This section is as follows:

"Every owner of a dog and every person who shall suffer or permit a dog to remain upon such premises under his immediate control without having caused such dog to be listed and the tax thereon to be paid as provided for by this article shall be guilty of a misdemeanor, and on conviction thereof fined not less than five dollars nor more than twenty-five dollars. Provided, that none of the provisions of this article shall apply to cities which now have or may hereafter have a population of 300,000 inhabitants or more. (Laws 1921, p. 679, Sec. 9)"

By this section, a person is guilty of a misdemeanor upon failure to pay his dog license tax as provided by law. It would appear from the provisions of Section 12881, provided that the act goes into effect as soon as the results of the election are published, that a person would be violating the law by failing to obtain a license at once. However, Section 12872, Laws of Mo. 1937, p. 225, provides as follows:

"No dog shall be permitted to be and remain with, in the limits of the state unless the owner thereof, or someone for said owner, shall have caused such dog to be listed and the tax imposed by this article

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to be paid on or before the first day of February of each year hereafter."

The annual rate of license tax is fixed by Section 12873, Laws of Mo. 1937, page 225, but no provision is made in this section for the splitting up of the license or the paying of a part of a year at a time. That being the case, we do not think that the county court, or any other official connected with the collection of the dog license tax, would have authority to split the tax or take payment for part of a year. The county officials must look to the act to determine their powers and duties. Absent the power to permit payment for the part of a year, the officers would be required to collect a full year's license.

As the assessor has until December 31st to make his returns of assessments of dog tax, and since the legislators have fixed only one date on which or before which the tax shall be paid, we think the license is due on or before February 1st of each year and that there would be no violation of the statute until a person fails to pay the license after February 1st.

CONCLUSION

It is, therefore, the opinion of this department that counties which have recently adopted the county dog tax license shall require the license to be paid on dogs on or before February 1, 1939, as provided by Section 12873, Laws of Mo. 1937, page 225, and that a failure to pay the tax before that time would not be in violation of the law as is provided by Section 12880, R. S. Mo. 1929.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

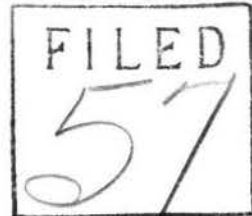
APPROVED:

J. E. TAYLOR
(Acting) Attorney General
TWB:RT

SHERIFF: Sheriff is prohibited from transporting or committing females to the State Industrial Home for Girls or the State Industrial Home for Negro Girls.

December 5, 1938

Mr. W. L. Marlin
Sheriff of Pettis County
Sedalia, Missouri



Dear Sir:

This will acknowledge receipt of your letter of December 2, 1938, requesting an opinion from this department, which reads as follows:

"I am writing you for an opinion in regard to transporting and committing Juveniles to the different Institutions in the State.

A Mrs. W. H. Fewell has been taking care of the Girl Prisoners although the Commitments are addressed to the Sheriff. Please advise me if the Sheriff is supposed to furnish transportation and receive fees for this work, whether they be male or female."

Section 8357, R. S. Mo. 1929, reads as follows:

"In all cases of conviction of felony, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the county in which the conviction is had. The sheriff, marshal or other person charged with the

delivery of any person to the reformatory shall be allowed the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time actually occupied in taking such person to said reformatory and in returning therefrom, to be paid by the state or county, as the case may be."

This section applies to the transportation of incorrigibles or convicts to the Missouri Reformatory.

Section 8374, R. S. Mo. 1929, reads as follows:

"The circuit court of each county shall appoint women attendants to take to said industrial home for girls all girls committed to said home by the court. The same fees that are now allowed by law for conveying prisoners to the penitentiary shall be allowed to the said women attendants of the several counties of this state for the service of taking to said industrial home such girls as may be committed there, and such fees shall be paid by the state in the same manner as now provided by law in section 11791, chapter 84, R. S. 1929."

This section applies to the transportation of incorrigibles or convicts to the State Industrial Home for Girls.

Section 8387, R. S. Mo. 1929, reads as follows:

"The circuit court of each county shall appoint women attendants to take to said industrial home for negro girls all negro girls committed to said home by the court. The same fees that are now allowed by law for conveying prisoners to the penitentiary shall be allowed to the said women attendants of the several counties of this state for the service of taking to said industrial home such girls as may be committed there, and such fees shall be paid by the state in the same manner as now provided by law in Section 11791, Chapter 84, R. S. 1929."

This section applies to commitments of incorrigibles or convicts to the State Industrial Home for Negro Girls.

It will be noticed that in Sections 8374 and 8387, supra, the word "shall" is used and should be considered as mandatory and not directory. It was so held in the case of Kansas City, Mo. vs. J. I. Case Threshing Machine Co., 337 Mo. 913, 87 S. W. (2d) 195, 1. c. 205, where the court held as follows:

"The words 'may, must, and shall' are constantly used interchangeably in statutes and without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the Legislature as determined by ordinary rules of construction. 59 C. J. 1081, sec. 635; 25 R. C. L. 768, sec. 12; 2 Lewis-Sutherland (2d Ed.) 1153, sec. 640; Maxwell on Interpretation of Statutes (5th Ed.) 389; Endlich on Interpretation of Statutes, 416-419, secs. 306, 307. 'A mandatory construction will usually be given to the word "may" where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.' 59 C. J. 1083, sec. 635. Of course, all of these rules of construction are auxiliary rules. 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the law-makers' intent.' Meyering v. Miller, 330 Mo. 885, 51 S. W. (2d) 65, 68."

The legislative intention should be construed according to the purpose of the Act and by Sections 8374 and 8387, supra, it was the purpose and intention of the Legislature that the sheriff should not be permitted to transport or commit females to the reformatory institutions.

In the case of State ex rel. Ellis v. Brown, 33 S. W. (2d) 104, 1. c. 107, 326 Mo. 627, the court said:

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory." 25 R. C. L. sec. 14 pp. 766, 767."

The act of the Legislature should also be construed so as to carry out the intention and not some absurd and different meaning than that intended by the Legislature. As in the case of prohibiting the sheriff from committing incorrigibles or convicts to the Industrial Home for Girls, the section which provides that a woman attendant should commit or transport incorrigibles or convicts to the Industrial Home for Girls is not in conflict with the general law which provides for the transportation of convicts to the State Penitentiary or to the Missouri Reformatory.

In the case of Fischbach Brewing Co. v. City of St. Louis, 231 Mo. App. 793, 95 S. W. (2d) 335, 1. c. 339, the court said:

"A cardinal rule of statutory construction is to give effect to the legislative intent, where ascertainable; another is to favor such a construction which would tend to avoid injustice, oppression, and absurd and confiscatory results and be in harmony with the rule of reason. The benign objectives heretofore pointed out were surely within the legislative intent as shown by all the surrounding circumstances covering the period in which this law was enacted. Rutter v. Carothers, 223 Mo. 631, 643, 122 S. W. 1056."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the sheriff is prohibited from furnishing transportation or transporting females to the State Industrial Home for Negro Girls or the State Industrial Home for Girls, but is permitted to furnish transportation and commit male incorrigibles or convicts to the Missouri Reformatory.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

COUNTY COURT: The County court may place the county jail
in the basement of the courthouse.

December 16, 1938

12-19
FILED

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We have received your letter of December 10,
1938, which reads as follows:

"Morgan County, Missouri, is the only county in the state that I know of that does not have a suitable county jail for the confinement of its prisoners under sentence or awaiting trial. By the order of the Circuit Court and the use of the statutes Boonville jail is used as a regular jail for Morgan County prisoners. The jail we have is a one cell hold over, not adequate in any way.

"In transporting these prisoners back and forth to Boonville, costs Morgan County in mileage paid to the sheriff, the sum of between five hundred and seven hundred dollars per year.

"For instance, a prisoner on trial in Morgan County, from Cooper county on a change of venue, tried to break jail, and the sheriff of our county, kept him every night in the new county jail at Jefferson City. In transporting this prisoner back and forth to the trial, it has cost over one hundred and twenty five dollars in mileage, and the end is not in sight because the prisoner must be present in the argument of the motion for a new trial.

"About forty years ago, the present county court house was built. In the construction thereof, the jail was to be in the basement of the building. In the basement of this building there are cell blocks made out of limestone rock, and cemented up. These cells are not completed. After this court house was built, there was some kind of a statute or decision that prisoners could not be confined in jail built below the ground. For this reason the jail cells in the basement were never completed, and never used.

"This court house has sewer, water, light, and the county without much expense could finish these cell blocks in the basement of the courthouse for use as a county jail. They could be lighted by electric lights. They could be air conditioned, if necessary.

"Do you know of any law, statute or decision that would prevent Morgan County from fixing up this court house basement for a regular county jail?"

Section 8537, R. S. Mo. 1929, reads as follows:

"It is hereby made the special duty of the court having criminal jurisdiction, at each term, to inquire and see that all prisoners are humanely treated."

Section 8524, R. S. Mo. 1929, reads as follows:

"There shall be kept and maintained, in good and sufficient condition and repair, a common jail in each county within this state, to be located at the permanent seat of justice for such county."

Section 8524 specifically states that "there shall be kept and maintained, in good and sufficient condition and repair, a common jail."

In the case of Harkreader v. Vernon Co., 216 Mo. 696, 1. c. 708, the court in defining "good and sufficient" stated as follows:

"The close air and squalid condition of a prison, "squalor carceris," were by many considered as the necessary attributes, and even men of respectable judgment have supposed, in the case of debtors, that the filth of the prison was a proper means of compelling them to do justice to their creditors.' (Witness the foul Bedford jail where the immortal Bunyan lay and dreamed his immortal dream.)

"All such notions are worthless in an age allowing humanity as an essential element in punishment and abhorring cruelty per se in laying the law's heavy hand on delinquents.

"It is written in the statutes that jails should be 'kept and maintained in a good and sufficient condition,' etc. (R. S. 1899, Sec. 8104), that is, 'good and sufficient' in a modern sanitary sense, having an eye to the sure results established by scientific investigation of the disease-breeding effects of filth and bad air."

Section 8545, R. S. Mo. 1929, reads as follows:

"It shall be lawful for the sheriff of any county of this state, when there shall appear to be no jail, or where the jail of such county shall be insufficient, to commit any person or persons in his custody, either on civil or criminal process, to the nearest jail of some other county; and it is hereby made the duty of the sheriff or keeper of the jail of said county to receive such person or persons, so committed as aforesaid, and him, her or them safely keep, subject to the order or orders of the judge of the court for the county from whence said prisoner was brought."

Section 12071, R. S. Mo. 1929, reads as follows:

"The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

In the case of State ex rel. v. Bollinger, 219 Mo. 204, 1. c. 223, the court said:

"Section 6736, Revised Statutes 1899, reads as follows: 'The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage.'

"Clearly that section of the statute gives the county court of Stoddard county jurisdiction over the subject-matters complained of in the petition; and the pleadings, evidence and report of the referee filed herein disclose the fact that the county has sufficient money on hand with which to pay for the proposed improvements. That being true, then the county court of that county was acting within its jurisdiction, and prohibition will not lie. (State ex rel. v. Reynolds, 209 Mo. 161; State ex rel. v. Riley, 203 Mo. 175.)"

In the above quotation, Section 6736, R. S. 1899, is now Section 12071, R. S. Mo. 1929.

In the case of Village of Nixa v. McMullin, 198 Mo. App. 1, 1. c. 5, the court said:

"We hold the law to be that a marshal who makes a lawful arrest must use care to see that his prisoner is not oppressed and that he must not be treated inhumanely, and that, if a calaboose is in such condition--known to the officer--as to be an unfit place in which to confine a man overnight without endangering his physical condition he must not put him in there; and a failure to use such due care and accord ordinary decent treatment will be a breach of his bond to faithfully perform his duty."

The same ruling should apply to sheriffs, who would be liable on their bond for ill treatment of prisoners.

Under the County Budget Act, Session Laws of 1937, page 422, Section 2, Class 5, any surplus could be used for the repair of the jail. Said Class 5 reads as follows:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, the county court may transfer any surplus funds from classes 1, 2, 3, 4 to class 5 to be used as a contingent and emergency expenses. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

The proper method of improving a jail would be a bond election in compliance with Section 2905, R. S. Mo. 1929, when the cost of the repair or altering would be in excess of the surplus of the general revenue.

CONCLUSION

In view of the above authorities, it is the opinion of this department that no statute or decision would prevent Morgan County from fixing up the court house basement for a regular county jail providing there is a surplus in Class 5, Section 2, of the Budget Act of 1937 to meet such an emergency. The only reason why a jail can not be placed in a basement would be that the sheriff or jailer would be liable for damages on his bond for the ill treatment or inhumane treatment of the prisoners by reason of it not being a good and sufficient jail in compliance with the holding of the case of Village of Nixa v. McMullin, 198 Mo. App. 1.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

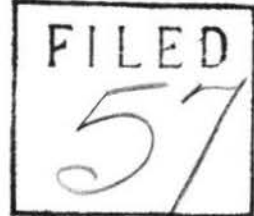
J. E. TAYLOR
(Acting) Attorney General

WJB:HR

PROSECUTING ATTORNEYS - Basis for determining salary

December 22, 1938

Mr. G. Logan Marr
Prosecuting Attorney
Versailles, Missouri



Dear Mr. Marr:

This will acknowledge receipt of your letter of November 29, requesting an opinion from this office relative to a charge of \$700.00 which your county court is carrying against you as for over-payment of your salary for the year 1931, and wherein such letter you ask the further question as to what reliance is to be accorded an opinion of the Attorney General.

Answering your first question wish to say that since the ruling of the Supreme Court came down in the case of State ex rel. O'Connor v. Riedel, 329 Mo. 616, which case you mention in your letter, the salary of prosecuting attorneys in the various counties of the state has been based upon the population of the respective counties as found by the official government census of 1930. Accordingly, when you went into office January 1, 1931, such was the basis of your salary for the year 1931, depending upon the 1930 census of Morgan County, and the previous basis of determining such salary, namely, by multiplying the last presidential vote by the numeral 'five' was discarded and of no further force and effect after such census went into effect in 1930.

It would appear from your letter that your salary as Prosecuting Attorney, for the year 1931, based upon the census population of Morgan County was \$1100.00, whereas, you were paid \$1800.00 for such year. Hence, the over-payment of \$700.00 is a proper charge against you.

Mr. G. Logan Marr

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December 22, 1938

Relative to your inquiry as to the reliance to be placed upon an opinion from this department, beg to say that our opinions are advisory and constitute a guide unless the subject matter of such opinion comes before the appellate courts of the State, and if a contrary ruling is made by such court then the court's opinion is one that must be thereafter followed.

Very truly yours

J. W. BUFFINGTON
Assistant Attorney General

APPROVED

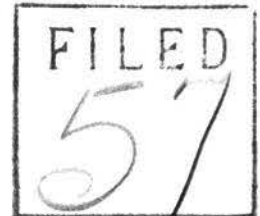
J. E. TAYLOR
(Acting) Attorney General

JWB LC

CRIMES & PUNISHMENT: When statute of limitations runs and when suspended, on felonies and misdemeanors. State must have consent of U. S. Attorney General to obtain Federal Prisoner for trial in State court.

December 29, 1938

119



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 20, 1938, which is as follows:

"In November 1934, W. L. Beavers sold Chas. Ensminger of Morgan County, Mo. some bonds that were issued in Oklahoma, and were not registered under the securities act of Missouri. W. L. Beavers did not have any license to sell foreign or domestic bonds in Missouri, and was not registered as such a bond salesman.

"According to Mr. Ensminger, W. L. Beavers in the course of the transaction stated that he was a resident of Kansas City, Missouri. When W. L. Beavers registered at the cabin hotel on the Lake of James E. Dunn at Gravois Mills, Mo., he registered as being of Kansas City, Mo.

"He originally had lived in Oklahoma City.

"May 8th, 1936, W. L. Beavers was sent to the State Penitentiary at McAllister, Oklahoma, on a manslaughter charge for killing two persons with a car. In the prison record, W. L. Beavers claimed his residence in Oklahoma City, Oklahoma.

"Sometime after his committment to the Oklahoma Prison, the federal authorities apprehended, Beavers, and he was sentenced in the Federal Court for using the mails to defraud in his fraudulent bond racket. He was then lodged in the Federal penitentiary at Leavenworth. In November 1937, Beavers was lodged in the Federal pen, but Chas. Ensminger did not know he was and what his real name was. He had sold the bonds to Ensminger under another name.

"In December 1938, Beavers is still confined in the Federal penitentiary in Leavenworth."

Upon these facts you present these questions. (1) Is a prosecution barred by the statute of limitations? (2) If Beavers was in fact a resident of Oklahoma in November 1934, when he represented himself to be a resident of Missouri, would this make any difference in limitations? (3) Are Missouri authorities barred from obtaining Beavers for trial in Morgan County, because he is now in the Federal Prison at Leavenworth?

One of the offenses that has been committed here is a felony. Section 7748 R. S. Mo. 1929 provides:

"Any person who shall do * * * * any act made unlawful by any of the provisions of sections 7736 or 7744 of this chapter shall be guilty of a felony * * *."

Section 7744 R. S. Mo. 1929 provides:

"No dealer or salesman shall engage in business in this state as such dealer or salesman or sell any securities including securities exempted in section 7726 of this chapter and excluding those mentioned in section 7727 of this chapter, unless he has been registered as a dealer or salesman in the office of the commissioner pursuant to the provisions of this section."

Under these sections it is clear that Beavers not being registered as a dealer or salesman has violated the law and is guilty of a felony unless the sale he made falls within the terms of Section 7727 R. S. Mo. 1929. If it falls within the terms of this statute he has committed no offense.

The other offense that has been committed is a misdemeanor. Section 7748 R. S. Mo. 1929 provides:

"Any person who violates any provision of this chapter other than the provisions of sections 7736, 7744 and 7749 thereof, shall be guilty of a misdemeanor * * * *."

Sections 7728, 7729 and 7730 R. S. Mo. 1929 as amended Laws 1937, p. 456, require certain securities to be registered before being sold in this state. The securities sold by Beavers not being registered when sold brings into force the punishment provided in the preceding quotation. However if these securities fall with those enumerated in Section 7726, Laws 1937, p. 456, which are not required to be registered, there has been no offense committed.

The limitations of criminal offenses, both felony and misdemeanor, are contained in Sections 3392 and 3393 R. S. Mo. 1929.

Section 3392 provides:

"No person shall be tried, prosecuted or punished for any felony, other than as prescribed in the next preceding section, unless an indictment be found or information be filed for such offense within three years after the commission of such offense * * * *."

Section 3393 provides:

"No person shall be prosecuted, tried or punished for any offense, other than felony, * * * * unless the indictment be found or prosecution be instituted within in one year after the commission of the offense, * * * *."

Sections 3394 R. S. Mo. 1929 suspends the operation of these limitations and is as follows:

"Nothing contained in the two preceding sections shall avail any person who shall flee from justice; and in all cases, the time during which any defendant shall not have been an inhabitant of or usually resident within this state shall not constitute any part of the limitations prescribed in the preceding sections."

The correct disposition of the first two questions revolves around the meaning to be given that part of section 3394, supra, which stops the running of the statute. This being "the time during which any defendant shall not have been an inhabitant of or usually resident within this state,"

Does this mean mere physical absence from the state, or the termination of legal domicile in the state?

This question, of course, assumes that Beaver was a legal resident of Kansas City, Missouri at the time of the offense. In *State v. Snyder*, 182 Mo. 462, it is held that the terms "inhabitant of" or "usually resident" in the state are synonymous and their use does not create two conditions which suspend the running of the limitations statute. Further in this case, at l. c. 512, the court quoted with approval from other jurisdictions. The case of *Graham v. Commonwealth*, 51 Pa. St. 255 is quoted from, with the court remarking that a statute the same as Missouri's has been in force there for years, it is said:

"The only question we have to deal with is, whether the facts found do or do not establish that the defendant Graham was an inhabitant and usually a resident of the State, during the two years after the Commission of the offense. His residence at the time' (of the commission of the offense) 'was in Indiana county, where he remained for several months after committing the offense charged, until he entered the service of the United States as a soldier. He served

in Maryland and Virginia, and returned home to his family several times, and remained for considerable periods, once as a paroled prisoner, and at other times on furlough, and when eventually discharged in June, 1865, returned to his family and residence at his home in Indiana county.' The court throughout its opinion treated the phrases 'an inhabitant of the State' or 'usual resident therein' as synonymous, and said: 'We think all the time he was in the service his absence was temporary and that he remained 'an inhabitant of the State or usual resident therein,' so that there was not the least obstacle in the way of instituting a prosecution against him, or even in claiming him to answer. His usual residence was not changed by the fact that he obeyed the call of the President, and volunteered to fight for his country at her command.' Further on, the court says, "'Usual' residence means 'customary,' 'common.' If the offender's customary residence is in the State during the two years, this is all the act requires. That it was in this case the facts found show. . . . If we were to yield to the construction contended for, namely, that a man is not an inhabitant of the State, and can not be usually a resident of it, who is not within it all the time during the two years, we would in effect repeal the limitation as it regards many persons, who, residing near the borders of the State, or whose business requires it, are out of the State numerous times within every two years. In such cases they would be forever liable, unless they tarried some time or other, during two whole years in the State. The proviso does not apply to such cases.'"

Further, in the Snyder case, l. c. 513 the court quoted from the case of *People v. McCausey*, 65 Mich. 72, and italicized for emphasis this statement:

"It is not mere absence from the state this statute refers to, but such absence as destroys residence."

The statute in Michigan, which suspended the running of limitations on criminal offenses reads "usually and publicly a resident in the State."

Considering the above, it is clear that section 3394, supra, contemplates severance of legal domicile rather than physical absence from the State. That a person might be physically absent yet maintain his legal residence here and the statute of limitations would continue to run. This being the meaning of said section then, if Beavers was actually a resident of Kansas City, Missouri in November 1934 when he represented himself to be such and has continued to keep Missouri as his residence, the statute of limitations on both offenses has run at this date. If he was actually a resident of Oklahoma at that time then the statute has not run and could not until Beavers takes up residence here and shall have been "an inhabitant of or usually resident" within this state for the period of limitations as prescribed in Sections 3392, 3393, supra. However if Beavers was actually a legal resident of Missouri in November 1934 and later terminated his legal residence here and took it up in Oklahoma and continues to claim Oklahoma as his residence then the running of the statute of limitations was suspended on the date he ceased to be a resident of Missouri.

Another thing which bears on the correct disposition of questions one and two is the meaning to be given that part of Section 3394, supra, which tolls the statute of limitations on a "person who shall flee from Justice."

In State v. Miller, 188 Mo. 370, 378, the court had this phrase before them and said:

"This court, in State v. Harvell, 89 Mo. 588, had presented the sole question as to the bar of the Statute of Limitations under a similar section of the statute. In the construction of the statute, Henry, J., speaking for this court, in no uncertain or doubtful terms gave expression to the views of the court as to the true and correct meaning of the terms "flee from justice" or "fugitive from justice."

He said: "Was he a fugitive from justice within the meaning of section 1706? We are of the opinion that he was. It was not essential that he should have left the State before he could be regarded as a fugitive from justice. One who commits an offense and conceals himself to avoid arrest, is a fugitive from justice. If he successfully hides or conceals himself so as to evade punishment for his crime, although such concealment may be upon his own premises, he is as much a fugitive from justice as if he had escaped into Canada. We are, therefore, of opinion that the defendant could not avail himself of the Statute of Limitations."

Thus if Beavers left the state after the commission of these offenses in an effort to conceal himself and avoid arrest the statute was tolled on the date he commenced said concealment.

Whether or not limitations has barred a prosecution for these offenses in Missouri depends upon the facts which may exist pertaining to Beavers legal residence or his fleeing from justice and you of course can apply those facts to the legal principles set forth here.

Your third question seems to be answered in the case of Ponzi v. Fessenden, 285 U. S. 254, 66 L. Ed. 607, 22 A. L. R. 879. In that case the petitioner, Ponzi, raised the point that he could not be tried in state courts while serving a sentence of a Federal court in a Federal penitentiary. The court ruled against petitioner and in the course of the opinion stated, A. L. R. 884:

"Until the end of his term (in the Federal penitentiary) and his discharge, no state court could assume control of his body without the consent of the United States. * * * *

There is no express authority authorizing the transfer of a Federal prisoner to a state court for such pur-

December 29, 1938.

poses. Yet we have no doubt that it exists and is to be exercised with the consent of the Attorney General. In that officer, the power and discretion to practice the comity in such matters between the Federal and state courts is vested."

Under this ruling it is apparent that Beavers cannot be obtained for prosecutions in this state until the end of his term and his discharge from the Federal prison, unless the consent of the Attorney General of the United States is obtained.

CONCLUSION

Therefore, it is our opinion that the statutes of limitation on criminal offenses do not run if, at the time of the offense, the offender is not a legal resident of Missouri and said statutes do not commence to run until he becomes such resident. That the running of the statute is suspended when the offender, if a legal resident of the state at the time of the offense, severs his residence in the State and does not again commence to run until the offender takes up again legal residence in Missouri. The statute is also suspended if after commission of the offense, the offender flees from justice and conceals himself to avoid arrest.

It is also our opinion that the authorities of Missouri cannot obtain an inmate of a Federal Prison for trial in the courts of this State until the end of his term and his discharge from said prison, unless the consent of the Attorney General of the United States is first obtained.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney-General

LLB:LB

BUILDING AND LOAN: Five shares required of directors may be full paid or installment shares. Directors having loans before Section 5593 went into effect do not have to liquidate same.

June 1, 1938



Mr. J.W. McCammon, Supervisor
Building and Loan Department
Jefferson City, Missouri

Dear Mr. McCammon:

This department is in receipt of your request for an official opinion which reads as follows:

"Question No. 1: Must the five shares as provided in Section 5591, be owned outright, or can they be installment shares with amounts due on them?

"Question No. 2: Section 5593 provides that no director of a building and loan association may borrow except on his private dwelling house. Supposing a director owed large sums to the building and loan on property other than his private dwelling house when this act was passed does this act require that particular director to liquidate his loans or may he continue as the debtor and director of the building and loan?"

We shall take your questions up in the order that you present them.

Section 5591, Laws of Missouri, 1931, page 147, provides in part as follows:

"No person shall be eligible to become or shall continue a director unless he shall be the owner of at least five shares of capital stock of such corporation, and not delinquent in any manner thereon."

It is, perhaps, the paramount rule of statutory construction that a statute should be construed so as to ascertain and give effect to the legislative intent expressed therein. *Thompson v. City of Lamar*, 17 S.W. 2nd 960, State ex rel. *American Corporation v. Trimble*, 44 S.W. 2nd 1103, 329 Mo. 495.

Further, as was said in *State ex rel. v. Imel*, 242 Mo. 293: "In construing statutes, the meaning of a word or phrase may be ascertained by the meaning of other words and phrases with which it is associated".

It will be noted that Section 5591, supra, provides that a director must not only be the owner of at least five shares of capital stock, but that he also is "not delinquent in any manner thereon". Therefore, the legislature must have intended to include installment stock in the term "capital stock", because it is on this type and not the fully paid stock that a stockholder might be delinquent.

CONCLUSION

It is, therefore, the opinion of this department that a director, under Section 5591, Laws of Missouri, 1931, page 147, must be the owner of at least five shares of capital stock. Such shares may be installment shares, but payment thereon must not be delinquent in any manner.

Your second question deals with a director who had a loan from the association on property other than his private dwelling house, and the legislature, subsequent to the granting of the loan, passed a law saying that such loans could not be made to a director. Should the director then be required to liquidate the loan?

Section 5593, Laws of Missouri, 1935, provides in part as follows:

"No real estate loan shall be made by an association to a director or officer or to a partnership or firm in which a director or officer is interested, or to a corporation of which a

director or officer of the association is a director or stockholder or upon real estate in which any director or officer has an interest as mortgagee; provided, however, that a real estate loan may be made to a director or officer upon the security of a first mortgage or deed of trust upon the single family residence or homestead of such director or officer, where such loan has first been approved in writing by a two-thirds majority of the board of directors and a copy of such written approval has been recorded in the minutes of the board of directors."

That part of Section 5593, quoted above, is not found in the section as passed in 1933 (Laws of Missouri, 1933, page 182).

Acts of the legislature must be held to operate prospectively only. State ex rel. Harvey v. Wright, 251 Mo. 325.

The provision of Section 5593, supra, states that no real estate loan "shall be made" to any director. The context of the statute shows that the statute is to be prospective in its operation.

As was said in Minter v. Bradstreet Co., 174 Mo. 444: "The word 'shall' as used in a statute ordinarily applies to something to be done or to take place in the future".

There is another reason why the statute would apply only to loans made subsequent to the passage of the act. Article II, Section 15 of the Constitution of Missouri provides "That no ex post facto law nor law * * * retrospective in its operation * * * can be passed by the General Assembly".

All statutes are presumed constitutional (Graves v. Purcell, 85 S.W. 2nd 543), and a statute, if ambiguous, must be given a construction rendering it constitutional. (State ex rel. v. St. Louis, 2 S.W. 2nd 713.) To construe

Mr. J.W. McCammon

- 4 -

June 1, 1938

Section 5593 as retrospective would be to render it unconstitutional. Therefore, such section must be given a construction which would make it constitutional, i.e., prospective in its operation.

CONCLUSION

In view of the above authorities, it is our opinion a director of a building and loan association who had obtained a loan, prior to the passage of Section 5593, Laws of Missouri, 1935, on a building other than his private dwelling house would not have to liquidate or pay such loan prior to its maturity.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

AO'K:VAL

CRIMINAL COSTS: Witness fees uncalled for in the county treasurer's office should be held one year from the time of the receipt of same before returning to state treasurer or county revenue fund.

August 15, 1938

Mrs. Pearl McBride
County Treasurer
West Plains, Missouri



Dear Mrs. McBride:

This is to acknowledge receipt of your request for an opinion under date of August 5, 1938, which is as follows:

"A situation has recently arisen in my office on which I would appreciate your ruling.

"Our County was recently audited by the State Office and of course the fee records were examined and the Auditors compiled a list of the old unclaimed fees to be returned to the State and County, which I returned while the Auditors were here.

"About ten days ago I was handed a letter by the Circuit Clerk from a man who had fees in a case which was included in the State Criminal Cost that was returned to the State on May 28, 1938. I immediately wrote this gentleman telling him the unclaimed fees in the case had been returned to the State. Yesterday this man came to my office and demanded that I issue him a check for his fees which I, of course, did not and could not do after same had been returned to the State. This man has threatened me with legal procedure. This was a State Case, Grand Larceny of Hogs, tried in February, 1936 and cost paid by

the State on October 18, 1937, and returned to the State on May 28, 1938.

"I was kind enough to write this man, which the law does not require me to do, when I received the cost bill in the case advising him that his fees in the case were payable, but received no response. Therefore, his unclaimed fees were returned to the State under Section 3856, which I am referred to in my Treasurer's Manuel sent to me by the State Auditor.

"I will appreciate your ruling in this matter by return mail as this man will be back here in two or three days."

Section 11823, R. S. Mo. 1929, reads as follows:

"It shall be the duty of all sheriffs, marshals, coroners, and all clerks of courts of record, and all other officers, to enter in such book all fees that they may now have in their hands belonging to others, giving the name of the owner and amount of such fees."

Section 11824, R. S. Mo. 1929, reads as follows:

"It shall be the duty of each sheriff, marshal, coroner, clerk of the courts of record, and other officers, on the first day of January and the first day of July in each year, to pay over all fees in their hands belonging to others to the treasurer of the county, with the name and amount belonging to each person, date when collected and in what case, taking from the treasurer duplicate receipts therefor, one of which the officer shall file with the clerk of the county court, who shall immediately charge the treasurer with the same."

Section 11825, R. S. Mo. 1929, reads as follows:

"Such treasurer shall keep a correct account of such fees in a book kept for that purpose, the account to correspond to that required to be kept by other officers in section 11822, and shall pay out the same to the proper owners as the same may be called for or demanded, and shall, in his regular settlements with the county court, make a full and complete exhibit of all his acts under the provisions of this chapter."

Section 11826, R. S. Mo. 1929, reads as follows:

"It shall be the duty of the treasurer, when any such fees shall remain in his hands for one year uncalled for or demanded by the proper owner or legally authorized agent, to turn the same over to the general revenue fund of the county."

The above Sections 11823, 11824, 11825, and 11826 were passed originally and set out in the Session Laws of 1891 at page 138. As you will notice, under Section 11826 it was the duty of the treasurer to hold uncalled-for fees for one year and then turn the same over to the general revenue fund of the county. It made no distinction between fees paid in by the state on state criminal cases and fees paid in by the county court on county criminal cases. In 1899, after the passage of the sections hereinbefore set out in 1891, a new section was passed and known as Section 2859, R. S. Mo. 1899. This section is now Section 3856, R. S. Mo. 1929, and reads as follows:

"At the end of each term of court after the receipt of each criminal cost fee bill from either the state auditor or the county clerk, the treasurer shall strike a balance of the same, and shall turn over the amounts collected on account of the various items of indebtedness hereinbefore mentioned to the various

funds to which they belong. And all uncalled-for fees paid by the state shall be turned into the state treasury, and those paid by the county shall be turned over to the credit of the county revenue fund."

This section did not by implication or by the language of the section repeal Section 11826, R. S. Mo. 1929, except as to the phrase, "to turn the same over to the general revenue fund of the county." This Section 3856 by implication only repealed Section 11826 to the extent of the addition of the following phrase:

"And all uncalled-for fees paid by the state shall be turned into the state treasury, and those paid by the county shall be turned over to the credit of the county revenue fund."

This phrase did not repeal Section 11826, which required the county treasurer to hold all uncalled-for fees which were paid by the state treasurer in state cases one year after receiving same before turning them back to the state treasurer.

It is well settled that when two sections of the statute relating to the same subject are repugnant, it does not necessarily follow that it repeals the whole section, but only that part that is repugnant. This was so held in the case of State v. Taylor, 18 S. W. (2d) 474, 1. c. 476, where the court said:

"The two acts should be construed so that each may stand and be given effect, if possible. The later statute should be construed to repeal the former only in so far as the two acts may be found to be in conflict. *Wrightsmen v. Gideon*, 296 Mo. 214, loc. cit. 223, 247 S. W. 135, and cases cited."

In the case of State ex rel. and to Use of Geo. B. Peck Co. v. Brown, Secretary of State, 105 S. W. (2d) 909, 1. c. 911, the court said:

"Repeals by implication are not favored--in order for a later statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand; where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the earlier one by implication; if they are not irreconcilably inconsistent, both must stand. These principles of construction are well settled.' State ex rel. Boyd v. Rutledge, 321 Mo. 1090, 13 S. W. (2d) 1061, loc. cit. 1065. Also, see State ex rel. Younger v. Stratton, 136 Mo. 423, 38 S. W. 83; State v. Taylor, 323 Mo. 15, 18 S. W. (2d) 474; State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S. W. (2d) 124; State ex rel. R. Newton McDowell v. Smith, 334 Mo. 653, 67 S. W. (2d) 50, 57; State ex rel. Karbe et al. v. Bader, 336 Mo. 259, 78 S. W. (2d) 835."

In the case of State ex rel. v. McCracken, 95 S. W. (2d) 1239, 1. c. 1241, the court said:

"Statutes which are in pari materia should be read and construed together in order to keep all the provisions of the law on the same subject in harmony, so as to work out and accomplish the central idea and intent of the lawmaking branch of our state government, * * *."

CONCLUSION

Under the above authorities, it is the opinion of this department that although Section 3856, R. S. Mo. 1929, provided for the return of uncalled-for fees paid by the state, for which the state was responsible, into the state treasury, and also provided for the return of the uncalled-for fees paid by the county, for which the county was liable,

August 15, 1938

into the county revenue fund, it did not set out the time for the return of the uncalled-for fees. Section 11826, supra, provided that the county treasurer must hold all uncalled-for fees above described for a period of one year after receiving same before returning said fees to the county revenue fund. It is further the opinion of this department that Section 3856, supra, only repealed Section 11826, supra, in respect to the place of payment of the uncalled-for fees, in that the county treasurer is ordered to return uncalled-for fees paid by the state, for which the state is responsible, into the state treasurer's office, and the money paid into the treasurer's office by the county on fees for which the county is responsible, which have been uncalled for, into the county general revenue fund. All fees remaining uncalled for must be held by the county treasurer one year from the time the fees are paid into the office of the county treasurer. The only way the witness described in your request can receive his fees at this time, as set out in your request, would be by a relief bill by the Legislature.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

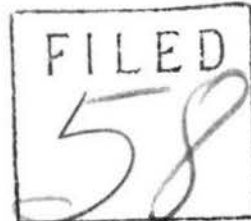
J. E. TAYLOR
(Acting) Attorney General

WJB:HR

BUILDING AND LOAN:

Board of directors may set up
"participating reserve fund" if permitted
by by-laws. Shares must be distributed
pro rata.

September 21, 1938 9/23



Honorable J. W. McCammon
Supervisor, Bureau of
Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This department is in receipt of your request
for an official opinion which reads as follows:

"I will greatly appreciate, at your
earliest convenience, formal advice
concerning procedure in connection
with a building and loan rehabilitation
proposition which now confronts me in
Kansas City. It is my policy whenever
possible to avoid receiverships and the
subject association, the Anchor Savings
and Loan Association, whose place of
business is 921 Walnut Street, Kansas
City, is in need of some type of re-
organization. We would like to segregate
the assets and obtain federal insurance.
The particular point upon which we seek
your advice is the method by which such
segregation should be brought about.

"I am attaching hereto a copy of amend-
ment to their by-laws known as Article
IX, Section 1. Does this amendment meet
the requirements of Section 5593, Laws
of Missouri, 1935, Page 201, and does
the Board of directors, with permission
of the supervisor, have the authority
to segregate this association and estab-
lish a 'participating reserve' fund?"

Section 5593, Laws of Missouri, 1935, page 201 provides in part as follows:

" * * * * *

And any building and loan association shall have the power to provide in its by-laws for the creation and establishment from time to time of a 'participating reserve fund,' in which may be placed any or all real estate owned by the association and any loans and/or other assets of doubtful value, the same to be selected by the board of directors, the book value of the assets in said reserve fund to be apportioned pro rata in reduction of the book value of the stock of the association then outstanding, subject to the approval of the supervisor of building and loan associations. Such reserve fund shall be and remain a separate (separate) fund from the other assets of the association to be liquidated and shall be represented by a class of stock to be known as 'participating reserve shares' of the association to be issued to those stockholders of the association pro rata, the book value of whose stock has been reduced by the creation of such reserve fund. In the liquidation of said reserve fund all the proceeds from the sale of said real estate or collection or liquidation of said loans or other assets shall be paid to the holders of said participating reserve shares, at such times as the board of directors shall determine. All losses, if any, that may occur in said reserve fund shall be absorbed by the holders of said participating reserve shares. The association, if so provided by by-law, may transfer and/or convey title to the assets in said reserve fund, or any part thereof, to three trustees selected by the board of directors, who may be officers of the association, under a trust

agreement defining the powers and duties of the trustees, who may issue 'participating reserve certificates,' instead of 'participating reserve shares,' to said stockholders entitled thereto, as provided above, giving all the rights and subject to all the liabilities herein provided as to 'participating reserve shares.' And upon the surrender to the association of the outstanding stock in the hands of a member of such association there shall be issued to such member new stock certificates of the association evidencing the reduced value of the stock surrendered, and in addition to such new stock certificates the reserve shares or reserve certificates to which such member is entitled, as above provided. Such reserve shares or reserve certificates issued to a borrowing member who had his stock up as collateral for a loan shall be pledged as additional collateral for such loan, and the borrowing member shall continue to make installment payments on his loan, as provided in the note or bond and deed of trust securing said loan, and upon payment of the loan in full the directors may apply as a credit on the loan the then value of the reserve shares as determined by the board of directors, after taking into consideration any estimated losses sustained in such reserve fund. In making reports and statements to the supervisory department of the state, the value of such a reserve fund undistributed shall be included as a part of the assets of the association and be classified as 'participating reserve fund.' Provided, however, that any building and loan association may in the discretion of the board of directors create more than one such participating reserve fund under the provisions of this act. And any building and loan association may in the sale of its real estate take stock in the association

in payment of the purchase price or any part thereof, at such price and upon such terms and conditions as the board of directors by resolution may approve."

The amendment which is attached to your request and which is to be construed, provides that the board of directors of the Anchor Savings and Loan Association may create and establish from time to time a "participating reserve fund" and then follows the wording of the statute except that the amendment does not provide that the shares shall be issued to the stockholders pro rata, as is required by the statute.

In an opinion rendered to you on June 3, 1937, this department held that Section 5593, supra, provided for a segregation of assets of an association without the necessity of a temporary receivership or court proceeding. The opinion did not take up the question of who had the power to create and establish the "participating reserve fund."

The primary difference between ordinary corporations and building and loan associations in regard to their management is that control vested in the officers of ordinary corporations is placed under the building and loan scheme in the board of directors. Sundheim on Building and Loan Associations, page 96, paragraph 98.

"The management of a building and loan association is generally intrusted, and rightfully so, to a board of directors, * * *" 9 Corpus Juris, 928.

As was said in Home Building and Loan Association v. Barrett, 160 Mo. App. 164, 141 S. W. 723:

"The officers and directors of a building and loan association are possessed of such powers as are granted by statute, charter and by-laws and such as are not inconsistent therewith, which are necessary to the discharge of their several offices, * * * *"

Therefore, when the statute says building and loan associations shall have the power to provide for the creation of a "participating reserve fund," the right to set up such fund is placed in the board of directors, and the amendment in question, since it provides for such control, is legal and proper.

However, as pointed out above, the statute provides that the shares must be issued to the stockholders pro rata which provision is ^{not} included in the by-laws. It is a well founded principle of building and loan law that the by-laws must conform to the statutes. 9 Corpus Juris 925; Collins v. Cobe, 66 N. E. 1079. Therefore, before approving any plan for segregation of the assets of the Anchor Savings and Loan Association we would advise that this provision be made a part thereof. In all other respects, Article IX, section 1 of the By-Laws of the Anchor Savings and Loan Association meets the requirements of Section 5593, Laws of Missouri, 1935, page 201.

CONCLUSION

It is, therefore, the opinion of this department that the board of directors may provide for the "participating reserve fund" under authority of Section 5593, Laws of Missouri, 1935, page 201, if there is a by-law of the association allowing such action. However, the shares representing such fund must be issued to the stockholders pro rata.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

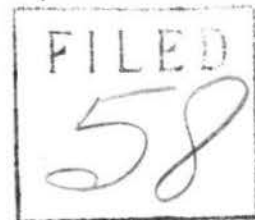
J. E. TAYLOR
(Acting) Attorney General

AO:DA

TAXATION AND
REVENUE:

Lands sold under Senate Bill No. 94 for the taxes of several years should be sold at one time for all the taxes charged against the land, which are delinquent, at the time of such sale.

November 29, 1938



Senator J. C. McDowell
Charleston
Missouri

Dear Senator McDowell:

We desire to acknowledge your request for an opinion on November 19, 1938, which reads as follows:

"I am tax attorney for Mr. Gilmore, Collector of Mississippi County, Missouri. He has been informed by the State Auditor's office on certain propositions of law, relating to the collection of general taxes, of which I believe he either misinterpreted or the State Auditor's office does not know what they are talking about, and I am asking you for an opinion, that I might properly direct him.

"Mr. Gilmore says that he has advertised taxes for 1935, prior years three times, and sold the land so advertised, in 1938. He had advertised 1936 twice, and 1937 once. Now he says that when he sells for 1935 and prior years, that that settles the taxes for 1936 and 1937, because the land has been advertised three times under the former years. Now he concedes that 1936, which has only been advertised twice, and 1937, once, that the bid was in the full amount as required by the Statute, but he says that since 1935 and prior years

have been advertised and offered for sale three times, that that gives him authority to sell this land for whatever it brings and cancels 1936 and 1937, which have not been advertised but once. Now if that is the law, they had better be writing some new Statutes. The Statute specifically says that lands cannot be sold for less than the taxes, for any year, unless they have been advertised three times, and of course 1936 and 1937 had not been advertised three times. I want an opinion from you on that proposition.

"I also want your opinion on another proposition. What is the duty of the Collector under the same set of facts, where he has advertised the land three times and offered it for sale three times for 1935 taxes, and he had advertised the land twice for 1936, and offered it for sale, and he has advertised the land one time for 1937 and offered it for sale, if a purchaser of a certificate for the 1935 taxes and prior years buys without the land having been sold for 1936 and 1937 taxes. Can the Collector issue a certificate when there are delinquent back taxes unpaid, or must he make the buyer at the time he receives his certificate for the 1935 taxes, pay up all the back taxes before he can issue him a certificate. I will greatly appreciate an opinion from you on these matters * * "

Section 9952a of Senate Bill No. 94 of the 1933 Session Acts is as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided

for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale; provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor. The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs." (Underscoring ours)

Section 9952b of Senate Bill No. 94 of 1933 Session Acts is in part as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.; provided, however, that if a part or parts of any forty-acre tract

or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated. To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered."
(Underscoring ours)

Section 9952c of Senate Bill No. 94 of 1933 Session Acts is in part as follows:

"On the day mentioned in the notice, the county collector shall commence the sale of such lands, and shall continue the same from day to day until so much of each parcel assessed or belonging to each person assessed, shall be sold as will pay the taxes, interest and charges thereon, or chargeable to such person in said county."

Section 9952d of Senate Bill No. 94 of 1933 Session Acts is in part as follows:

"When more than one tract or lot belonging to the same person shall be for sale at the same time, in the same municipal corporation or township, a part of one of said tracts or lots shall be offered, first for the payment

of the whole sum due from such owner on all such delinquent lands or lots, or otherwise; and if no person shall bid off a part of such tract or lot the sum required, the said tract or lot shall then be offered to the highest bidder for cash, and if any amount shall yet remain due, or if no person bid for a part or all of one tract or lot, each of the other tracts or lots shall be offered in like manner until the required sum is realized; and if no one bids upon a part or all of said tracts or lots separately, enough to pay the amount due, then the whole of said tracts and lots shall be offered together and sold to pay the taxes, penalty, interest and costs thereon;
 * * * * * (Underscoring ours)

Section 9953 of Senate Bill No. 94 of 1933 Session Acts is as follows:

"If at the first offering of sale of any tract of land or lot under the provisions of this act no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact in his record of sale and the county collector shall note a recital thereof in his record containing the list of delinquent lands and lots, and said tracts of land or lots shall be again offered for sale, at the next sale of delinquent lands and lots as in this act provided, if such lands or lots be at such time delinquent. If at the second offering for sale no person shall bid therefor a sum equal to the then delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact upon his record of the sale,

and the county collector shall enter a recital of such fact in his record book containing the list of delinquent lands and lots."

Section 9953a of Senate Bill No. 94 of 1933 Session Acts is as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales." (Underscoring ours)

Section 9953b of Senate Bill No. 94 of 1933 Session Acts is as follows:

"Such lands may be redeemed from such sale upon the same terms and conditions as other lands may be redeemed from delinquent tax sales, as provided herein; but in the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and costs not paid by such sale."

Section 9957 of Senate Bill No. 94 of 1933 Session Acts is in part as follows:

" * * * the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold." (Under-scoring ours)

A proceeding in foreclosure of delinquent taxes under Senate Bill No. 94, supra, is an action in rem.

In the case of Allen vs. McCabe 93 Mo. 138 involving taxes for 1876, 1877 and 1878, the court says:

"It must be remembered that, although the statute makes it necessary that the owner of the property should be made a party, and this is necessary to call into activity the jurisdiction of the court over the subject-matter, yet, when this is done, the proceeding is in rem against the property to enforce the lien of the State on that property, subordinate to which the owner holds his title; the judgment is in rem. The execution goes against, and the sheriff sells, the property, and not the interest of any particular person in it."

This rule was restated in the case of Construction Company vs. Ice Rink Company 242 Mo. 241, l.c. 253-254.

In Construction Company vs. Ice Rink Company, supra, l.c. 255, the court cites a Minnesota case in establishing a rule as to the question of summary remedies in enforcing tax collections in the following language:

"The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. In view of that necessity it has been a common practice to provide summary remedies for enforcing such demands, which have been upheld by the courts whenever assailed, although it is quite probable that some of the remedies so provided could not have been sustained as affording due process of law, if the proceedings had related to the collection of purely private debts."

Senate Bill No. 94 providing for the enforcement of delinquent taxes and therefore being an action in rem, provides further that such collection shall be made in a summary manner.

The sale should be made for the taxes charged against the land, which are delinquent, at the time of such sale. This means all delinquent taxes. We are unable to find any provision in said Senate Bill No. 94 requiring that each years taxes be advertised three times.

We do not find where this question has been passed upon by the appellate courts of Missouri, but we do find that the appellate courts of other states have construed it.

In the case of Worthen vs. Badgett et al 32 Ark. Rep. 496, l.c. 533, in passing on this question, the Supreme

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Court stated:

"There should have been but one offering and sale of each tract or lot, for all of the taxes, etc., charged upon it."

In giving an example for such conclusion, the Court said in Worthen vs. Badgett, supra, at page 533:

"Suppose, for example, that A had bid off a tract for the taxes of 1873, and the collector had put it up again for the taxes, etc., of 1874, and B had purchased it, and on the next offer for the taxes, etc., of 1875, C had bought it, who would be entitled to the land? It would be like the woman of the Scriptures who had seven husbands, and the question was, which of the seven would have her in the resurrection?"

In Preston vs. Van Gorder 31 Iowa 250, 1.c. 253, the court passed upon this question in the following language:

"The treasurer possesses no power or authority, independent of the statute, to sell lands for delinquent taxes. His authority is derived alone from the statute, and in the exercise of the authority conferred he must conform strictly thereto. Abel v. Cross, 17 Iowa, 171. This section gives the treasurer no discretion to sell lands now, for the delinquent taxes of the preceding year, and again for those of a former year. He is 'required to offer' them 'at public sale' (not sales), 'and such sale' (the only sale authorized by law) 'shall be made for and in payment of

the total amount of taxes, etc., due and unpaid thereon. He has authority to make but one sale for delinquent taxes then due and unpaid. This is clearly the limit of his authority under section 763, and no where else in the statute do we find any authority for a second sale for taxes delinquent, and unpaid at the time of the first sale. The statute conferring the authority on the treasurer to sell lands for delinquent taxes also limits it. Beyond the authority thus conferred, he cannot go.

"If the treasurer fails to sell, as the law requires him to do, 'for the total amount of taxes, interest and costs delinquent,' he may possibly render himself liable on his official bond, but as this question is not before us, we do not pass upon it."

The same court construed this question in Shoemaker vs. Lacy 45 Iowa 422, l.c. 424:

"The District Court found that the plaintiffs had not redeemed. This court reversed the decision. Now the reverse of that decision certainly is that the plaintiffs had redeemed. And such indeed appears to have been the fact. They had redeemed from the sale as shown in certificate No. 214, and that was really the only sale; the other sale was made without authority of law and was void. Section 763 of the Revision provided that 'the sale shall be made for and in payment of the total amount of taxes, interest and costs due and unpaid.' The sale then made as shown in certificate No. 214 must be regarded as having been made 'for and in payment of the total amount of taxes,' etc. There was then

no tax for which the land could be sold again at that time. This was held substantially in *Preston v. Van Gorder*, 31 Iowa, 250, and *Miller, J.*, in his opinion in the case at bar cites approvingly that case, and holds that the second sale was unauthorized. But it is plain to see that it was unauthorized because the first sale was made 'in payment of the total amount of taxes' on the property. It was not, therefore, a sale from which a redemption was necessary."

The same principle was stated in *Barker vs. Hume* 84 Neb. 235, 1.c. 236:

"It was provided by the revenue law in force at that time that the treasurer should sell each tract of land on which the taxes are delinquent to the person who offers to pay all of the taxes due thereon. The command of this statute is imperative, and a sale for a less amount is a void sale. *Adams v. Osgood*, 42 Neb. 450; *State v. Helmer*, 10 Neb. 25; *Tillotson v. Small*, 13 Neb. 202; *O'Donohue v. Hendrix*, 13 Neb. 257. Such a sale is not a sale of the land at all, and its only effect is to transfer the tax lien of the county to the purchaser.

In the case of *Barker vs. Hume*, supra, the court cited *Grant vs. Bartholomew* 57 Neb. 673, which had construed this principle.

CONCLUSION

Therefore, it is the opinion of this department that

lands if legally advertised by three newspaper publications at each sale, and sold under and by virtue of Senate Bill No. 94 for the taxes for several years, should be sold at one time for all the taxes charged against the land, which are delinquent, at the time of such sale.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
SVM:RT

BUILDING AND LOAN - Sewer district trustees are not "trustees of trust funds" so that excess money may be invested in building and loan shares.

December 1, 1938

Honorable J. W. McCammon
Supervisor
Bureau of Building & Loan Supervision
Jefferson City, Missouri



Dear Mr. McCammon:

This department is in receipt of your request for an official opinion which reads as follows:

"Laws of Missouri 1937, page 508, provides that it shall be lawful for 'trustees of trust funds' to invest their trust funds and moneys in their custody or possession in the stock or savings accounts in any building and loan association that is a member of the Federal Home Loan Bank and has its share accounts insured by the Federal Savings and Loan Insurance Corporation.

"I would like to know whether or not 'trustees of trust funds', as used in the above statute, would include trustees of a sewer district.

"Attached herewith is a file which will further explain our request."

The file attached to your request discloses that the Clayton Outfall Sewer District of St. Louis County has certain excess funds which they wish to invest in Building and Loan shares. It appears that

said sewer district was organized under the Article providing for the establishment of sewer districts in counties of 150,000 to 400,000 inhabitants, which was passed by the Legislature at the Extra Session, 1933 and which is found in Laws of Missouri, Extra Session, 1933-34, pages 119 to 136. This law provides for the creation of sewer district in counties of certain sizes to be managed by a board of trustees to be made up of three members elected by the vote of the residents of the district.

The statute imposes various duties upon the board of trustees, such as issuing bonds (Section 8), estimating the amount of money required for the coming year (Section 9), certifying to the county court the amount to be levied (Section 9), appointing an engineer (Section 15), awarding contracts (Section 16), constructing trunk lines and mains (Section 17), appropriating land (Section 18), and employing an attorney (Section 19).

As to the care of the funds of the sewer district, Section 8 of the act provides, in part, as follows:

"* * * * * The monies of the district shall be deposited by the Treasurer of the District in such bank or banks as shall be designated by order of the board of trustees and the Secretary of the District shall charge the Treasurer therewith and the said monies shall be drawn from the said treasury upon warrant issued by the district for the purposes for which the bonds were issued."

Laws of Missouri, 1937, page 508, provides as follows:

"Section 1. May invest trust funds in stock or savings accounts of building and loan associations, when. --- It shall be lawful for banking institutions, trust companies, insurance companies, loan and investment companies, mortgage loan companies and trustees of trust funds, and they are authorized to invest their trust funds and their funds and moneys in their custody or possession, in the stock and/or savings accounts in any federal or state building and loan association a member of a Federal Home Loan Bank, and insured by the Federal Savings and Loan Insurance Corporation, and said institutions and trustees of trust funds are further authorized to become members of said associations according to the Charter and By-laws of said associations; Provided, that no such investment may be made in excess of the maximum amount for which such a stock or savings account may be insured.

"Section 2. Stock or certificates of savings accounts eligible as security for public deposits. - The stock and/or certificates of savings accounts in said associations may be eligible as security for all public deposits in depositories or by public officials, deposits of state or any political subdivision thereof where bonds or deposits are required by law to be deposited."

The question presented is whether trustees of sewer districts are "trustees of trust funds" so as to permit them to invest the funds of the sewer district in shares of a building and loan association insured by the Federal Savings and Loan Insurance Corporation. 18 Corpus Juris, page 580, section 45, states:

"Where there are statutory provisions relating to the deposit of public funds, there is no authority to make a deposit except to the extent and on the terms and conditions prescribed.
* * * * *

In Harris v. Langford, 277 Mo. 527, 1. c. 537, 211 S. W. 119, the court had before it the statute requiring drainage funds to be placed in depositories. The court said:

"* * * * * The General Assembly, in its wisdom, has apparently worked out a satisfactory plan for dealing with the above questions and has endeavored to place the county courts under legal obligations to follow the requirements of said laws. * * * * *

The above quotations illustrate the protective attitude that the law takes towards public funds. The intent to safeguard public moneys is further evidenced by laws passed as to every political subdivision requiring them to deposit their moneys in depositories and laying down the requirements to be followed in so doing.

From a reading of the above statute relating to the duties of the trustees of the sewer district, it will be seen that they are not trustees in the

strict equity sense of the word but rather are commissioners to carry on the administration of the sewer district. This distinction is noted in *Semmes v. the Mayor and Council of Columbus*, 19 Ga. 471. The court says:

"The counsel for plaintiff in error insists, again, that the mayor and council are only trustees for the citizens, and are bound, like all trustees, not to sell or dispose of the property of the city at an undervalue. The mayor and council are vested, by the Act which creates them, in all matters of contract, with special discretionary powers. They may make any contract which they may deem necessary for the welfare of the city. They are not trustees, in the technical sense in which Courts of Equity regard that term. Courts of Chancery, from their inherent jurisdiction, have assumed the control over trustees in the discharge of their duties. (Hill on Trustees, 42.) But these are trustees against whom the only remedy is in a Court of Chancery. The mayor and council, if trustees, do not belong to that class. * * * * *

Willerup v. Village of Hempstead, 199 N. Y. S. 56, aptly explains the status of trustees of the sort provided for by the sewer law. The court said:

"Trustees of a villare are public officers selected under the law for the purpose of duly administering the public affairs of the village."

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From a reading of Laws of Missouri, 1937, page 508, it will be seen that the "trustees of trust funds" referred to are those trustees who are trustees of express trusts holding money thereunder for the benefit of someone and over whom a court of equity would have jurisdiction.

The trustees of a sewer district are not of this type and cannot be included within the scope of the statute so as to allow them to invest district funds in shares of building and loan associations.

CONCLUSION

It is, therefore, the opinion of this department that trustees of a sewer district organized under Laws of Missouri, Extra Session, 1933-34, pages 119 to 136, are not "trustees of trust funds" within the meaning of Laws of Missouri, 1937, page 508, so as to permit them to invest the funds of the sewer district in shares of a building and loan association insured by the Federal Savings and Loan Insurance Corporation.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

AO'K LC

BUILDING & LOAN: Supervisor does not have right to remove officers of associations because of inefficiency or incompetency, nor the right to force a merger.

December 1, 1938

Hon. J.W. McCammon
Supervisor, Bureau of
Building & Loan Supervision
Jefferson City, Missouri



Dear Mr. McCammon:

This Department is in receipt of your request for an official opinion which reads as follows:

"In view of the fact that this Bureau's program calls for rehabilitation of several Kansas City building and loan associations which we hope can be put into effect with federal insurance of shares without receivership, I will greatly appreciate legal advice in written form, so that we may make it a part of our files, on the following questions:

"1. In the event that this Bureau, in cooperation with the Federal Insurance Corporation, should be of the opinion that the interests of shareholders would be better protected by a change in the personnel of any building and loan association, how much legal authority does this Bureau have--if any--to bring about the removal of a president or a secretary or any other officers for the purpose of substituting a more efficient man or men to fill the vacancy or vacancies? Of course, in receivership we understand that we would have much more latitude, but I am basing this question on the theory that we are trying to bring about a reorganization without receivership.

"2. If, in the opinion of this Bureau and representatives of the Federal Insurance Corporation, the merger of two or more associations--not in receivership--would be beneficial to the interests of shareholders, what legal authority--if any--does this Bureau have to put such merger into effect? Would it or would it not be a matter of whether we could or could not persuade the officers of the several associations, which we might believe should enter into the merger, to agree to our merger plan? Inasmuch as the merger of two or more associations would automatically reduce the number of paid executives, we assume that there would be opposition to any merger plan and what power, under the law, would we have to overcome such opposition and to select the man this Bureau and the Insurance Corporation might deem best from an efficiency viewpoint for retention in the new organization?

"3. What legal authority--if any--does this Bureau have to remove a president, a secretary, or other officer of any building and loan association in the interest of making possible more efficient management provided that such officer or officers be not charged with any illegal action but might, in our opinion, be merely lacking in efficiency?

"Of course, I fully understand that if we were to take any association or any group of associations into receivership, this Bureau would then have the way cleared for presenting to the circuit court for judicial approval any reorganization plan we might deem proper. But, all of the questions I

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have herein propounded are based on the hope and expectation that we may, if at all possible, bring about necessary rehabilitation and reorganization in several instances without receivership."

Your questions epitomized are: (1) Does the Supervisor of the Bureau of Building and Loan Supervision of Missouri have the right to remove any officer of a building and loan association on the ground that the officer is inefficient or lacks the business ability which the Supervisor deems necessary for a proper continuance of the association? (2) Does the Supervisor have any power by which he may force two or more associations to merge for the betterment of said associations without putting one or all associations into receivership?

It is a fundamental principle that "building and loan associations are creatures of statute and have very few if any common law powers and the statute that creates them must be strictly followed so far as it provides for their existence, powers, rights and liabilities." Sundheim on Building and Loan Associations, Third Edition, page 74. 9 Am. Juris Prudence, 101, 12 C.J.S. 400.

The Courts of Missouri have gone even further and have held that:

"Building and loan associations are quasi public financial institutions, and for the protection of them the state of Missouri has by the act of 1931, provided special inquisitorial, supervisory, and regulating laws which are specific, adequate, complete and therefore exclusive." State ex rel. Wagner vs. Farm and Home Savings & Loan Association, 90 S.W. (2) 93.

Therefore, we must look to the Building and Loan Statutes to determine whether the Supervisor has the right or power to do the things mentioned in your request. A close reading of the building and loan statutes of Missouri discloses no enactment which states, even by reference, that the Building and Loan Supervisor has the right to remove an officer from an association on account of incompetency or inefficiency.

While an officer may be removed for failure to be the owner of at least five shares of capital stock as is required by Section 5591, Laws of Missouri 1931, p. 147, still Missouri has no statute which provides that an officer or director of a building and loan association may be removed by the Supervisor for just cause. (Confer. Shaw vs. Hinton, (Tex.) 31 S.W. (2d) 478.

Therefore, since the statutes do not provide for such a procedure and since our Supreme Court has held that the Building and Loan Act is exclusive as to the rights and powers of associations, then we hold that you as Supervisor do not have any right or power to remove an officer because of inefficiency or incompetency.

In passing, however, it might be noted that even if our statutes were not exclusive and complete still such power would not be vested in you. It has been held that where no provisions are made relating to building and loan associations the general principles of law and equity will prevail. 9 Am. Juris Prudence 102.

Fletcher in his excellent work on Corporations, Volume 2, page 120, states:

"The authorities are well nigh universal to the proposition that the public has no legal interest in the question of suspension or removal of officers of private business corporations unless a public wrong is being committed or some fundamental principle or public policy violated. The only remedy is by private action instituted by the party or parties aggrieved."

In regard to your second question Section 5611, Laws of Missouri 1931, page 157, provides that any two or more corporations "with the approval of the Supervisor of building and loan associations previously had in writing", may merge

December 1, 1938

if agreed to by three-fourths of the members of each body present at a meeting. Under the above statute the two associations may merge and a prerequisite is the approval of the Supervisor. However, in the absence of receivership we can see no power vested in the Supervisor in any way to bring such merger about. While we do not mean to infer that the Supervisor may not work with the directors and shareholders of the two associations in order to bring about a successful and amicable agreement, still the statutes do not vest any dictatorial power in him to force such a merger.

CONCLUSION

It is therefore the opinion of this Department that the Supervisor of the Bureau of Building and Loan Supervision has no right to remove an officer of a building and loan association because of inefficiency or incompetency. It is further the opinion of this Department that the Supervisor cannot force two associations to merge although he may render advice and aid in bringing about such merger.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO:MM

BUILDING AND LOAN:

Association may not purchase Class "B" shares. Officer of association may purchase shares through broker providing broker does not mislead seller.

December 22, 1938



Honorable J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This department is in receipt of your request for an official opinion which reads as follows:

"We are in receipt of a letter from Ray W. Hunt, secretary of the Sedalia Savings and Loan Association, in which he raises several legal questions. Mr. Hunt's letter reads in part as follows:

'I am writing for some information regarding the sale, purchase and transfer of Class B. certificates in building and loan associations.

'I would like to know whether or not we would be violating any State law or ruling of the building and loan department should we make direct purchase of Class B. certificates from the customers of this association who wish to dispose of their Class B certificates? Do we have the right to make direct purchase?

'In the event our shareholders sell their certificates to broker and that broker offers to sell the certificates to an officer or director of this association for his own individual use, would that be in violation of the law

or rules and regulations of the Department? Of course, it is understood in this last question that the money for the purchase of this stock is the individual money of the purchaser.'

"Please give us a ruling on the legal questions raised in the above at your earliest convenience."

I.

The first question presented is whether a building and loan association may purchase Class "B" stock, that is, "participating reserve shares" or "participating reserve certificates" from its shareholders. Building and loan associations are quasi public financial institutions, and for the protection of them the state of Missouri has, by the building and loan statutes, provided special inquisitorial, supervisory, and regulating laws which are specific, adequate, complete, and therefore, exclusive. State ex rel. Wagner v. Farm and Home Savings Loan Association, 90 S. W. (2d) 93.

Section 5593, Laws of Missouri, 1935, page 201, provides for the creation of "participating reserve fund" and for issuing certificates therefor. This statute provides that any real estate or any loans or assets of doubtful value may be placed in a separate fund from the other assets of the association to be represented by "participating reserve shares" or "participating reserve certificates". As to the manner in which these shares or certificates are to be paid, the statute says:

"* * In the liquidation of said reserve fund all the proceeds from the sale of said real estate or collection or liquidation of said loans or other assets shall be paid to the holders of said participating reserve shares, at such times as the board of directors shall determine. * * * * *

And any building and loan association

may in the sale of its real estate take stock in the association in payment of the purchase price or any part thereof, at such price and upon such terms and conditions as the board of directors by resolution may approve."

From a reading of the above, it will be seen that the "B" stock may only be retired by payment from the assets which represent such stock or by the acceptance of such stock as payment in the sale of real estate. No other method of retiring the Class "B" stock is provided for by the statutes and since the building and loan laws are exclusive, it is our opinion that an association may not purchase Class "B" stock from its shareholders.

II.

The next question presented is whether a director of a building and loan association may purchase shares of stock for his own personal use, through a dealer or broker, from a shareholder of the association.

A dealer of building and loan securities is defined by Section 5628A, Laws of Missouri, 1935, page 195, as follows:

"(e) 'Dealer' shall include every person who, in this state, engages for all or part of his time, on his own account or as an agent or broker, personally or through an agent or broker, directly or indirectly, and by whatsoever means in the purchasing or otherwise acquiring from any person or persons of building and loan securities for the primary

purpose of selling or, except by withdrawal or through the maturity thereof, otherwise disposing of the same at a profit or for a commission, or in otherwise dealing or trading in building and loan securities."

Transactions which involve the sale of shares through a dealer are impersonal. The buyer puts an order in, the dealer acquires the stock and the seller and buyer are never cognizant of the identity of the other.

The authorities all agree that a director is not precluded by virtue of his position from purchasing stock from an individual shareholder (14 C. J. 128).

Therefore, a sale of stock by a shareholder to a director is proper where no profit or ultimate gain accrues knowingly to the director except that of which the seller is aware.

There is a conflict in the authorities, however, whether there is a duty on the director to disclose information acquired in his capacity as director which may affect the value of the stock.

The directors of a corporation stand in a relation of trust to the corporation and are bound to exercise the strictest good faith in respect to its property and business. *Proctor v. Farrar*, 213 S. W. (Mo. Sup.) 469. *Chouteau v. Allen*, 70 Mo. 290. However, this relationship is deemed to be limited to the management of the general corporation affair and not to extend to dealing with the individual share owner in respect to his shares of stock. 7 R. C. L. 457; *Fletcher's Cyclopedia of Corporations*, Vol. 3, section 1168.

The general rule as stated in 84 A. L. R. 616, is:

"The general rule, as already indicated, is that an officer or director of a corporation does not sustain a fiduciary relation to an individual stockholder with respect to his stock, and consequently the mere failure on the part of such officer or director,

in purchasing the shares from the stockholder, to disclose any inside information, will not militate against him so long as he does not actively mislead the seller or perpetrate a fraud; in other words, ordinarily, a corporate officer or director has a right to purchase the stock of a shareholder therein, the same as any other person has a right to purchase such stock, and there is nothing in the mere fact that the purchaser is an officer or director of the corporation whose shares he purchases from which fraud or unfair dealing may be inferred."

To the same effect is 32 Mich. L.R. 678, 47 Har. L.R. 353.

This rule is recognized in *Wann v. Scullin*, 210 Mo. 429, in which our Supreme Court held that a director, buying stock from a shareholder, was not required to disclose to the shareholder that he was a director in the corporation.

In the case of *Goodwin v. Agassiz*, 283 Mass. 358, 186 N. E. 635, the defendant, a director of a corporation, purchased shares through a broker on the stock exchange, from a shareholder. The director defendants were in possession of knowledge which would tend to increase the value of the stock. The court held that the fact that the defendants were directors created no fiduciary relation between them and the plaintiff in the matter of the sale of his stock. The court said at l.c. 661:

"* * * Purchases and sales of stock dealt in on the stock exchange are commonly impersonal affairs. An honest director would be in a difficult situation if he could neither buy nor sell on the stock exchange shares of stock in his corporation without first seeking out the other actual ultimate party to the transaction and disclosing to him everything which a court or jury might later find that he then knew affecting the real or speculative value of such

shares. Business of that nature is a matter to be governed by practical rules. Fiduciary obligations of directors ought not to be made so onerous that men of experience and ability will be deterred from accepting such office. Law in its sanctions is not coextensive with morality. It cannot undertake to put all parties to every contract on an equality as to knowledge, experience, skill and shrewdness. It cannot undertake to relieve against hard bargains made between competent parties without fraud. On the other hand, directors cannot rightly be allowed to indulge with impunity in practices which do violence to prevailing standards of upright business men. Therefore, where a director personally seeks a stockholder for the purpose of buying his shares without making disclosure of material facts within his peculiar knowledge and not within reach of the stockholder, the transaction will be closely scrutinized and relief may be granted in appropriate instances. * * * * *

Therefore, the rule seems to be that a director may purchase stock through a broker from a shareholder provided he does not knowingly allow the broker to obtain such stock by misleading the seller or perpetrating a fraud upon the seller in order to obtain the stock.

CONCLUSION

It is, therefore, the opinion of this department that a building and loan association may not purchase Class "B", that is, "participating reserve shares" or "participating reserve certificates" from its shareholders.

It is further the opinion of this department that a director may purchase stock from a broker providing he does not knowingly permit the broker to obtain the shares by misleading the seller or perpetrating a fraud upon the seller.

Respectfully submitted

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

ELECTIONS: In counties of 200,000 to 400,000 population,
clerk of Board of Election Commissioners cannot
hold office of treasurer of municipality.

March 19, 1938.

3-25

Honorable Jas. L. McQuie, Chairman
Board of Election Commissioners
Saint Louis County
Clayton, Missouri



Dear Sir:

This will acknowledge yours of the 16th,
which reads as follows:

"On behalf of the Board of Election Commissioners of St. Louis County, your opinion is respectfully requested on the following proposition:

"Can a clerk appointed by this Board hold an appointive office as City Treasurer from a municipality located in St. Louis County?

"The Election Laws of the State of Missouri revised for 1935 and 1936, Chapter 61, Article XV, Section 45, sets forth the creation, appointment and qualification of the members of the Board of Election Commissioners of St. Louis County; and Section 49 provides for the appointment by the Election Commissioners of two clerks of the Board."

Section 49, p.p. 260-261, L. 1935, after providing for the appointment of two clerks of the Board of Election Commissioners, reads as follows:

" ** Said clerks and employees shall be subject to the same restrictions and take and subscribe the same oaths as said commissioners, and shall file same together with their bonds as clerks with said commissioners. ** "

Since the foregoing provision makes the clerks in question subject to the same restrictions as the Commissioners, we must look into the law relating to the appointment of Commissioners, to see what those restrictions are.

Section 45, p. 258, L. 1935, provides for the appointment of Commissioners, and then adds:

" ** They shall hold no other public office other than notary public and shall be ineligible to an elective or appointive office during their term of office, and shall before entering upon the duties of said office take and subscribe an oath to support the Constitution of the United States and of this state, and to demean themselves faithfully and impartially in office. ** "

If, therefore, the position of city treasurer of a municipality is a "public office", or even if it is an "office", the clerk of the Board of Election Commissioners cannot occupy it during his term as clerk, and therefore we must determine whether the position of city treasurer of a municipality is a public office. A "public office" has been defined by the courts of this state on numerous occasions. One of the recent definitions by our Supreme Court is found in the case of State ex rel. vs. Truman, 64 S. W. (2d) 106, which is in the following language:

"In Mechem on Public Officers, pp. 1 and 2, Sec. 1, it is said: 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an

individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' We have approved this definition in State ex rel. Walker v. Bus, 135 Mo. 325, 331, 332, 36 S. W. 636, 33 L. R. A. 616, State ex rel. v. Hackmann, 300 Mo. 59, 254 S. W. 53, 55, and Hasting v. Jasper County, 314 Mo. 144, 282 S. W. 700, 701; and it appears to be in harmony with the great weight of authority. State ex rel. Key v. Bond, 94 W. Va. 255, 118 S. E. 276, 278, 279; State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 115 N. E. 919, 920; Bunn et al. v. People ex rel., 45 Ill. 397, 409. *** "

A compilation of the various definitions of "public officer" will be found in the case of State ex rel. vs. Hackmann, 300 Mo. 59. Among those definitions is the following (l.c. 67) :

"In the most general and comprehensive sense a 'public office is an agency for the State and a person whose duty it is to perform this agency is a 'public officer.' Stated more definitely a 'public office' is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of sovereign power, whether great or small. A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office assigned to him by law. (State ex rel. Smith vs. Theus, 38 So. 870-72, 114 La. 1098; cited in State ex rel. v. Maroney, 191 Mo. l.c. 545.) "

The statutes of the state authorize the election or appointment of a city treasurer, and the city ordinances prescribe his duties. We understand from conversations with you that the municipality in question is a city of the fourth class. Your attention is called to Section 6960, R. S. Mo. 1929, which reads in part as follows:

"Appointive officers.--The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, *** "

Section 6974, R. S. Mo. 1929 reads in part as follows:

"Powers and duties to be prescribed by ordinance.-- The duties, powers and privileges of officers of every character in any way connected with the city government, not herein defined, shall be prescribed by ordinance. *** "

It will be noted from the foregoing, that the treasurer of a city is denominated by the Legislature an officer of the city, and from the definitions heretofore given in this opinion, it is apparent that the treasurer of the city is a person "elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office assigned to him by law." We must, therefore, conclude that the city treasurer is a public officer and hence the office he holds is a public office.

CONCLUSION.

It is, therefore, the opinion of this office that a clerk of the Board of Election Commissioners in

Hon. Jas. L. McQuie

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March 19, 1938

counties of 200,000 to 400,000 population, appointed under the provisions of Section 49, p. 260, L. 1935, cannot also hold an appointive office as city treasurer of a municipality.

Very truly yours,

HARRY H. KAY
Assistant Attorney General

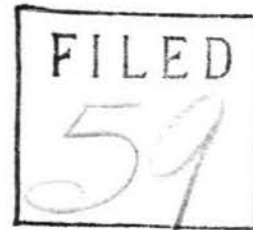
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

LABOR DEPARTMENT -- Appropriation for Department of Labor and
Industrial Inspection not limited to \$65,000 for biennium.

March 30, 1938 4/1



Honorable W. B. McGregor
Assistant Budget Director
Department of Budget
Rooms 427-428 Capitol Bldg.
Jefferson City, Missouri

Dear Sir:

This will acknowledge yours of the 24th, which
reads as follows:

"In the making up of that part of the
1939-40 biennial budget that pertains
to the Department of Labor and Industrial
Inspection, I am somewhat confused as to
the total amount of money that can legally
be appropriated for this Department.

"Reading from Section 7826, page 455, 1919
Missouri Laws, which also appears as Sec-
tion 13220 of the 1929 Revised Statutes,
the following language is quoted:

" 'Provided, that no salary or expense
shall be paid for the Commissioner
of Labor and Industrial Inspection
or Deputy Commissioner or Deputy In-
dustrial Inspectors or clerks in ex-
cess of the receipts from the fees paid
into the Industrial Inspection fund;
and provided further, that the salary
of the Commissioner of Labor and In-
dustrial Inspection and his assistants,
and all expenses for traveling, office
rent, printing, stationery, postage
and other items of expenditure, shall
be limited for the biennial term of
two years to an amount not exceeding
\$65,000, and all moneys remaining in
said Industrial Inspection fund at

the close of each biennial term, after the payments of the salaries and expenses herein provided for shall be transferred to the General Revenue fund.'

"The Legislature during the Fifty-Fourth General Assembly amended the law but did not repeal the foregoing section, but repealed 'Section 6737, 6739 and 6744 of Article I; and Section 6781 of Article V; and Section 6851 of Article X, all of Chapter 54 of the Revised Statutes 1919, and all other Acts or parts of Acts inconsistent with the provision and operation of this Act are hereby repealed.'

"I am anxious in having you determine if Section 13220 of the 1929 Revised Statutes remains of full force and effect or if it was the intention of the Legislature to repeal this part of the law as 'inconsistent with the provision and operation' of the 1927 Act.

"An opinion from your Department clearing the matter up will aid this Department in making its recommendations for appropriations for the Department of Labor and Industrial Inspection to the Legislature.

"I shall be glad to talk to you or any member of your Department if I have not made myself clear in this letter."

Section 7826, p. 455, Laws 1919, was carried forward in the revision of 1919, and appears as Section 6784, R. S. Mo. 1919. This section was therefore on the statute books in 1927 when the Legislature passed S. B. 149, page 292, Laws 1927, which now appears as Sections 13166 - 13178, R. S. Mo. 1929, and which we shall hereafter refer to as the act of 1927.

Section 6781, R. S. Mo. 1919 provided for the appointment of a State Industrial Inspector and provided further for the appointment of two Assistant Industrial Inspectors and ten Deputy Industrial Inspectors.

Section 6784, provided for the salaries of the Industrial Inspector, his two Assistants and his Deputies, and then contained these two provisos:

" ** Provided, that no salary or expense shall be paid for the industrial inspector or assistant or deputy industrial inspectors or clerks in excess of the receipts from the fees paid into the industrial inspection funds; and provided further, that the salary of the industrial inspector and his assistants, and all expenses for traveling, office rent, printing, stationery, postage and other items of expenditure, shall be limited for the biennial term of two years to an amount not exceeding sixty-five thousand dollars, and all money remaining in said industrial inspection fund at the close of each biennial term, after the payment of the salaries and expenses herein provided for, shall be transferred to the general revenue fund."

The act of 1927 expressly repeals Section 6781, supra, (Sec. 14, p. 296, Laws 1927). By repealing Section 6781, the Legislature abolished the office of State Industrial Inspector. Therefore, the provisions in Section 6784, supra, (now Section 13220, R. S. Mo. 1929) relating to the salary of such officer would be meaningless even if it had not been repealed.

The two provisions inquired about relate entirely to the method of payment of the salary of the Industrial Inspector and the limit of expenditures on behalf of his office, and when the act of 1927 specifically abolished that office, it is evident that these provisions became meaningless even if they were considered as not repealed.

However, Section 14 of the act of 1927 specifically repealed certain numbered sections and "all other acts or parts of acts inconsistent with the provisions and operation" of the new act.

The provision of Section 6784, *supra*, limited the expenditures for the office of Industrial Inspector to the Industrial Inspection fund. However, by the act of 1927, that fund was abolished and all fees formerly going into it were required to be paid into the State Revenue Fund (Sec. 13, p. 296, Laws 1927). Therefore, the provision as to the Industrial Inspection fund is wholly inconsistent with the provision as to turning the fees into the State Revenue fund and the operation of the act of 1927 as to this fee would be entirely inconsistent and conflicting with the provisions of the former law as to the handling of the fees collected in connection with this act.

The second provision, which limits the total expenditures of the office of the Industrial Inspector to \$65,000 for the biennial term of two years, definitely refers to that particular office of Industrial Inspector, which office has now been abolished. It will be noted that said proviso, after limiting the total expenditures to \$65,000, requires the balance remaining in said Industrial Inspection fund to be turned over to the General Revenue fund. However, as pointed out above, the Industrial Inspection fund was abolished by the act of 1927. It seems clear, therefore, that the two provisions under discussion relate entirely to the old set-up under the State Industrial Inspector.

The act of 1927 definitely created a new set-up for the work formerly done by the State Industrial Inspector. Section 2 of said act declares the purpose thereof in Section 2, page 293, in the following language:

" ** it being the declared purpose of the general assembly to effect a consolidation, under the single department created by this act, the departments of labor statistics, and industrial inspection, as provided for by chapter 54, Revised Statutes of 1919, and to trans-

fer the powers, duties and functions of these departments, commissions, boards and bureaus to the department hereby created in order to bring about a more orderly and economical administration of the laws pertaining thereto."

The act then goes on to make provisions for everything covered by the old Section 6784. The provisions of the act are conflicting with those in said Section 6784. For instance, Section 6784 provides that all fees collected shall go into the State revenue to be credited to the Industrial Inspection fund, whereas the act of 1927, Section 13, provides that said fees shall be paid into the State revenue fund; the salary provided for the chief office in Section 6784 was \$2,500.00, whereas the salary for the chief office under the act of 1927 was \$3,500.00; the subordinate officers provided for in Section 8 of the act of 1927 are different from those provided for in said Section 6784; the salaries provided for the subordinate officers are set forth in Section 9 of the act of 1927, which are different in many particulars from those set forth in Section 6784. The provisions for branch offices under Section 5 of the act of 1927 are different from the provisions for branch offices under said Section 6784, and the provisos of Section 6784 are inconsistent with the provisions and operation of the act of 1927 as heretofore pointed out.

It would therefore seem clear that the act of 1927 repealed Section 6784, supra, both by reason of the fact that it expressly repealed all acts inconsistent with its provisions and operations and also by reason of the fact that the said act created an entirely new set-up governing the same subject matter. As was said in the case of Meriwether vs. Love, 167 Mo., 1.c. 521:

" ** the Legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject-matter in force at the same time."

It seems that the Legislature in 1929 carried Section 6784 over into the revision of that year. An ex-

amination of the said section as it appears in the revision of 1929 (Section 13220) will show that the revision changed the said section in several particulars. It substituted the title "Commissioner of Labor and Industrial Inspection" for the title of "State Industrial Inspector", which may have been justified by Section 10 of the act of 1927. However, the second sentence of Section 13220 changed the words \$2,500.00 to \$3,500.00, and by substituting the title "Commissioner of Labor and Industrial Inspection" for "State Industrial Inspector" made the first proviso read that the salary and expenses of the new officer should be paid from the fees paid to the State Industrial Inspection funds, although no such Inspection funds are now available, since the new act of 1927 required all fees to be paid into the State Revenue fund.

Likewise, the second proviso as revised reads that any surplus remaining in the Industrial Inspection fund after payment of the expenses provided for, which should not in any event exceed \$65,000 for a biennium, should be transferred to the General Revenue fund, but, as heretofore pointed out, there is no longer any such fund as the Industrial Inspection fund. It therefore seems clear that these two provisos were originally directed to the office of State Industrial Inspector and that they cannot have any application to the present office of Commissioner of Labor and Industrial Inspection. The mere fact that the said section 6784 was carried over into the revision of 1929 after it had been repealed by the act of 1927 did not operate to keep said section in force. *State ex rel. vs. Nolte*, 187 S. W. 896.

It is interesting also to note that every Legislature since the passage of the act of 1927 has appropriated in excess of \$65,000 for each of the biennial periods since that time. It would therefore seem that the various Legislatures since the passage of the act of 1927 have not considered that the limitation referred to above was applicable to appropriations for the Commissioner of Labor and Industrial Inspection. The interpretation placed upon this provision by subsequent Legislatures is entitled to some weight in determining the proper construction to be placed upon it. *State ex inf. vs. Long-Bell Lumber Company*, 12 S. W. (2d) 64.

Hon. W. B. McGregor

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March 30, 1938

CONCLUSION

It is, therefore, the opinion of this office that the last provision, now appearing as Section 13220, R. S. Mo. 1929, does not apply as a limit to the amount of appropriation which can be made for the expenses of the office of Commissioner of Labor and Industrial Inspection.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

LIQUOR CONTROL--Supervisor cannot reopen, set aside or change decision
in closed case

May 7, 1938



Colonel E. J. McMahon
Supervisor of Liquor Control
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of May 4, 1938, in which you request an opinion as follows:

"May the Supervisor, reopen a revocation hearing held under the provisions of Section 26 of the Liquor Control Act and 13139z-24 of the Non-Intoxicating Liquor Laws, after final decision has been rendered by him and revocation or suspension properly executed by your office has been forwarded to the licensee or defendant."

The statutes of Missouri pertaining to the regulation and control of the sale of intoxicating and non-intoxicating liquors vest the authority to carry out these statutory provisions in an officer appointed by the Governor and designated as the Supervisor of Liquor Control.

The Supervisor of Liquor Control derives his authority to revoke or suspend an intoxicating liquor license under the provisions of Section 26 of the Liquor Control Act, Laws of 1937, page 531. This section reads in part that "whenever it shall be shown, or whenever the Supervisor of Liquor Control has knowledge that a dealer licensed hereunder, has not at all times kept an orderly place or house, or has violated any of the provisions of this act, said Supervisor of Liquor Control shall suspend or revoke the license of said dealer." The same authority is given the supervisor in the identical language, with the exception of the word "suspend," over licensees under the Non-Intoxicating Beer Act by Section 13139-z-24, Laws of 1935, page 402.

These two sections are the only provisions of this law which prescribes the duties and powers of the Supervisor with reference to revoking or suspending licenses, except for Section 13, Laws of 1937, page 528, which reiterates the authority to "revoke or suspend" as set out, supra, in Section 26.

Colonel E. J. McMahon

It is from these provisions that we must determine the correct answer to your question. The Supervisor of Liquor Control holds an office created by statute, and the officer holding said office must find his authority to act in the statute. It is apparent here that the statute does not directly give the Supervisor the authority to do that contemplated by your letter.

In 46 C.J., Section 287, page 1032, it is said:

"In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom. But no powers will be implied other than those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred and imposed, and where the mode of performance of ministerial duties is prescribed, no further power is implied."

Further, in Section 290, page 1033, it is said:

"Powers conferred upon a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity."

And in Section 292, page 1033, it is said:

"In the absence of statutory authority, an officer in performing a statutory duty which does not involve the exercise of discretion is without the power of amendment; and when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, although the statute conferring authority expressly makes his determination discretionary."

Applying these excerpts from Corpus Juris to the present question, we see that the legislature has prescribed the mode in which a licensee is to be punished for violation of the law - that is, revocation or suspension of his license by the Supervisor - thus, "no further power can be implied," but he must exercise this power "only in the manner . . . prescribed by law." When a hearing is had and a finding of guilty made with an order assessing the punishment issued pursuant to said hearing, the supervisor has, under the statutes completely

Colonel E. J. McMahon

exercised his judgment or discretion in the performance of a specific duty - that of punishing a violator - and "the act is beyond his review or recall."

CONCLUSION

Therefore, it is the opinion of this department that once the Supervisor has made a definite finding of the guilt of a person holding a license for violating the liquor laws, and assessed the punishment that person is to receive for said violation, he no longer has any power or authority to reopen, set aside or change said order.

Respectfully submitted,

Tyre W. Burton
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

Supplement to opinion to Colonel E. J. McMahon, dated May 7, 1938

The following additional authorities support the foregoing conclusion:

In Garfield v. United States ex rel. Goldsby, 30 App. Cases (D. C.) 1.c. 183, it is said:

"It is * * well settled * *, when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, unless power to that extent has also been conferred upon him."

In Cress v. State, 152 N.E. 822(Ind.) the court, in discussing the power of an officer to undo an act completed, said 1.c. 826:

"And power to undo an act once done will not be implied from the mere grant of power, in the exercise of a sound discretion, to do the act."

In Throop's Public Officers Section 564 , p. 534, it is stated:

"* * * where a quasi judicial power has been exercised, upon which a private individual has acquired rights, the rule is the same, as where a judgment has been rendered by a court of inferior and limited jurisdiction

Colonel E. J. McMahon

that is, that the officer or body can exercise the power only once, and cannot afterwards alter his or its decision."

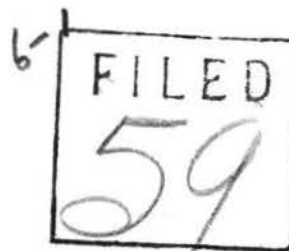
In People v. Cantor, 180 N.Y.S. 1.c. 155, it is said:

"It is true that, where quasi judicial power is conferred upon an administrative officer or body, the exercise of such power is not generally subject to review by the official or the board making the determination, unless the power of review is also conferred by the statute. (Case cited) The question always is whether the power conferred was in its nature quasi judicial or merely administrative; and the answer to that question depends upon the proper construction of the statute conferring the power."

LAWRENCE L. BRADLY
Assistant Attorney General

LIQUOR CONTROL: Intoxicating beer must be inspected and the inspection fee paid while the beer is in hands of brewer. If distributor desires to bottle bulk shipment of beer, he must procure proper label and affix on said bottles or containers.

May 23, 1938



Col. E.J. McMahon
Supervisor of Liquor Control
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of May 7, 1938, in which you submit the following:

"Brewers operating under a 5% beer solicitors permit are shipping beer in bulk to distributors located within this State, said distributors in turn bottling the beer in 32 and 64 oz. bottles. The beer shipped in bulk is tax paid at the Brewery at the rate of 62¢ per barrel and as a result the distributors have not been affixing the case stamp basing their refusal to do so on the theory of double taxation; therefore, * * * * *

Upon these facts, you present this question: May brewers ship beer in bulk, without the bulk shipment bearing the inspection label, to distributors located in this state, who in turn, bottle the bulk shipment and affix the inspection label on the bottles or containers?

Section 34, Extra Session Laws, 1933-34, page 89, provides in part that "It shall be the duty of the Supervisor

May 23, 1938

of Liquor Control to cause to be inspected all beer, as herein defined, or other intoxicating malt liquors, brewed, manufactured or sold in this state, and * * * to place upon the package containing such beer or intoxicating malt liquor his label, certifying that the same has been inspected and made from wholesome ingredients".

Section 37, Laws of 1935, page 282, provides that the Supervisor shall be paid "for the inspecting and gauging of all malt liquors containing alcohol in excess of three and two tenths (3.2%) per cent by weight, * * * the sum of sixty-two (62¢) cents per barrel".

It will be noticed that these sections pertaining to the labeling, inspection and gauging of intoxicating malt liquors, do not state in whose hands said beer is to be inspected, that is, the brewer or the distributor.

Even though the above sections do not expressly provide the time and place for the inspection of, and the payment of inspection fees on intoxicating malt liquors, it is clear that Sections 34 and 37, supra, contemplate that the fees are to be paid at the time and place the inspection and labeling takes place.

In whose hands should intoxicating liquors be inspected? The answer to this must be gleaned from other provisions of the act since there is no express provision concerning this.

Section 17, Extra Session Laws, 1933-34, provides that:

"The term 'intoxicating liquor' as used in this act shall mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt, or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations or mixtures for beverage purposes, containing in excess of three and two-tenths (3.2) per cent of alcohol by weight."

This definition includes intoxicating malt liquors.

Section 41a, Extra Session Laws, 1933-34, page 91, provides that:

"Any person who shall haul or transport intoxicating liquor, whether by boat, airplane, automobile, truck, wagon or other conveyance, in or into this state, for sale, or storage and sale in this state, upon which the required inspection, labeling or gauging fee or license has not been paid, shall upon conviction thereof, be deemed guilty of a misdemeanor."

In view of this section, how can the distributor obtain beer in bulk that has not been inspected, gauged, and labeled? No transporter can or will transport said beer from the brewer to the distributor. The only result which can follow in applying the provisions of Section 41a, supra, is that intoxicating malt liquor must be inspected in the hands of the brewer. And this is entirely proper because the inspection is for the purpose of seeing that said beer is made of the proper ingredients and under sanitary conditions in the brewery. Section 31, Extra Session Laws, 1933-34, page 89. The inspection fee must be paid at the time and place said beer is gauged and labeled, and that is in the hands of the brewer.

Assuming that a distributor has purchased beer in bulk from a brewer, bottled the same and now desires to place it on the market, will said distributor have to purchase labels to place on said bottles or containers?

Section 39, Extra Session Laws, 1933-34, page 90, provides:

"Any person who shall sell any intoxicating liquors, as herein defined, within this statute, which * * * (are) * * * contained in packages which shall not have upon them the certificate and label of the Supervisor of Liquor Control * * * shall be deemed guilty of a misdemeanor."

The law even goes further and not only makes the sale of non-labeled intoxicating malt liquors a crime, but by Section 8, Laws of 1937, page 528, provides that:

"No person shall possess intoxicating liquor within the State of Missouri unless the package in which such

May 23, 1938

intoxicating liquor is contained and from which it is taken for consumption has, while containing such intoxicating liquor, been labeled and sealed with the official seal prescribed under this act and the regulations made hereunder; * * *."

Thus, we see that in this state, no person may transport, sell or possess non-labeled and uninspected intoxicating malt liquor. If the distributor chooses to buy beer in bulk, upon which the inspection fee has been paid - and this is the only way he can buy it - and bottle same, he must procure labels for said bottles or containers, place said labels on said bottles or containers while he has said beer bottled and in his possession, and before he offers the same for sale.

It has been advanced that this will subject said beer to double taxation, which is not favored or permitted. State ex rel. v. Louisiana and Missouri R.R. Co., 215 Mo. 479. Concerning this, it is apparent that the distributor, by his own conduct (bottling the bulk shipment), has placed himself in the position of having to pay another inspection fee. The law provides a course, if followed, whereby the distributor will not be compelled to pay said inspection fee. This course being to handle and place said beer on the market in the original container in which it was placed by the brewer. Under these circumstances, we do not think the distributor is in a position to register a valid complaint upon being compelled to pay another inspection fee on a bulk shipment of beer which he has bottled.

CONCLUSION

Therefore, it is the opinion of this department that intoxicating malt liquor must be inspected, labeled and the inspection fee paid while said beer is in the hands of the brewer. That a distributor, if he purchases said beer in bulk from the brewer, upon which the inspection fee has been paid, and bottles the same, must procure and place upon said bottles or containers the proper inspection labels in order to possess and offer the beer for sale.

APPROVED By:

Respectfully submitted,

J.E. TAYLOR
(Acting) Attorney General

TYRE W. BURTON
Assistant Attorney General

LLB: VAL

COURTS: Where Judge of Circuit Court dies, Judge of another Circuit Court cannot hold term of court in circuit where vacancy is.

July 26, 1938

7-27

Hon. Roy W. McGhee
Prosecuting Attorney
Wayne County
Greenville, Missouri



Dear Sir:

This will acknowledge receipt of yours of the 18th which reads as follows:

"This office and Hon. Robert I. Cope, judge of the 33rd circuit would appreciate an opinion from you regarding the holding of the regular August Term of court in Wayne County, Missouri.

"As you no doubt know, Hon. E. M. Dear- ing, judge of the 21st judicial circuit of which Wayne County is a part, died recently and the Governor has not seen fit to make an appointment or tell us when he will make the appointment, except to say that it will be after August 1.

"I talked to judge Cope today and he said that he would be glad to hold the term of court for us if he could legally do so and asked that I secure an opinion from you in that regard. Our court meets on August 1, but Judge Cope says that he cannot sit until August 8.

"Please give us your opinion as to whether under the circumstances Judge Cope has the authority to hold our term of court and outline the procedure."

There is no statute of this state which makes any provision for holding court in a circuit after the death of the judge of that circuit and before the appointment of his successor. However, Section 29, Article 6 of the Constitution of Missouri provides as follows:

"If there be a vacancy in the office of judge of any circuit, or if the judge be sick, absent, or from any cause unable to hold any term or part of term of court, in any county in his circuit, such term or part of term of court may be held by a judge of any other circuit; and at the request of the judge of any circuit, any term of court or part of term in his circuit may be held by the judge of any other circuit, and in all such cases, or in any case where the judge cannot preside, the General Assembly shall make such additional provision for holding court as may be found necessary."

The answer to your question, therefore, turns upon the effect of the first part of the foregoing constitutional provision. If that part of said constitutional provision is self enforcing, then the judge of another circuit can hold court during the vacancy caused by the death of the judge of another circuit.

Whether said part of the constitutional provision above mentioned is self-executing must be determined by well known rules of construction of constitutional provisions in that regard. The general rule as to determining whether constitutional provisions are self-executing has been stated in 12 C.J. 729 in the following language:

"Constitutional provisions are self-executing when there is a manifest intention

that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed."

Again the rule has been stated in 11 Am. Jur. 692 in the following language:

"Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action."

The courts of this state have laid down the rule for construction in this particular in the case of Sharp v. National Biscuit Co., 179 Mo., l.c. 563 in the following language:

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. (Cooley's Const. Lim. (7 Ed.), p. 121.)"

July 26, 1938

Our question then is, does the first part of the constitutional provision under discussion supply a rule by means of which the right given thereby may be enjoyed and exercised? That part of the constitutional provision grants the right or power to the circuit judge of another circuit to hold a term or part of a term of court in another circuit when there is a vacancy in the office of judge of such other circuit. However, that part of the constitutional provision does not set out any rule or method by means of which that right or power may be exercised. There are a large number of circuit judges in the State of Missouri. If one of such judges should die, which one of the other circuit judges of the state can exercise the power granted by said constitutional provision? Shall it be the judge of a next adjoining circuit, or could a circuit judge from a far distant corner of the state appear upon the scene and proceed to hold court in the circuit where the vacancy exists? Is it left merely to the discretion or willingness of the other judges as to whether one of them shall hold court in the circuit where the vacancy exists? Suppose several of the other circuit judges of the state should arrive at the circuit where the vacancy exists and insist upon their right to hold court in that circuit. In the latter case, which of the judges could actually hold the court?

We have suggested the foregoing questions to emphasize the fact that the constitutional provision does not set out any method by which the right granted can be enjoyed. That part of the constitutional provision evidently requires enabling legislation by the Legislature to put it into operation. It would be within the province of the Legislature to say in a case where a circuit judge dies how another circuit judge should be called in or designated to hold court in the circuit where the vacancy existed. The Legislature has not passed any such enabling legislation, and therefore, the power granted to other circuit judges in such cases cannot be exercised by them. In the case of *Cowart v. State*, 111 Pac. 672, the court was considering a constitutional provision of the State of Oklahoma which reads as follows:

"In the event any judge shall be disqualified for any reason from trying

any case in his district, the parties to such case may agree upon a judge pro tempore to try the same, and if such parties cannot agree, at the request of either party a judge pro tempore may be elected by the members of the bar of the district, present at such term. If no election for judge pro tempore shall be had, the Chief Justice of the state shall designate some other district judge to try such case."

In discussing said provision the court said, l.c. 674:

"In our opinion the holding of such an election necessitates the provision of some method of voting, of canvassing and tabulating the votes cast, and of declaring and recording the result; and the votes must be canvassed and the result determined and declared by some person or persons designated by law. Provision must be made for the time and place of holding the election, and the notice to be given thereof; and some one must be vested with authority to determine who is entitled to vote in such election. But the Constitution makes provision for none of these matters. It merely declares that at the request of either party a judge pro tempore may be elected. It does not provide the machinery or procedure for holding the election. It contains no provision for notice to the bar or any other person of the time and place of holding it; no provision insuring its fairness, regularity, and legality; no provision insuring the correct declaration of the result. No record is required to be made or kept, and no person is authorized or empowered to determine and declare the result. Without a requirement of notice that such an election is to be held and the time thereof, with no method of voting provided for, with no person

designated to conduct the election and to pass upon and determine the right of any person to vote therein, no one authorized to declare the result, no record required to be made, no minimum limit as to the number whose participation may constitute an election, no provision as to whether a mere plurality or a majority vote is required to elect, and no restrictions upon the right of the interested attorneys to participate therein, all sorts of fraud and wrongdoing could easily be perpetrated in an attempted election, and the appellate court could have no means of telling and no rule for determining whether the election was fairly, honestly, and legally conducted, and whether the person who presided as special judge in the trial was in fact elected. An unseemly scramble for advantage in the election might easily ensue; and one side or the other, by employing three or four attorneys, might by their votes control the election and place on the bench as special judge an unfit, incompetent, or partisan person. In our opinion, by every declared test, this provision is not self-executing. It grants the power and creates the right to elect a special judge, but it provides no means or procedure by which the power may be exercised or the right enforced or protected; and the provision of such means and procedure is necessary to give it effect."

By similar reasoning we think that the first part of Section 29, Article 6 of the Missouri Constitution grants a power and creates a right in other circuit judges of the state to hold court in a circuit where a vacancy exists, but it provides no means or procedure by which the power may be exercised or the right enforced. Therefore, such means and procedure must

July 26, 1938

be supplied by legislation before the constitutional grant of power can be exercised.

It is to be noted that the second part of the constitutional provision being considered provides that the judge of any circuit may call in the judge of another circuit to hold a term or part of term of court. That grants the power to such other circuit judges and also provides a means or procedure by which such power may be exercised. That part of the constitutional provision is therefore self-executing, and such was the holding of the court in the case of *State ex rel v. Higbee*, 43 S.W. (2d) 1.c. 827 in the following language:

"That part of the section authorizing circuit judges to hold court in other circuits under the circumstances mentioned, if requested to do so by the regular judge, is self-enforcing."

It is to be noted also that said constitutional provision provides that in any case where the judge cannot preside the General Assembly shall make such additional provision for holding court as may be found necessary. The Legislature has passed additional provisions to cover such cases as will be seen by reference to Sections 1942, 1943, 1948, 3649 and 3651, R. S. Mo. 1929. However, the Legislature has not seen fit to make any provision for the exercise by other circuit judges of the state of the right granted them by the first part of said constitutional amendment and in the absence of such enabling legislation there is no way by which this right can be exercised.

CONCLUSION

It is, therefore, the opinion of this office that in case of the death of a circuit judge, the judge of another

Hon. Roy W. McGhee

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July 26, 1938

circuit of the state cannot hold court in the circuit of such deceased judge during the vacancy caused by the death of such judge.

Yours very truly

DARRY H. KAY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

HHK/w

PEDDLERS:

What constitutes selling as a peddler
so as to require license as such.

August 18, 1938



Honorable Harry McGee,
State Representative,
Warren County,
Warrenton, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of August 15, 1938, requesting an opinion on the following:

An oil distribution company has a bulk plant located within an incorporated city. The company pays a merchant's license and property taxes. It has an employee distributing its products throughout the county. Is this type of business that of a peddler?

For the purpose of this opinion we are assuming that it is the county peddler's license to which you have reference and whether a company engaged in this business, in the manner outlined, must obtain a county license to peddle.

Section 13312, R. S. Mo. 1929, from which we have deleted inapplicable provisions, is as follows:

"Whoever shall deal in the selling of
* * * * goods, wares or merchandise,
* * * * by going about from place to
place to sell the same is declared to
be a peddler."

In *City of Aurora v. Stafford*, 51 S. W. (2d) 547, the Springfield Court of Appeals interpreted the meaning of this statute. What is said in that case we think is decisive of the question before us here.

August 18, 1938

The Stafford case was one which involved the construction to be placed on an ordinance of the City of Aurora which was substantially the same as the above statute. The defendant in said case was the agent of a bakery located in Springfield, Missouri. This agent was engaged in driving a truck for the bakery and selling and delivering to regular customers of said bakery in Aurora its products. The truck was loaded in Springfield, driven to Aurora where the driver contacted the regular customers, ascertained what they wanted and supplied them. No sales were made direct to the consumer. The bakery confined its sales to wholesale distribution to merchants for resale.

In passing on this case the court said at l. c. page 548:

"* * * The term 'peddler' in the statute and ordinance should be given its meaning as it is ordinarily understood. A peddler is generally understood to be a person who carries his wares with him, and goes from house to house or place to place to sell them, and does sell and deliver them to each purchaser as he goes along, without any previous agreement relative thereto.
* * * "

Following this the court cited a number of cases bearing on the question, and went on to say concerning them that:

"Some of these cases go so far as to say that a wholesaler selling to a retailer and not to a consumer is not a peddler. It is not necessary in this case for us to go that far, and we are not prepared to say that under no circumstances at all could a wholesaler who sold only to retailers be held to be a peddler; but when the wholesaler confines his

August 18, 1938

sales to retailers who are his regular customers he is not a peddler, even though the party delivering the goods does not know until he reaches the place of business of the retailer just how much goods the retailer will want."

We are not advised by your letter in just what way this oil company operates with respect to any previous agreement to sell to a particular person or whether the parties with whom it deals are its regular customers. Because of this failure we cannot undertake to say whether or not it is a peddler. However, if its manner of operation brings it within our holding here it is not subject to pay a county peddler's license.

CONCLUSION

Therefore, it is our opinion that if an oil distribution company distributes and sells its products to retail merchants who are its regular customers it is not a peddler "even though the party delivering the goods does not know until he reaches the place of business of the retailer just how much goods the retailer will want." Nor is it a peddler if a previous agreement relative to said sales was entered into.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:DA

ELECTIONS - Must have resided in county 12 months prior to
general election before name can be placed on
ballot for Prosecuting Attorney.

September 24, 1938

Honorable Roy W. McGhee
Prosecuting Attorney
Wayne County
Greenville, Missouri



Dear Sir:

We have your request of September 22, 1938
for an opinion upon the following statement of facts:

"This office will appreciate an opinion
on the following questions:

"Can B, who was a bona fide resident
of X county on April 1, 1938, and
who removed to Y county on April 15,
1938 and was placed on the ballot as
a candidate for the office of prose-
cuting attorney by the county central
committee of Y county, after having
received the highest number of votes
for that office at the November elec-
tion, 1938, lawfully assume said of-
fice on January 1, 1939.

"If not, could he assume the office
on April 15, 1939."

For your information, we are enclosing copy of
an opinion written on this identical subject to the
County Clerk of Washington County, which opinion holds
that a person whose name was placed on the ballot as
a candidate for Prosecuting Attorney must have lived
within the county for at least one year prior to this
November election, and that if he has not so lived in

Hon. Roy W. McGhee

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September 24, 1938

the county, he is ineligible to such. This means that he could not assume office at any time because he is ineligible for election. The County Clerk should not, under such conditions, place his name on the ballot as a candidate.

It is, therefore, the opinion of this office that B could not be elected Prosecuting Attorney in Y county and could not at any time thereafter assume office by reason of having received a number of votes at such election.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE
Enc.

LIQUOR CONTROL:

Supervisor does not have the power, when license is revoked, to refuse to issue to another person a license covering the same premises.

10/15
October 13, 1938



Colonel E. J. McMahon
Supervisor of Liquor Control
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of September 23, 1938, in which you request our opinion on the following question:

Does the Supervisor of Liquor Control have the authority, when a license is revoked, to refuse to issue another license covering the same premises covered by the revoked license?

If the Supervisor has this power, it must be found in the law which creates his office and prescribes his duties, either expressly or by necessary implication.

Section 27, Laws, 1937, page 533, prescribes the qualifications a licensee must have, as follows:

"No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; and no person shall be granted a license or permit hereunder whose

October 13, 1938

license as such dealer has been re-
voked, * * * * *
or who employs in his business as
such dealer, any person whose license
has been revoked * * * * *

Section 13-a, Laws of Missouri, 1933-34, Extra
Session, page 82, pertains to the qualification of persons
desiring to sell intoxicating liquor by the drink, and is
as follows:

"Any person who possesses the qualifi-
cations required by this act, and who
meets the requirements of and complies
with the provisions of this act, and
the ordinances, rules and regulations
of the incorporated city in which such
licensee proposes to operate his busi-
ness, may apply for and the Supervisor
of Liquor Control may issue a license
to sell intoxicating liquor, as in
this act defined, by the drink at
retail for consumption on the premises
described in the application. * * * "

Section 16, Laws of Missouri, 1933-34, Extra
Session, page 83, provides as follows:

"No license issued under this act
shall be transferable or assignable."

Thus, it is clear upon reading the above sections
together, that a license to sell intoxicating liquors is
something which is a personal right of the holder. The
qualifications and disqualifications prescribed all per-
tain to the person and not to a particularly described
premise. This is further borne out by what is said in
State v. Parker Distilling Company, 236 Mo. 1.c. 253,
and the definition of "liquor license" as contained in
33 Corpus Juris, page 529, section 82.

In the Parker Distilling Company case it is said:

"Since the decision in Austin v. State,
10 Mo. 591, it has been the established

law of this state that the right to sell spirituous or intoxicating liquors is not a natural right, but is a calling which no one has the right to pursue, without first having received the privilege or a license so to do, from the lawful authorities of the State."

In Corpus Juris, supra, it is stated:

"A liquor license is a formal grant of permission or authority from the government or a state or municipality acting through its appointed agents to a selected individual to engage in the sale * * * of intoxicating liquors."

The right to close or bar a particular premise from being used for the sale of intoxicating liquor has been jealously guarded by the Legislature. By Section 44-a-10, Laws, 1935, page 283, it is provided that courts having equity jurisdiction have the authority through injunction to close a particular premise used for the sale of intoxicating liquor if its use is such as to constitute it a nuisance as defined by the liquor act. The vesting of this power in the equity courts of this state brings into play the doctrine of "Expressio unius est exclusio alterius," that is to say, where the statute vests authority in a certain body it necessarily includes a negative that no other body shall exercise said authority. Kroger Grocery and Baking Company vs. City of St. Louis, 106 S. W. (2d) 435 (Mo.).

A liquor license is a thing personal to the holder thereof. The Supervisor has the duty to see that the applicant for a license is qualified and that the premises described is constructed in the manner required. He is not enjoined with the duty of ascertaining the moral character of the premises (if such inanimate objects can be said to possess morals). The authority to close by injunction premises operated in such a manner as to constitute a nuisance is vested in the courts of this state having equity jurisdiction and this excludes the Supervisor for exercising such power.

October 13, 1938

We do not mean to convey the impression, however, that we are holding the Supervisor is without authority to refuse a permit when it appears that the subsequent application by another person is merely a blind in order to permit the revoked licensee to continue his business under the name of another. This would be doing indirectly what is prohibited being done directly and cannot be permitted. State ex rel. v. Gorden, 236 Mo. l.c. 167. Also, we might call attention to the fact that Section 27, supra, prohibits a licensee from employing in his business a person whose license has been revoked.

CONCLUSION

Therefore, it is the opinion of this department that the Supervisor of Liquor Control does not have the authority to refuse to issue a license when the premises described in the application is the same upon which a previous license has been revoked.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:DA

INTOXICATING LIQUORS:

STUDENTS:

Section 11558, R. S. Mo. 1919,
prohibiting sale of intoxicating
liquors to students stands repealed.

December 8, 1938



Honorable E. J. McMahon
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your letter of December 6,
1938, which reads as follows:

"I have copy of REPORT OF STATUTE
REVISION COMMISSION AND PROPOSED
LEGISLATIVE ENACTMENTS recently pub-
lished, and my attention has been
called officially to page 47, and
paragraph 77, in re 'selling liquor
to student - penalty.'

"The question has been raised as to
whether the Revised Statutes of 1919,
Section 11558, prohibiting the sale
of intoxicating liquors to the students
of the University of Missouri, or any
other college or academy of the State,
is still in effect or has been voided
by any subsequent legislative action.

"I request your opinion on this sub-
ject for the guidance of this Depart-
ment."

Section 11558, R. S. Mo. 1919, did provide that
any person who should knowingly sell, give or in any manner
dispose of any intoxicating liquor to any student of the
University of the State of Missouri, or of any school,

Dec. 8, 1938

college or academy in this State should be deemed guilty of a misdemeanor. However, the Legislature in the year 1931 repealed this section. The repealing act contained in the Laws of Missouri, 1931, page 347, reads as follows:

"Section 1. Repealing specified sections. - That sections 11192, 11193, 11195 and 11196, article 2, chapter 102, Revised Statutes, 1919; sections 11293 and 11294, article 5, chapter 102, Revised Statutes, 1919, and section 11558, article 18, chapter 102, Revised Statutes, 1919, be and the same are hereby repealed.

"Approved April 21, 1931."

CONCLUSION

Consequently, since Section 11558, R. S. Mo. 1919, was repealed by the Legislature in the year 1931, it is no longer a law of this state.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

INTOXICATING LIQUOR:

Conviction for violation of laws other than liquor laws does not result in automatic revocation of liquor license.

December 31, 1938



Honorable E. J. McMahon
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion, which reads as follows:

"I invite your attention to Section 30, Intoxicating Liquor Laws of the State of Missouri, paragraph headed 'Violation a misdemeanor.'

"I request an opinion in the cases quoted below as to whether the acts charged and proven against certain licensees of this Department constitute a violation of the Liquor Laws and whether this Department must automatically revoke these licenses as provided in Section 30. I cite two specific cases:

"JOHN F. RYAN and ROBERT RILEY, 7014 Clayton Road, Richmond Heights, Missouri, cited before the Supervisor for hearing on November 9, 1938. One charge being that they did not at all times keep an orderly house, violation of Section 26 of the Liquor Control Act of the State of Missouri, (this being a gambling charge covering the operation of a 5¢ slot machine).

"At this hearing the Supervisor found the evidence substantiated the citation, and gave Ryan and Riley an 8-day suspension, November

Dec. 31, 1938

13th to 20th, inclusive. Transcript of the testimony was then sent to the Prosecuting Attorney of St. Louis County and later Ryan and Riley were tried on the charge of 'Betting on Games,' before George J. Sick, Justice of the Peace of Carondelet Township, who found the defendants guilty and fined them \$10.00 and costs of \$19.20.

"JAMES J. DEVINE, Highway #66, Alleton, Missouri, was similarly cited for hearing before the Supervisor on charges including a similar citation, 'not keeping an orderly house' in that he operated a slot machine, and his license was suspended for fifteen days, November 13th to 27th, inclusive. Transcript of the testimony was also sent to the Prosecuting Attorney of St. Louis County, and likewise, Devine was tried before George J. Sick, Justice of the Peace of Carondelet Township, charged with 'Betting on Games,' was found guilty and fined \$10.00 and costs of \$18.80.

"I am attaching herewith the Transcript of Criminal Procedure, signed by George J. Sick, Justice of the Peace of Carondelet Township in the trial of both Ryan and Riley and the trial of James J. Devine.

"There are several other licensees in St. Louis County who have been heard before this Department on similar charges and transcript of testimony has been forwarded to the Prosecuting Attorney of St. Louis County, but up to the present we have not been advised of any subsequent action.

"I desire to be advised if convictions under the charges noted on the attached transcripts do constitute a violation of 'any of the provisions of this act,' this being the language of Section 30."

Section 30 of the Liquor Laws, Laws of Missouri, Extra Session, 1933-1934, page 88, reads in part as follows:

"Conviction in any court of any violation of this act shall have the effect of automatically revoking the license of the person convicted, * * *."

The question then is whether or not a conviction in a court on a charge of operating a slot machine or of gambling has the effect of automatically revoking the liquor license of any person so convicted. It will be noted that the convictions referred to in Section 30 refer solely to violations of "this act." We think it is clear that the term "this act" refers only to the provisions of the liquor laws and of convictions as a result of the violation of the specific terms thereof.

In this connection it is sufficient to say that gambling and the operation of slot machines is not prohibited or designated as a crime by any of the terms of the Liquor Act. Neither does the Liquor Act provide any penalty as the result of a conviction for operating a slot machine or gambling, such as a penitentiary or jail sentence or a fine. Such laws and penalties are contained in Chapter 30 of the Revised Statutes of Missouri, 1929, dealing with crimes and punishments, and not in the Liquor Act. Consequently a person so convicted would not be convicted "of any violation of this act," and consequently the liquor license would not be automatically revoked.

A contrary interpretation would lead to absurd results and would include all the duties and restrictions imposed upon the entire citizenry of this state by all the laws in the State of Missouri. For example, laws prohibit persons from speeding in certain incorporated areas. Other laws prohibit persons from spitting on the streets. Can it be said that a conviction for the violation of either of these laws would have the effect of "automatically revoking the license of the person convicted"? We do not think so. The Legislature, in our opinion, did not intend that any and all convictions should have that effect. Therefore, the language in Section 30 can refer only to convictions for violations of the terms of the Liquor Act itself.

Section 26 of the Liquor Laws, Laws of Missouri, 1937, page 531, does provide that the Supervisor of Liquor Control shall revoke or suspend liquor licenses if any licensee "has not at all times kept an orderly place or house." This statute provides further, however, that the Supervisor of Liquor Control must give the licensee ten days' notice in writing of such application to suspend or revoke, with full right to have counsel and produce witnesses and be heard before any such action can be taken. There is no doubt that any liquor licensee who permits gambling and slot machines in his place of business is not keeping "an orderly place or house," yet this statute does specifically provide that notice must be given and a full hearing accorded the dealer before the license can be suspended or revoked. In other words, any such revocation or suspension can not be and is not "automatic." Any action taken after any such hearing is discretionary with the Supervisor. He may revoke or suspend the license or dismiss the charges. Further more, the Supervisor can act under Section 26 whether there has been a prior conviction in any court or not. Consequently, Section 26 plays no part whatsoever and its terms need not be followed by the Supervisor of Liquor Control if a licensee is convicted in any court of violating any of the terms and conditions of the Liquor Act. In that event, the revocation of the license is immediate and automatic. However, if there has been no prior conviction of any violation of the liquor laws, or if there has only been a prior conviction of the violation of laws of the State of Missouri other than the liquor laws, then there is no automatic revocation and the Supervisor must give due and proper notice in writing of the charges and allow the licensee a full hearing before taking any action in either revoking or suspending the license.

CONCLUSION

Our conclusion is that if any liquor licensee is convicted in any court of violating any of the terms of the Liquor Act, the liquor license is automatically and immediately

Dec. 31, 1938

revoked. However, a conviction of a violation of any other laws of the State of Missouri not contained in the Liquor Act itself does not have the effect "automatically" of revoking a liquor license, although the evidence and facts causing such conviction may be sufficient to authorize the Supervisor of Liquor Control to revoke or suspend the license after giving due notice in writing and according the licensee a full hearing.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVE:

J. E. TAYLOR
(acting) Attorney General

ARMORIES:

State Board of Education can accept titles to property for the state subject to restrictions.

January 4, 1938

FILED
60

Honorable Lewis M. Means,
The Adjutant General,
Jefferson City, Mo.

My dear Sir:

This will acknowledge receipt of your letter requesting an official opinion under date of December 27, 1937, which reads as follows:

"It is contemplated that several armories are to be built in the State of Missouri, using funds appropriated by the Missouri Legislature and in conjunction with WPA Federal funds and local contributions from the people living in the locality of the different armories. It is the understanding that these buildings are to be titled in the name of the State, but it is generally understood and agreed that the building in a local community is to be available for civic, school and other local uses, so long as it does not interfere with the training of the local National Guard unit.

This office is in receipt of request from authorities at Kennett, Missouri, and wish to be advised whether or not the State would accept the deed to the property consisting of the new building and the grounds, with an easement in deed, as follows:

'It is understood and agreed that the city of Kennett and the Kennett School District shall have a perpetual easement in the use of the

January 4, 1938

building to be constructed on the within described premises so long as such use does not conflict with the necessary training of the local unit of the National Guard located in Kennett, Missouri.'

Opinion is requested as to whether or not such easement in this particular deed, or any other similar project, could be accepted by the State of Missouri."

Under Section 643 R.S. Mo. 1929, a commission was created to accept devises, bequests, donations and gifts. Under this section the commission consisted of the governor, attorney-general and state treasurer, but the act was amended in 1933 at page 251 which names the State Board of Education as the donee to accept gifts for the state. The amended act of 1933, page 251, reads as follows:

"That Sec. 643, Article 1, Chapter 4, Revised Statutes of 1929, be and the same is hereby repealed and a new Section enacted in lieu thereof, to be known as Sec. 643, and to read as follows:

Whenever any devise, bequest, donation, gift or assignment of money, bonds, or choses in action, or of any property, real, personal or mixed, shall be made or offered to be made to this state, the State Board of Education, as constituted by law, shall be and are hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor, or assignor of said property and said officials constituting said Board, so that the right and title to shall pass to and vest in this State; and all such property so vested in this state and the proceeds thereof when collected, may be appropriated for educational purposes, or for such other purposes as the legislature may direct. The intention of this act is to abolish

the commission heretofore created to accept devises, bequests, donations, gifts or assignments of money, bonds or choses in action, or of any property, real, personal or mixed, and to transfer such duties to the state board of education."

The purpose of the amendment and the intention of the legislature in this act was to abolish the commission heretofore created in Section 643 R.S. Mo. 1929. In this amendment you will notice that the State Board of Education is authorized to receive and accept gifts under such terms, conditions and limitations as may be agreed upon between the grantor, donor or assignor of said property and said officials constituting said board.

Section 9510 R.S. Mo. 1929 describes who shall be members of the State Board of Education and reads as follows:

"The supervision of instruction in the public schools shall be vested in a state board of education, whose powers and duties shall be prescribed by law. The superintendent of public schools shall be president of the board; the governor, secretary of state and attorney-general shall be ex officio members, and, with the superintendent, compose said board of education. It shall be the duty of the state board of education to take the general supervision over the entire educational interests of the state; to direct the investment of all moneys received by the state to be applied to the capital of any fund for educational purposes; to see that all funds are applied to such branch of the educational interest of the state as by grant, gift, devise or law they were originally intended."

Under Section 643, page 252, Session Laws of 1933, it is discretionary with the State Board of Education to accept gifts in the name of the state. So long as the State Board of Education in receiving gifts or donations do not violate the rule of contracts as to public policy, the State Board under this section, is given the authority to accept gifts for the state notwithstanding certain restrictions or reservations made in the gift. As described in your request for an opinion, it

January 4, 1938

would not violate the rule of contracts against public policy, for the reason that the public is interested in such a contract being made.

This question has not been raised in this state, but in the case of State ex rel. v. Turner, 93 Ohio State 379, 113 N.E. 327, the court held:

"A municipality may deed land to the state for an armory, reserving the right to use the armory for purposes of drill by its police and fire departments."

They also held that:

"Such a contract entered into by the state and municipality was not a contract against public policy."

The same holding was also had in Kansas City School District v. Scheidley, 138 Mo. 672, 40 S.W. 656.

That this contract as presented in your letter is not against public policy is also varified by Section 13871 R.S. Mo. 1929 reads as follows:

"Upon the application of all posts of the grand army of the republic, camps of the united confederate veterans, camps of the united Spanish war veterans and of other societies composed of veterans of any war in which the forces of this state have participated, the officer in charge of any armory owned or leased by the state may permit the use of such armory for the meeting of such veteran societies without charge on dates when the same is not in use for military purposes."

Article 13, Section 7 of the Constitution of the State of Missouri provides as follows:

"The General Assembly shall provide for the safe-keeping of the public arms, military records, banners and relics of the State."

Hon. Lewis M. Means

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January 4, 1938

CONCLUSION

In conclusion will state that it is the opinion of this office that such an easement described in your letter in this particular deed, or any other similar project, could be accepted by the State of Missouri as hereinbefore provided.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

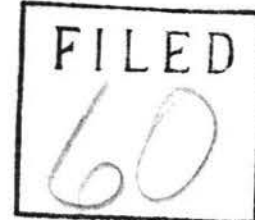
J. E. TAYLOR
(Acting) Attorney General

WJB:DA

SOLDIERS' BONUS - Wife of deceased soldier may claim his bonus.

January 22, 1938

Honorable Lewis M. Means
The Adjutant General
Jefferson City, Missouri



Dear Sir:

We acknowledge your request of January 11, 1938 for an opinion, which reads as follows:

" Re: Pierce, Allen
Serial #3,775,998

The above named soldier died in service October 9, 1918. The widow of the above named soldier remarried after his death.

"This office desires an opinion as to whether or not a widow who remarries after the death of her soldier husband would be entitled to his Missouri Soldiers' Bonus."

Article IV, Section 44b of the Missouri Constitution provides in part:

" *** The wife *** of any deceased resident who served honorable in the military or naval forces, as provided in this section, shall be paid the sum or allowance that such deceased resident would be entitled to receive hereunder if such deceased resident had lived: *** "

Statutes pursuant to this constitutional provision are in the language of the Constitution.

The question turns on the statutory construction to be placed on the word "wife."

Section 655, R. S. Mo. 1929, provides in part:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import;
*** "

CONCLUSION.

No language in the law prohibits the wife of a deceased soldier from being paid the Missouri bonus of her deceased husband should she remarry. To read into the law such a condition would be to add language not therein contained, and we believe not intended by the people.

The fact that one be the wife of a deceased soldier does not change her constitutional status should she remarry, and we are of the opinion that she is entitled to prove her claim for the bonus of her deceased husband.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

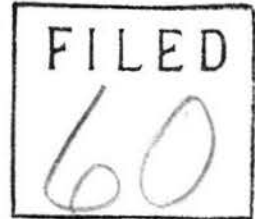
J. E. TAYLOR
(Acting) Attorney General

WOS:FE

THE CHATTEL MORTGAGE:

A chattel mortgage cannot be released, which was filed by the mortgagee with an assignment in blank attached without presenting chattel mortgage and note in accordance with Section 3099 Laws of Missouri 1935, page 209.

January 28, 1938



Mr. L.R. Mead,
Recorder of Deeds,
Saline County,
Marshall, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of January 19, 1938 requesting an official opinion from this office which reads as follows:

"Section 3099, Revised Statutes of Missouri, 1929, found at page 209, Laws of Missouri, 1935, provides for the different methods for satisfying chattel mortgages on the records. Paragraph 1 is as follows:

'1. By the mortgagee, cestui que trust, his agent or assigns, on the margin of such index, which shall be attested by the recorder.'

Do I have a right as Recorder to make an entry of satisfaction on the record in a case where a copy of the mortgage is filed, said copy showing that the note and mortgage have been assigned in blank by the mortgagee, and the mortgagee later appears without the original note or mortgage and insists on being permitted to satisfy the same?

You will note that this sub-division of the section does not provide that the original mortgage shall be produced but only says that the mortgagee, cestui que trust, his agents or assigns, can satisfy the same on the margin of the index."

Section 3099, as set out in the Laws of Missouri 1935 at page 209, reads as follows:

"Such recorder shall enter in a book, to be provided by him for such purpose, the names of all the parties to such instrument, arranging the names of such mortgagors or grantors alphabetically, and shall note thereon the time of filing such instrument or copy, for which said recorder shall receive a fee of twenty cents. Said fee shall also include and cover all costs for discharging said mortgage or deed of trust according to the methods hereinafter provided. Such mortgage or deed of trust, when satisfied, shall be discharged by any of the following methods:

1. By the mortgagee, cestui que trust, his agent or assigns, on the margin of such index, which shall be attested by the recorder.
2. Upon the presentation by the mortgagor or grantor of the original mortgage or deed of trust, and upon such mortgagor or grantor making affidavit before such recorder that the instrument presented by him is the original of the copy on file, and that such mortgage or deed of trust has been fully paid and satisfied.
3. Upon presentation or receipt of an order in writing, signed by the mortgagee or cestui que trust, thereof, attested by a justice of the peace, or any notary public, stating that such instrument has been paid and satisfied.

When any of these provisions have been complied with, it shall be the duty of the recorder to enter in a column for that purpose the word 'satisfied,' giving date. When a chattel mortgage shall be satisfied as above provided, the recorder may deliver

said mortgage to the holder of the note secured thereby, or, if the holder of said note refuse to receive the same the recorder may destroy said mortgage: Provided, that the recorder may deliver to the parties entitled thereto, or destroy all such mortgages now remaining on file in his office and which have been entered satisfied on the chattel mortgage register."

In your letter you state that the mortgagee filed a copy of the chattel mortgage in your office, which before filing, had been endorsed in blank leaving the name of the last mortgagee, according to your record, in blank. On the face of the chattel mortgage constructive notice is given to the public that the mortgagee who filed the chattel mortgage was not the owner of the chattel mortgage. The original mortgagee, not being the owner of the chattel mortgage according to your record, could not release under paragraph one of section 3099 without a further record showing he was the mortgagee, cestui que trust or an agent or assignee. You also stated that the original mortgagee insisted on releasing the chattel mortgage without showing the original note and mortgage. In order to satisfy the record, under paragraph one of section 3099, someone must present the original mortgage and note in order to protect you in case the mortgage has been assigned to someone other than the party desiring to release the chattel mortgage. There are no statutes in regard to blank assignments of chattel mortgages, but section 2643 R.S. Mo. 1929 in regard to negotiable instruments reads as follows:

"Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill up as such for any amount. In order that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such

instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

Although the chattel mortgage is not considered a negotiable instrument, it secures a negotiable instrument to-wit, the note which is described in the chattel mortgage. Under section 2643 it gives authority for the person in possession of the note to complete it by filling up the blanks therein.

8 Corpus Juris, page 182, paragraph 313 reads as follows:

"The delivery of an inchoate or incomplete bill or note, as where the instrument is delivered with blanks left for the insertion of the amount or terms of payment, or where a signature on a blank paper is delivered with the intention of having a complete instrument written over it, confers presumptive authority on the person to whom it is delivered, and on subsequent holders, to complete the instrument by filling the blanks, or by writing the instrument, as the case may be, in the way apparently contemplated by the signer, with matter general conformity with the character of the writing. Thus a note may be written on the reverse side of a blank indorsement which has been so delivered, and a bill may be drawn on a blank acceptance which has been duly executed and stamped; but the form itself cannot be changed and the blanks filled so as to make a different instrument.

The Negotiable Instruments Law expressly provides that, 'where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein.' This provision

is merely declaratory of the common law."

Also in 8 Corpus Juris, page 183, paragraph 314 it states:

"a. The implied power to fill blanks extends to all parts of the paper, even to the promise itself, and the pronoun 'I' or 'we' may be inserted. It also includes the signature; the name of the drawee or the payee; the date; the time or place of payment; the amount to be paid; and the rate of interest agreed upon or the statutory rate.*****"

Under the authority of paragraphs 313 and 314, the original mortgagee after assigning his interest in the chattel mortgage, for the purpose of releasing same, may place his name in the blank assignment as assignee from himself.

In the case of Fischman-Harris Realty Co. v. Kleine, 82 S.W. (2d) 605, the court held:

"Legal effect of indorsement in blank on note prior to delivery cannot be varied by evidence from a source other than instrument itself, and indorser cannot be charged with primary liability of maker by proof of contrary parol agreement."

Under this authority a statement by the mortgagee that he is still the owner of the chattel mortgage a copy of which he has filed in your office, can only be shown by the presentment of the chattel mortgage and note itself.

In the case of Commercial Investment Company v. Whitlock, 274 S.W. 833, the court said:

"When the First National Bank was designated as the place of payment, a place of payment was added when none was theretofore specified, and such addition under the facts was a material alteration. Section 911, supra. Section 800, R.S. 1919, provides that, where an acceptance of an instrument payable at a fixed period

after sight is undated, any holder may insert therein the true date of acceptance. Hence the insertion of the date of the acceptance did not affect the validity of the bills. Defendants accepted the bills, and thereby admitted that they were the drawees, and are estopped from defending on the ground that there was no drawee designated in the original bills. Daniel On Negotiable Instruments (6th Ed.) 486, 497; 7 Cyc. 570; 6 C.J. p. 299, 471; Davis v. Clark, 6 Q.B. 16; Peto v. Reynolds, 9 Exch. 410. Also the rule is that, where the drawee's name is left blank, such may be filled in under an implied authority like any other blank. 7 Cyc. 570 and 620; Clay & Funkhouser Banking Co. v. Dobyns et al., 213 Mo. App. 468, 255 S.W. 946. The point was not directly ruled in the case last cited, but the rule mentioned was fully recognized."

CONCLUSION

Under the authorities above set out, the mortgagee after assigning the mortgage before filing a copy in your office has assigned his rights to such an extent that he may not release under paragraph 1 of section 3099 without presenting the original mortgage and note showing that he is the mortgagee as described by paragraph one of section 3099. The chattel mortgage filed and as described by you in your letter cannot be released under any circumstances under paragraph three of section 3099 for the reason that the chattel mortgage only describes an alleged mortgagee who has assigned his interest in blank to a person unknown and not of record in your office.

It is further the opinion of this office that the mortgagor may release such chattel mortgage as described in

Mr. L.R. Mead

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1/28/38

your letter by complying with paragraph two of section 3099.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

SCHOOLS: METHOD OF CHANGING SITE OF SCHOOL LOCATION IN
CONSOLIDATED DISTRICTS

February 3, 1938

2-7

Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri



Dear Sir:

This is to acknowledge your letter dated January 31, 1938, as follows:

"The consolidated district number 8 of Purdy, Missouri, school house was destroyed by fire some few weeks ago, and there is an effort being made to change the site of the school house by a vote of the tax payers of the district.

"It is my opinion that the site of a consolidated district cannot be changed by the vote of the tax payers. It is also my opinion that volume 28, Missouri Appeal, on page 70, W. E. Gladney et al vs. John M. Gibson settles this question, however, I could be wrong and would like to have your opinion in regard to locating a site or changing a site of a consolidated district whether or not it is in the power of the voters and tax payers of the district or in the hands of the board."

Section 9330, Revised Statutes Missouri 1929, reads, in part, as follows:

"When the demands of the district require more than one public school building therein, the Board shall, * * * and the Board shall select and procure a site in each newly formed ward and erect a suitable school building thereon and furnish the same."

The above statute has been construed in a number of cases wherein it was held that the Board of a consolidated school district can change a school site without the necessity of a vote of the resident taxpayers.

Gladney v. Gibson, 208 Mo. App. 70; 233 S.W. 271;
State ex rel. Miller v. Consolidated School
District, 224 Mo. App. 120; 21 S. W. (2) 645;
State ex rel. Gehrig v. Medley, 28 S. W. (2) 1040;
Crow v. Consolidated School District, 36 S. W.
(2) 676;
Corley v. Montgomery, 46 S.W. (2) 283.

In State ex rel. Gehrig v. Medley, supra, the Springfield Court of Appeals said:

"It seems to be contended by relators that the school board in a consolidated district has no power to change a school site unless authorized by a vote of the resident taxpayers. There is no merit in that contention. The board in a consolidated or city school district has the power to change the site without a vote of the taxpayers." (cases cited).

Honorable Emory C. Medlin

-3-

February 3, 1938

Therefore, by virtue of Section 9330, the school board in a consolidated district may change a school site without a vote of the resident taxpayers. However, does it necessarily follow that the resident taxpayers are precluded from voting to change a school site, which is the question presented in your request for an opinion. Nowhere do we find any statute which permits the resident taxpayers of a consolidated district to vote upon any question pertaining to the changing of a school site, or the establishing of one. The only statute found relative to consolidated schools on establishing of a school site or changing same is Section 9330. Therefore, we conclude, and it is our opinion, that the Board of a consolidated school district is vested absolutely with the discretion as to the location, or changing of location, of sites used for school purposes, and as long as the Board does not abuse its discretion in the premises, the courts will not interfere. *Corley v. Montgomery*, 46 S. W. (2) 283.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

JLH LC

SCHOOLS: Apportionment of railroad taxes received by school districts should be divided according to levies made by the school district for the various funds.

February 4, 1938



Mr. W. J. Melton
Presiding Judge
Mississippi County
Anniston, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of January 28th, wherein you make the following request for an opinion:

"In apportionment of Railroad taxes received out to School Districts, should all of this money go in the teachers funds, where the District has bonded indebtedness for school buildings, and levy a tax for that purpose, or should it be divided accordingly to the levies made by these districts."

Section 10029, R. S. Mo. 1929, relates to the taxation of railroads and street car companies. For convenience we refer to pertinent parts of the section as follows:

"For the purpose of levying school taxes, and taxes for the erection of public buildings, and for other purposes, in the several counties of this state, on the roadbed, rolling stock and movable property of railroads in this state, the several county courts shall ascertain from the returns in the office of the county clerk the average rate of taxation levied for school purposes, and also the average rate of

taxation levied for the erection of public buildings, and for other purposes, each separately, by the several local school boards or authorities of the several school districts throughout the county. Such average rate for school purposes shall be ascertained by adding together the local rates of the several school districts in the county, and by dividing the sum thus obtained by the whole number of districts levying a tax for school purposes, and shall cause to be charged to said railroad companies taxes for school purposes at said average rate on the proportionate value of said railroad property so certified to the county court by the state auditor, under the provisions of this article, and the said clerk shall apportion the said taxes for school purposes, so levied and collected, among all the school districts in his county, in proportion to the enumeration returns of said districts. Such average rate levied for the erection of public buildings, and for other purposes, shall be ascertained, each separately, by adding together the local rates of the several districts in the county levying a tax for the erection of public buildings, or for other purposes, and by dividing the sum thus obtained in each case by the whole number of districts in such county; and the clerk shall cause to be charged to said railroad companies taxes for the erection of public buildings or for other purposes, at said average rate on the proportionate value of said railroad property so certified to the county court by the state auditor, under the provisions of this article, and the county court shall apportion the said taxes for the erection of public buildings, or for other purposes

so levied and collected, among the several school districts levying such taxes, in proportion to the amount of such taxes so levied in each of said districts: * * * *

By the terms of Section 9199, R. S. Mo. 1929, it becomes the duty of the board to provide for the collection of an annual tax to pay the interest in the sinking fund on bonds which constitute an indebtedness of the district. You state in your letter the district in question has a bonded indebtedness and has levied a tax for that purpose; hence, that portion of Section 10029, heretofore quoted, relating to the taxation of railroads for the erection of public buildings, should be considered. Under Section 9261, R. S. Mo. 1929, and by the terms of Section 9312, R. S. Mo. 1929, the three funds of a district are the "teachers' fund," the "incidental fund," and the "building fund."

Section 10029, supra, refers to the levying of school taxes for the erection of public buildings and for other purposes. Clearly, the intention of the Legislature in dealing and referring to public buildings of a school district in said section, when it states,

"and the county court shall apportion the said taxes for the erection of public buildings, or for other purposes so levied and collected, among the several school districts levying such taxes, in proportion to the amount of said taxes so levied in each of said districts,"

was to the effect that upon the district receiving money from railroads, when such levies have been made, the said funds so received should be placed to the credit of the three funds.

Mr. W. J. Melton

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Feb. 4, 1938

We are, therefore, of the opinion that the amount of railroad taxes received by the district in question, which have been levied for building purposes, should be placed to the credit of the building fund and not all of the money received by the district should go into the teachers' fund; that the taxes so received should be divided according to the levies made by the school district for the various funds.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

CONSTABLE:

Jurisdiction in an adjoining township.

February 8, 1938

2-17

Mr. Emory C. Medlin,
Prosecuting Attorney,
Barry County,
Cassville, Missouri.



Dear Sir:

This will acknowledge receipt of your letter of February 5, 1938, requesting an official opinion, which request reads as follows:

"I would like to have your opinion on a matter which is a little embarrassing to write to you about, and it is regrettable that I need the kind of services that I am asking you about.

I would like to have your opinion to know whether or not the Constable in Purdy Township, which is an adjoining township to Monett, would have the authority to serve search warrants for me. I am disgusted with issuing so many search warrants and nothing being accomplished."

Section 11756 R.S. Mo. 1929 reads as follows:

"Constable may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

In the case of Putnam v. Coates, 283 S.W. 717, the court held:

"To our minds the evidence in this case fully justified the trial court in dissolving the temporary injunction. As to defendant W.L. Coates, the injunction was properly dissolved, if for no other

reason, because at the time of trial he was a duly commissioned deputy constable of the township in which the park was located, and, under our statute, had the power as such officer to serve warrants, process, etc., throughout the whole county. Section 2151, R.S. Mo. 1919."

In issuing a search warrant as described in this request, you must comply with Section 3783 R.S. Mo. 1929, which specifically sets out that the process shall issue in the name of the constable who is to execute the writ or process. Section 3783 reads as follows:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles hereinafter named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:

First--Any gaming table or gambling device prohibited by law.

Second--Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained.

Third--Any of the following articles, kept for the purpose of being sold, given away or otherwise distributed or circulated, contrary to law, viz.: pills, powders, medicines, drugs or nostrums, or instruments or other articles or devices for preventing conception, producing or procuring abortion or miscarriage, or other indecent or immoral use, or any letters, handbills, cards, circulars, books, pamphlets, advertisements or notices of any kind describing or purporting to describe any of such articles, or giving information, directly or indirectly, when, where, how, or of whom any of such things can be obtained.

Fourth--All articles or raw materials found in the possession of any person or persons intending to manufacture the same into any articles or things heretofore in this section described, and also all tools, machinery, implements and personal property where such article are found and seized and used or intended to be used in the manufacture of such articles and things."

CONCLUSION

Under the above statute and authority, it is the opinion of this office that a constable can exercise authority conferred upon them by law throughout the whole county and is not limited to the township where he is elected.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

SOLDIERS' BONUS: Deceased soldiers' bonus is payable to widow, when.

February 17, 1938

Hon. Lewis M. Means
The Adjutant General
Jefferson City, Missouri



Dear Sir:

We acknowledge receipt of your request for an opinion dated January 24, 1938, which reads as follows:

Re: Harry Breen (Presumably dead)
Missouri Claim #54,236.

It is requested an opinion be furnished this office in the following case:

"The above named veteran served honorably in the United States Army from August 15, 1917 to August 26, 1919. In 1922 he perpetrated an insurance fraud, after he disappeared. His wife returned to Germany where she now resides. Breen was, and is, a fugitive from justice, yet the German courts have ruled that he is legally dead. The widow is now trying to collect his Missouri Soldiers' Bonus.

"If the Veteran proved to be a resident of Missouri from April 6, 1916 to April 6, 1917 and to the date of his enlistment in the Army, would his presumptive widow have a legal claim for the Veteran's State Bonus?"

Article IV, Section 44b of the Missouri Constitution provides for the distribution of soldiers' bonus money, and reads in part as follows:

* * * * The Legislature shall enact such laws as may be necessary to carry into effect this amendment. The wife or husband, child, mother or father, in the order named and none other, of any deceased resident who served honorably in the military or naval forces, as provided in this section, shall be paid the sum or allowance that such deceased resident would be entitled to receive hereunder if such deceased resident had lived; * * *."

Pursuant to this constitutional amendment, the Legislature has provided in the Laws of Missouri, 1937, page 479, Section 9, as follows:

"It shall be the duty of the adjutant-general to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein prescribed. Applications for such payments shall be filed with the adjutant-general on or before December 31, 1938, and at such place or places as the adjutant-general may designate and upon blanks furnished by the adjutant-general: Provided further, the adjutant-general shall have the power to adopt all proper rules and regulations not inconsistent herewith to carry into effect the provisions of this act; and provided further, that all officers of the state or any county and any city or town therein are hereby directed to furnish free of charge, in writing, any information that the records in his office may disclose relative to the identity, place and period of residence and the war service of any soldier claiming a payment under this act, whenever such information is required by the adjutant-general of any

person making an application for such bonus or any part thereof; and any application for bonus heretofore filed and rejected may be filed before the adjutant-general and by him again heard; and if it appears that the rejection of the claim was erroneous, the rejection may be set aside, and the claim allowed and paid; and provided further that no department of the state government shall employ any clerks for the purpose of carrying out the provisions of this act, except the adjutant-general shall employ an examiner of soldier bonus claims and one stenographer for the handling of claims."

Section 1709, R.S. Missouri, 1929, provides:

"If any person who shall have resided in this state go from and do not return to this state for seven successive years, he shall be presumed to be dead in any case wherein his death shall come in question, unless proof be made that he was alive within that time."

The first question which presents itself is whether or not the State of Missouri is forced to recognize the judgment of the German court that the absentee in question is legally dead, and cannot of its own accord and right, determine this question. The only reason why a state recognizes a decision of a court of a foreign nation as determining a matter is because of comity.

"Comity" has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation having due regard both to the international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws". *Hilton v. Guyot*, 159 U.S. 113; 40 L. Ed. 95.

However, as was pointed out in *Augusta Bank v. Earle*, 13 Peters 519; 10 L. Ed. 274:

"Comity . . . extended to other nations, is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible, when contrary to its policy, or prejudicial to its interests."

Whether the State of Missouri shall make a voluntary and gratuitous payment of money to an individual is a question in which the state has an interest, so the judgment of the German court is not binding, and the fact of death may be determined from the laws of this state.

In the case of *Carter v. Life Insurance Co.*, 158 Mo. App. 368; 138 S.W. 49, the court construed Section 1709, *supra*, and said:

"But the presumption of death, which is the one on which the statute operates, only arises when these facts are present: first, residence of the person in this state; second, departure of that person from this state; third, the continued absence of that person from this state for seven successive years, no proof being made that he was alive within that time."

It will be noted one of the facts that must be present before a person is presumed to be dead is that he has departed from this state. Under the facts which you present in your request, the person in question is said to have disappeared, but there is no showing that he has departed from this state. This prerequisite must be shown before the statute, Section 1709, *supra*, will operate.

It is further pointed out that the person is a fugitive from justice. The question, therefore, presents itself just how the fact that a person is a fugitive from justice affects the presumption of death from absence. In *Winter v. Supreme Lodge, K.P.*, 96 Mo. App. 1; 69 S.W. 662, it appeared that the absentee was a defaulting lodge treasurer. The court held that an instruction that the jury could draw an inference adverse to the presumption of death from the facts surrounding his disappearance was proper.

This seems to be uniform rule, that, the fact that the absentee is a fugitive from justice, although it does not prevent the presumption of death from absence from arising, is admissible in evidence to rebut the presumption of death and it thereupon becomes a question for the jury, taking into consideration all the circumstances. *Ashberry v. Sanders*, 8 Cal. 62; *Kelly v. Felgar*, 71 Ga. 775; *Equitable Life Ins. Co. v. James*, 127 N.E. 11; *Mutual Benefit Life Ins. Co. v. Morton*, 108 Ky. 11; *Van Buren v. Syracuse*, 131 N.Y.S. 345.

Therefore, if the person in question is presumed to be dead under authority of Section 1709, *supra*, still if he is a fugitive from justice, then the adjutant-general, in determining the persons entitled to payment under the act, may take such fact into consideration in order to rebut such presumption.

However, we point out certain difficulties which might arise if the adjutant-general determines that the absentee is dead, and thereupon pays the bonus to the supposedly deceased's widow. Under Section 44b, Article IV of the Constitution of Missouri, which provides for the soldiers' bonus and which is quoted in part above, the payment of the bonus is to the soldier himself. If such person is deceased, then it is to be given to the "wife or husband, child, mother or father, in the order named". It will be seen that the soldier is the person who is to receive the bonus and it is only when he is dead that any other person has a right to claim this money. If the adjutant-general, in his discretion, determines that the absentee is dead and pays the money to the widow, then if such absentee were to later return, this would abrogate such determination. The soldier's right to the money is primary and takes precedence over the claim of any other person.

This view is brought out in *Grimes v. Miller*, 221 Mo. 636, in which the court said:

"But proof, under proper pleadings, even in a collateral suit, that he was living at the time of the appointment of the administrator, controls and overthrows the prima-facie evidence of his death and establishes that the court had no jurisdiction, and the administrator no authority; and he is not

bound, either by the order appointing the administrator, or by the judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either."

The court said further:

"That it is not competent for a State by a law declaring a judicial determination that a man is dead, made in his absence and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and vesting it in * * * next of kin."

Therefore, the returned soldier could demand his bonus, even though it had been paid to his supposed widow.

CONCLUSION

It is, therefore, the opinion of this department that before the presumption of death of a person because of absence from the state for seven years will arise one of the facts that must be shown is that such person has departed from the state. It is further the opinion of this department that if such a person is a fugitive from justice, then this fact may be taken into consideration in order to rebut the presumption that the absentee is dead because of not being heard of for seven years. It is also the opinion of this department that if the adjutant-general pays the widow of a person who is entitled to a bonus because such person has been absent for seven years and is, therefore, presumed to be dead, if the absentee appears and demands his bonus, then any payment by the adjutant-general to any other person would have been null and void and the absentee would be entitled to payment.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

AO'K:VAL

BONUS - Payable only on basis of actual service.

March 21, 1938



Honorable Lewis M. Means
The Adjutant General
Jefferson City, Missouri

Dear General Means:

We acknowledge your request for an opinion dated March 8th, which reads as follows:

"It is requested that this office be furnished an opinion in the following case:

"John Lawrence O'Leary, Navy Service No. 117-17-10 enlisted in the United States Navy on May 5, 1917. He was at home awaiting orders until August 13, 1917, and classified by the Naval Department as an Apprentice Seaman. He was then sent to the Naval Training Station, Great Lakes, Illinois, from August 13, 1917 to November 6, 1917. He was then transferred on November 6, 1917, to the U. S. Virginia, where he served until his Honorable Discharge, March 9, 1918.

"The Bureau of Navigation has ruled that this man and others under the same conditions were on active duty while they were at home awaiting orders, in this case, from May 5, 1917 to August 13, 1917. Heretofore, this department has never paid these men a state soldiers' bonus for the time which they were at home awaiting further orders from the Naval Department.

"This policy was followed because of the fact that those men who registered for the draft and were at home awaiting orders, do not receive a state bonus for the time spent.

"It is the opinion of this office that those men who enlisted in the Navy, and were at home awaiting orders, should not receive pay for the time so spent. However, we would like an opinion from your office in the matter, defining the word 'active' as used in Section #1 of the Bonus Law."

Section 44b, Article IV of the Missouri Constitution provides for the payment of state bonuses to Missouri residents "who served honorably in the military or naval forces of the United States of America at any time between the sixth day of April, nineteen hundred and seventeen, and the eleventh day of November, nineteen hundred and eighteen."

Pursuant to this constitutional provision, Laws Mo. 1937, p. 479, Section 9, provides:

"It shall be the duty of the adjutant-general to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein prescribed. Applications for such payments shall be filed with the adjutant-general on or before December 31, 1938, and at such place or places as the adjutant-general may designate and upon blanks furnished by the adjutant-general: Provided further, the adjutant-general shall have the power to adopt all proper rules and regulations not inconsistent herewith to carry into effect the provisions of this act; and provided further, that all officers of the state or any county and any city or town therein are hereby directed to furnish

March 21, 1938

free of charge, in writing, any information that the records in his office may disclose relative to the identity, place and period of residence and the war service of any soldier claiming a payment under this act, whenever such information is required by the adjutant-general of any person making an application for such bonus or any part thereof; and any application for bonus heretofore filed and rejected may be filed before the adjutant-general and by him again heard; and if it appears that the rejection of the claim was erroneous, the rejection may be set aside, and the claim allowed and paid; and provided further that no department of the state government shall employ any clerks for the purpose of carrying out the provisions of this act, except the adjutant-general shall employ an examiner of soldier bonus claims and one stenographer for the handling of claims."

CONCLUSION.

The purpose of the people of Missouri, in giving a bonus to its soldiers, was intended as a loving gesture for actual military service. The Constitution speaks of those who "served", and makes no mention of those who were on "active duty" awaiting orders for actual service.

Soldiers or sailors awaiting orders for actual service were not intended beneficiaries of the Missouri Soldiers' Bonus, and such is the opinion of this office.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

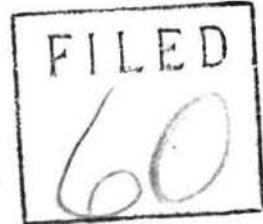
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HOSPITALS: When a benevolent institution, and when engaged in the practice of medicine.

March 24, 1938.

4-18



St. Louis Medical Society

Missouri Pacific Hospital Association

Gentlemen:

The question presented in this matter, so far as this department is concerned, is whether or not, under all the facts and circumstances presented in the case, quo warranto proceedings could be sustained, and, as a consequence, whether or not such proceedings should be instituted by the Attorney General upon the request of the St. Louis Medical Society, which we will hereafter refer to as the "Society," against the Missouri Pacific Hospital Association, a corporation, which we will hereafter refer to as the "Hospital."

The quo warranto proceedings is sought by the Society upon two grounds, namely:

1. That the incorporation of the Hospital was and is void ab initio and that legally it is not now a corporation, although exercising corporate functions.
2. That it was validly incorporated, but is functioning beyond its charter and corporate powers by reason of the contention that it is engaged in the practice of medicine.

Due to commendable frankness on the part of the Society, both grounds are aimed at the one result, namely, to force the Hospital to discontinue its practice of furnishing its patients only with physicians who constitute its regularly employed medical staff.

The Facts.

Based upon the memoranda, briefs, records, etc., obliquely furnished us by respective counsel, together with the oral arguments advanced, we have probably gleaned enough therefrom to denominate same as the facts in the case, which, briefly stated, may be taken as follows:

From the 24th annual report of the Hospital Association for the year ending December 31, 1936, it appears that a Hospital Department of the Missouri Pacific Railroad was organized in 1876, under the exclusive control of the Railroad, and continued so until on or about August 1, 1912, when by reason of the Hospital Department being self-sustaining, the Hospital property, or real estate, and the funds on hand were turned over by the Railroad Company to the control of the employees of the Railroad for their operation and benefit. The Hospital was thereafter operated by the employees, through a Board of Managers, apparently as a voluntary association, until May 29, 1922, when it became incorporated under a pro forma decree of the Circuit Court of the City of St. Louis, in conformity with the provisions of Article 11 of Chapter 90 of the Revised Statutes of Missouri, 1919 (now Article 10, Chapter 32, Revised Statutes of Missouri, 1929), entitled "Benevolent, Religious, Scientific, Fraternal-Beneficial, Educational and Miscellaneous Associations," and hence is a non-stock and non-profit corporation.

The charter provisions of the corporation, among other things, provided that all officers and employees of the Railroad Company, and all employees of the Hospital (subject to enumerated exceptions) constituted the membership of the corporation, together with employees of allied railroad lines who could become members, depending on certain provisions relating to such allied lines and the employees thereof; that the financial support of the Hospital should be from a fund denominated "membership dues," derived by monthly assessments deducted from each member's wages or salary in accordance with a scale in proportion to wages received; that the management of the Hospital should be vested in a Board of Managers elected as representatives from and by the several employee organizations; that the chief surgeon shall be appointed by the chief operating officer of the Railroad Company, and shall be a member of the Board of Managers, with voice, but no vote, and the chief surgeon shall appoint all assistant physicians,

surgeons and specialists, subject to the approval of the Board.

The By-laws of the Hospital provide that a patient, in order to be admitted therein for treatment, should be waited on by the Hospital's regular staff of doctors. However, a further provision permits a member or employee to engage his own doctor at the member's own expense (this latter mentioned provision may relate to treatment outside the Hospital, but, considering the two provisions, some confusion is created in arriving at what is intended).

It appears to be a fact in the case that the member doctors of the regular staff, who are furnished to patients, are paid either a fixed salary or per call, by the Hospital.

It further appears that the Hospital has a bonded indebtedness amounting to approximately \$90,000.00, which is held by and among the membership.

The above facts and outline of operation will probably suffice for the purpose of determining the applicable law to the case.

I.

IS THE HOSPITAL LEGALLY INCORPORATED?

Counsel for the Society contend that the Hospital could not be legally incorporated under Article 11, Chapter 90, R. S. Mo. 1919, or, put differently, that it was incorporated for business purposes and for pecuniary profit. Counsel for the Hospital contend, on the other hand, that it was legally entitled to incorporate as a benevolent association under the statutes.

Article 10, Section 21, of the Constitution of Missouri provides:

"No corporation, company or association, other than those formed for benevolent, religious, scientific or educational purposes, shall be created or organized under the laws of this State, unless the persons named as

corporators shall, at or before the filing of the articles of association or incorporation, pay into the State treasury fifty dollars for the first fifty thousand dollars or less of capital stock, and a further sum of five dollars for every additional ten thousand dollars of its capital stock. * * * "

Sections 4996 and 4999, R. S. Mo. 1929 (heretofore Sections 10264 and 10267, R. S. Mo. 1919), provide in part as follows:

"Sec. 4996. Any number of persons not less than three, who shall have associated themselves by articles of agreement in writing, as a society, company, association or organization formed for benevolent, religious, scientific, fraternal-beneficial, or educational purposes, may be consolidated and united into a corporation."

"Sec. 4999. Any association formed for benevolent purposes, including any purely charitable society, hospital, * * * and in general, any association, society, company or organization which tends to the public advantage in relation to any or several of the objects above enumerated, and whatever is incident to such objects, may be created a body corporate and politic by complying with sections 4996 and 4997."

The Society contends that by reason of the words found in Section 4999, to-wit, "including any purely charitable society," that the words "purely charitable" qualify the word "hospital." If such a view could be taken, it would logically follow that each and every of the additional objects enumerated in the statute must likewise be purely charitable, when it is common knowledge that some of such objects, incorporated or not incorporated, depend in whole or in part upon financial support from those who partake of the benefits to be derived from such objects. This is especially true in the case of a fraternal-beneficial association, which cannot be and is not a purely charitable organization, but is, nevertheless, held to be a benevolent organization, as shown by the case of *Umberger v. M. B. A.*, 162 Mo. App. 1. c. 143, wherein the court said:

"Such associations are benevolent associations. * * * It is manifest that notwithstanding the insurance feature, they do not represent trade or commerce. They are essentially benevolent."

In view of the constitutional provision and Sections 4996 and 4999, both using the word "benevolent" in their respective contexts, without such, or any limitation thereto, as counsel contend for, and considering the necessary character of some of the other objects enumerated, we would hesitate to place such a limited construction as contended for without direct authority therefor from our Missouri courts, or out-state decisions construing a statute of the same context or wording. Counsel have presented nothing, and we have been unable to find any such authority from independent research.

Hence, it appears to us, so far as this case is concerned, that the character of the Hospital turns upon the question of whether or not it is an organization or incorporation formed for benevolent purposes within the legal meaning of the term.

Counsel for the Society assert, first, in their brief, that "The General Assembly may not otherwise provide or make a benevolent corporation out of that which is not such," and present authority sustaining this general principle of law. Counsel for the Hospital agree with this principle. Hence, no issue is created on the point, and such point, in our judgment, not being determinative of any real issue in the case, we pass on to the Society's next point, namely, as presented, "It is a business organization and not a benevolent institution or charitable institution." The Society cites a number of decisions for the purpose of sustaining its contention, first among which, in analogy, so far as our Missouri courts are concerned, is *Phillips v. Railroad*, 211 Mo. 419. A reading of this case, at first blush, gives a strong impression that it is decidedly in point. However, a closer reading and analysis of the case results in substantial doubt as to its force, because, first, the suit was against the railroad company and not the hospital in question. The railroad's defense is stated as follows, l. c. 426:

"Defendant contends that it is in no sense responsible for the negligent acts, if such there were, of 'The Employees'

Hospital Association of the Frisco Line; that it is a distinct corporate entity, not under control of defendant, and that it is responsible for its own acts of negligence."

The court then said, l. c. 426:

"This relationship between the defendant and the Hospital Association is important on the question of excluding certain evidence, in addition to the point now in review."

We take it that the court alludes, by the language shown in the above excerpt, "in addition to the point now in review," to the point raised as to whether or not the Hospital in question was a distinct entity, not in control of the defendant. Hence, it appears to us that there was in reality no issue in the case respecting whether or not the Hospital was a charitable organization and it was not necessary to so decide. The case further shows that the hospital physicians in charge of the welfare of the plaintiff were likewise the physicians in charge of the railroad, and hence the real issue involved was one of agency and not the character of the hospital. Furthermore, the court's view that the hospital in question was not a public charity and had but few, if any, of the earmarks of a voluntary benevolent association, we believe was unnecessary to express under the facts, because even if it had been found that the hospital was a charitable institution, we apprehend that if the physicians working therein were likewise the agents and employees of the railroad company (as found by the court), the same liability would attach to the railroad company as was found in the case.

Counsel for the Society presents *Haggerty v. Ry. Co.*, 100 Mo. App. 426. This case presents the same situation as the Phillips case, namely, the issue involved was agency or the application of the rule of respondeat superior. It was shown that the relief organization brought into the case was a department of the defendant railroad company. Hence, the character of this organization was in no wise decisive of the issue in the case.

In addition to reviewing all of the Missouri cases cited us by counsel for the Society, we have also read with interest all of the out-state authorities presented in the brief on this point; and it appears to us that there is enough difference between the facts shown in these several out-state cases and the instant case, coupled either with some difference in legal issues involved, or purpose of corporate organization, as to throw doubt as to their applicability here.

Two Federal cases have been shown which are of interest here, one by the Society, namely, *St. Louis Southwestern Ry. Co. v. Yates*, 23 F. (2d) 283, and one by the Hospital, namely, *Union Pacific R. R. Co. v. Artist*, 60 F. 365. Both cases concern a hospital setup and both setups are strikingly similar to the hospital setup here involved. However, if we were forced to choose between one or the other, as sustaining authority for or against the point here discussed, we believe the last mentioned case would prevail, because in the first one the question involved was tax exemption of the hospital, and, as well known, the law is strictly construed against tax exemption. The second case concerned the question of liability of the hospital for personal injury. Hence, we believe the second case is more apposite as an authority in the instant case, as supporting the Hospital's contention.

The opposing contention on the part of counsel for the Hospital is that, while not conceding that the Hospital is not a charitable institution, they emphatically contend that, without question, it is a benevolent institution. Counsel thus draw a distinction between an institution which is charitable and one which is benevolent. There appears to be respectful authority sustaining this view.

In *State ex rel. v. Lesueur*, 99 Mo. 1. c. 558-559, the court in discussing the provisions of the Constitution involved herein, said:

"And it is to be observed in the first place, that the constitution uses the words 'for benevolent, religious, scientific and educational purposes,' in a broad and comprehensive sense. The corporations thus exempted from the payment of the tax are, to a certain extent, mentioned in contradistinction to such as are organized for pecuniary profit.

" * * * Some degree of liberality must be allowed in the formation of those associations where all pecuniary profit is excluded."

In the case of *Westerman v. Supreme Lodge K. of P.*, 196 Mo. 1. c. 701, the court in speaking of a fraternal beneficiary association, said:

"It is only essential to constitute the defendant a fraternal beneficiary association that it be organized for the benefit of its members, and not for gain or profit."

7 C. J., page 1140-1141, says as follows:

"Since the context may qualify or restrict the ordinary meaning of the term 'benevolent,' the word is frequently used as synonymous with 'charitable;' but this is not necessarily so, 'benevolent' being, it seems, a word of somewhat broader, larger, and wider meaning than 'charitable.' In other words, charity may be benevolence, but all benevolence is not necessarily charity."

Hence, it would seem that our Missouri courts give a broad and liberal construction to the term "benevolent," especially so when a fraternal beneficiary association is classed as a benevolent organization. The likeness between a fraternal-benefit association and the hospital is more or less striking in that both exact dues or assessments from its membership in order to dispense the benefits respectively provided for. Both operate without profit. The only difference, if there be one, is that the one organization incidentally dispenses social benefits to its members, while the other dispenses medical benefits to the sick and injured.

As heretofore stated, the Hospital does not concede that it is not a charitable institution within the legal meaning of the term.

In reviewing the case of *Nicholas v. Evangelical Deaconess Home*, 281 Mo. 182, which involves a suit by a patient against the aforesaid Home, the salient features of the setup of the Home, held by the court to be a charitable institution, bear a marked similarity to the salient features of the setup of the Hospital here, as will appear by the following:

The Home.

- (a) Object. To nurse the sick and care for the poor and aged.
- (b) Membership. Every Protestant Christian of a certain belief.
- (c) Dues. Members required to pay at least \$2.00 annually.
- (d) Substantially all of the annual revenue necessary to support the Home was received from pay patients.
- (e) Control of the Home vested in twelve persons.
- (f) A non-stock, non-profit corporation.

The Hospital.

- (a) Object. The medical and surgical care of members, with an allowance for burial expenses of the poor or indigent members.
- (b) Membership. All persons who are, or shall become, employees of certain railroads.
- (c) Dues. Members required to pay annually amounts proportional to wages.
- (d) All the revenue necessary to support the Hospital was received from dues of members.
- (e) Control of the Hospital vested in nineteen persons.
- (f) A non-stock, non-profit corporation.

Practically speaking, we can see but little, if any, difference in the respective setups of the two institutions so far as actual charity is concerned. If the revenue figures of the Home for 1914 are a fair average of the annual operation, it would appear that the pay patients (leaving out of consideration what additional amount was received from membership dues) all but paid the way of whatever indigent patients were treated.

On the other hand, there may be as much practical charity on the part of the Hospital in treating the employees, mentioned in Section 4, Article 4, of its By-laws, free, and in the allowance provided for burial of indigent employees.

However, legally speaking, there may be some difference between the two institutions from the charity standpoint, but until so pointed out to us, a substantial doubt exists as to any difference.

After consideration of the issue as to whether the Hospital is a charitable or benevolent institution, or whether it is neither, we believe (without passing on such issue) the solution as to whether or not quo warranto would likely be sustained against the Hospital on the point now being discussed, resolves itself into the question, would the proceeding be timely?

The Hospital has existed as a corporation for substantially the past twenty years, conducting its operations, including a regular paid medical staff, in the same way throughout this period. We take it, from more or less common knowledge, that the St. Louis Medical Society has existed as such for a much longer period. In any event, there must be members of the present Society who have been practitioners for more than twenty years, and who, as individuals, or a collection thereof, could have long ago made the same complaint against the Hospital as is now being made.

That the time element can play an important and decisive part in the court's action in quo warranto proceedings is shown by the following cases:

In State ex rel. v. Town of Westport, 116 Mo. 1. c. 595, the court said:

"If there is to be no limit to such proceeding and if at any period of time, however remote from the time of the organization of a municipality, a proceeding by quo warranto can be resorted to, and such municipality and its officers ousted of their franchises, because of irregularity in its organization, it would effectually destroy the credit of municipalities generally, to such an extent as to render it impossible to grade and improve their streets, or to construct any kind of improvements promotive of the health, welfare and convenience of their inhabitants, and issue bonds or tax bills in payment thereof."

In State ex inf. Attorney-General v. School District, 314 Mo. 1. c. 329, the court said:

"That aptly applies to the situation here. Here, there was acquiescence in the status quo for four years. The relator brought suit attacking the validity of the change and only questioned it after four years and after his failure to get his taxes reduced by other proceedings. He brought his first proceeding after four years and he brought this one, the only legal proceeding, in eight years. All the time his reason was, not on account of poor schools or bad management or to accomplish better school facilities, but merely to escape higher taxes."

Again at page 331:

"In case of State ex inf. v. Arkansas Lumber Company, 260 Mo. l. c. 284, after quoting the Statute of Limitations, this court said at page 284: 'There have been cases adjudged in which the rights of towns and villages to exercise their corporate franchises were brought in question by informations in the nature of quo warranto. It has been held upon the doctrine of laches, however, that the right to investigate such matters is sometimes barred without regard to the Statute of Limitations.'"

And again at page 332:

"The granting of a writ of quo warranto is a matter of discretion. The court will not grant it unless some good purpose can be served by it. (State ex rel. v. Cupples, 283 Mo. l. c. 145.) The quotation above from the language of Judge Goode in the Mansfield case aptly fits this case. Unless some equity in favor of the State is shown, its laches ought to preclude it from attempting to cancel the proceeding by which the School District of Lathrop was extended and cause the injurious results which would follow from the disorganization of that district. * * * * Thus without any evidence that the school conditions

would be improved, but with a situation which suggests that they would be impaired, with no complaint from any one who had school children or is interested in any school, this court should exercise its discretion and deny the relief sought."

A number of other Missouri cases, both before and since, in point of time, could be cited, but we believe that the foregoing cases will suffice to show the legal principle which could be applied to the instant case.

Furthermore, another question that asserts itself here in addition to that of laches, and as a companion question, is, that while a writ of quo warranto will issue at the instance of the Attorney General as a matter of course, yet the granting of the writ is a matter of discretion and the court will not grant it unless some good purpose can be served by it.

In the case of State ex rel. v. Cupples Station L. H. & P. Co., 238 Mo. 1. c. 146, the court quotes with approval from Judge Goode in State ex rel. v. Town of Mansfield, 99 Mo. App. 146, 1. c. 152, as follows:

"That the court may exercise a considerable latitude of discretion both as to whether it will grant a rule upon the defendant to show cause, where the proceeding is instituted in that way, and as to whether there has been sufficient abuse of franchises by a corporation to warrant their forfeiture, there can be no doubt upon the authorities. But so many relations, public and private, are involved in a forfeiture at suit of the State, and each case involves so many considerations peculiar to itself, that no definite general rules can be stated to guide courts and practitioners. It must be borne in mind that specific facts which have been held sufficient to warrant a judgment of forfeiture in one or several adjudged cases may be so modified by extraneous facts in another case as to

deprive the former of value as guides to a correct decision. The most important if not the only interest to be served is that of the public. If that is kept constantly in view, but little difficulty should be encountered. Especially do these observations apply in cases where the proceedings are based upon mis-user or non-user of franchises. It may be considered well settled that not every mis-user which may be detected will justify a forfeiture, but only those which constitute a prejudice to some public interest, or which, being persisted in, will involve the safety, welfare, or security of the community. * * *

"Since the public good is the element chiefly to be considered, we are persuaded that, under the facts in this case, we ought in the exercise of a sound discretion to decline to oust respondent from the overhead district."

See, also, State v. Ellis, 329 Mo. 1. c. 129.

In view of the fact that this Hospital, as well as all hospitals, administer to and treat the sick and injured, and in most cases return the individuals to society in reasonably good physical condition, bespeaks for a hospital a work of public benefit. Public health is public wealth. The public health is of such paramount concern to the public interest that both the national and state governments maintain departments of public health. It would seem to us that every city, town, or community would welcome as many hospitals located therein as could efficiently maintain themselves. Manifestly, in view of all that is said and done in furtherance of public health, the Hospital in question, or any hospital, if reputable and operating efficiently, could not be subversive of the public interests or work any harm or injury to society or such interests.

We comment here on the fact that the Hospital has an outstanding bonded indebtedness as of January 1, 1937, of substantially \$90,000.00, carried by the individual members of the Hospital. Consequently, to oust this institution by quo

warranto, if the result be to destroy its operations as a hospital, would, in our opinion, be not only against public interest, but would visit upon that part of the public, namely, those of it who are members of the Hospital holding the indebtedness of the institution, a particular or additional injury, because, if this, or any hospital, should be forced to shut down and cease operation, the value of the buildings and equipment would compare in value with that of the proverbial "white elephant". On the other hand, if the Hospital could be deprived of its corporate charter, and if it would then be possible to continue its operations as at present, including its employment of its own doctors, as a voluntary association, then nothing would be accomplished by quo warranto in gaining the one result sought by the Society.

Hence, in its final analysis, and even though its character as to being a charitable or benevolent institution be resolved, for argument, against the Hospital, yet we believe the court in passing upon the writ, if issued, would decide that the remedy to be applied to achieve the cure desired would be too drastic; and hence we further believe that the result of a quo warranto proceedings would be unsuccessful so far as invalid incorporation is concerned.

II.

IS THE HOSPITAL ENGAGED IN THE CORPORATE PRACTICE OF MEDICINE?

This question has been directly answered by the St. Louis Court of Appeals in the case of State ex inf. v. Lewin, 128 Mo. App. 149, wherein it is shown that quo warranto proceedings were instituted against Lewin Hernia Cure Company, a corporation, charging that such corporation was exercising the right and privilege of engaging in the practice of medicine. The judgment was against the State and the court in ruling on the case, said, page 155:

"In all the larger cities, and connected with most of the medical colleges in the country, hospitals are maintained by private corporations, incorporated for the purpose of furnishing medical and

surgical treatment to the sick and wounded. These corporations do not practice medicine but they receive patients and employ physicians and surgeons to give them treatment. No one has ever charged that these corporations were practicing medicine. The respondents are chartered to do, in the main, what these hospitals are doing every day, that is, contracting with persons for medical treatment and contracting with physicians to furnish treatment, and the fact that Dr. W. A. Lewin is the principal stockholder and the manager of respondent corporation, and is employed by it to furnish medical and surgical treatment to patients who may contract with it for such treatment does not alter the legal status of the corporation or show it has violated the terms of its charter."

It seems to us that the Lewin case is controlling as it passes upon the precise point here involved, namely, the right of the Hospital to furnish medical and surgical treatment or care for diseased and injured patients. While the language used in the charter of the Hospital in stating its object or purpose may not be identical with the language so used in the charter of the Lewin corporation, yet, in substance and effect, we believe it to be the same. In any event, the Hospital, in carrying out its purpose, is, in point of fact, furnishing doctors to treat the sick and injured, the same as done in the Lewin case.

We say the Lewin case is controlling because the St. Louis Court of Appeals is a court of last resort when acting within its jurisdiction. (See State v. Trimble, 271 S. W. 1. c. 46.) However, if anything more be needed with respect to the ruling in the Lewin case, it has the stamp of approval of the Supreme Court as shown in the case of State v. Gate City Optical Co., 97 S. W. (2d) 1. c. 92, 93, wherein the court said:

"The case of State ex inf. v. Lewin et al., 128 Mo. App. 149, 106 S. W. 581, 582, furnishes an apposite application of that rule and another. That was a proceeding by quo warranto to oust a medical corporation from engaging in the practice of medicine and surgery. The charter of the company contained this language: 'The company is formed for the purpose of furnishing treatment for hernia and medical and surgical treatment for all other diseases, accidents and deformities.' Respondent Levin, a duly licensed physician, entered into contract with the company as manager thereof 'and during that time to personally treat all persons who employed said company to furnish treatment for the cure of hernia,' etc.' The interpretation of the quoted charter power turned on the meaning to be ascribed to the word 'furnish.' The court said that if the meaning be taken to be 'to give,' then the charter conferred the power on the corporation to practice medicine and was void. The court applied the rule of construction, that where a grant from the state is susceptible of two constructions, one of which would render the grant void and the other make it legal and enforceable, the latter should be adopted, for the state should not, in the making of contracts, be convicted of doing a void and useless thing. Accordingly, the court construed 'furnish' to mean 'supply,' and further said: 'The corporation is not restrained by its charter from entering into contracts with persons to supply medical treatment, nor from entering into contracts with physicians to render medical and surgical services, and has, in this respect, the same right to contract as a private individual (citing the King case, supra)' and the exercise thereof in the manner stated 'does not alter the legal status of the corporation, or show it has violated the terms of its charter.'

* * * * *

"The elucidations contained in the cases reviewed herein, and particularly as contained in State ex inf. v. Lewin et al., State v. Knapp, Jaeckle v. L. Bamberger & Co., and in the dissenting opinion in Eisensmith v. Buhl Optical Co., are clear, rational, logical, and convincing. The common result reached properly exemplifies the public policy of our state, and renders further discussion unnecessary."

Counsel for the Society say with respect to the Lewin case that,

"This decision was handed down many years ago, and at that time there was not present the urgent necessity of guarding the standards and roster of the professions which has made itself felt today."

Be that as it may, the Lewin case still stands today as the law of this state on the precise question before us.

Counsel again say that the Gate City case has no application here because it held (so counsel say) that it was considering a field of practice which was not a learned profession. In our review of the case we do not find that the court ruled on such point, but merely comments on the fact that there appears from out-state authority to be two lines of decisions, one line holding that optometry is a learned profession, and the other line that it is not. But whether or not the case so ruled on such point is immaterial here in view of the fact that it has not overruled the Lewin case on the precise question here involved.

Counsel for the Society further urge upon us as supporting authority for their contention, despite the Lewin case, the cases of State v. St. Louis Union Trust Co., 335 Mo. 845, and State v. C. S. Dudley & Co., (Sup. Ct.) 102 S. W. (2d) 895. The first notable difference between the last mentioned cases and the Lewin case (as ruled by the Court of Appeals and approved by the Supreme Court) is that the rulings in the Trust Company and Dudley cases are confined

to one class only of the so-called learned professions, namely, lawyers, and not doctors. Of course, it might be claimed that the rulings in the Trust Company and Dudley Company cases ought to be applied to, and overrule the Lewin case, but our Supreme Court has not seen fit so to do. In fact, the Supreme Court en banc, two years after the divisional opinion in the Trust Company case, and on the eve of the divisional opinion in the Dudley case, specifically ruled, by expressly approving the Lewin case, that a corporation could furnish doctors to treat the sick and injured.

Again, the Trust Company and Dudley Company were profit-making corporations, organized for the purpose of making, and hence must make, profits for stockholders. Consequently, there could be a motive for the lawyers employed by such profit-making corporations to act in its interest rather than in the interests of the patron whom the lawyer was supposed to act for and protect. Hence, such relationship between the lawyer and corporation, under such circumstances, was adjudged to be injurious to the public interest.

But in the case of a non-profit corporation, such as the Hospital here, there could be no motive for the Hospital doctor to act any differently towards his patient in the hospital than in the case of treatment by him of a non-member patient outside the hospital. It would seem far-fetched to say that the treatment of a patient in the hospital here, or in any other reputable hospital, by a reputable and skilled physician, could harm the patient, or the public interest, merely by reason of the doctor receiving a fixed salary from the hospital. Hence, the Trust Company and Dudley cases are not apposite by reason of the fact that the basis for the decisions in the Trust Company and Dudley cases, namely, harm to the public interest, is not shown to be the fact in the Lewin case, and, we believe, could not be shown to exist under the circumstances in the case of the Hospital.

After all is said and done, it seems logical to us that if the operation of the Hospital itself, and the furnishing of its own medical staff, paid upon a fixed salary basis,

was in fact harmful to the public interests, some member of the Hospital, or past or prospective patient thereof, would undoubtedly be the ones more concerned in making, or joining in making, the complaint here lodged. Or, next in line, some one or more of the lay public, to whom no other motive than an altruistic one could be ascribed, would do likewise. On the other hand, so far as we are informed, the complaint is solely made by some or all of the members of the Society. Its counsel with commendable frankness states the purpose of the complaint in the following language:

"What we are trying to accomplish in these proceedings is to curtail the salary staff at the hospital to a point where it can only take care of the emergencies, make a schedule of fees such that private practitioners can work under, and give free choice of physicians to both the in and out patients at the hospital."

It does not appear from the above stated purpose, either by express words or by inference, that harm, if any, to the public interests were in any wise considered or involved. We believe a fair inference to be concluded from the purpose stated is that of loss of fees or compensation only to those members of the Society who might procure employment from among the patients of the Hospital.

We believe counsel desire us to be frank. But whether or no, we must be frank with ourselves, and in view of all the facts and circumstances hereinabove set forth, together with the authorities cited, we are impelled to the conclusion that a court, in exercising its discretion in the matter, would deny ouster in this case.

It would seem to us that the remedy for the complaint by the Society might be brought about with much more likelihood of success by action within the ranks of the physicians themselves or by legislative relief.

We cannot let pass unnoticed the sincere, frank and able manner in which counsel for the Society have presented their views to us, and as well on the part of counsel for the Hospital, all of which has been sincerely appreciated, and which also has been most helpful to us in resolving and reaching the conclusion that quo warranto proceedings in this matter would not bring a successful result.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWB:HR

NATIONAL GUARD:
MILITARY COUNCIL:
MEDALS:

Awards and medals may be granted
only to those prescribed in Laws
of Missouri, 1931, page 262.

May 3, 1938

5-6

Honorable Lewis M. Means,
Adjutant General,
Jefferson City, Missouri.



Dear Sir:

This is in reply to yours of the 28th of April, 1938,
requesting an official opinion from this department based
upon the following letter:

"On May 21, 1931, the Missouri Legislature enacted certain legislation authorizing the Governor under certain conditions to award medals; first, for conspicuous service; second, for meritorious military service; and third, for long service. In the years since this enactment medals of each nature have been awarded.

On January 21, 1938, the Military Council, Missouri National Guard, voted and authorized the Military Council to provide a suitable medal which should be awarded by them to certain officers for faithful and efficient service over a long period of years.

An opinion is desired, in view of the fact that formerly a legislative enactment was made authorizing the award of certain medals, whether or not under the Missouri law the Military Council has the authority to present a medal for faithful and efficient service over a long period of years."

The Military Council of Missouri was created by virtue of the provisions of Section 13824, R.S. Mo. 1929, which is as follows:

"There shall be a military council, to consist of the commanding general of the national guard, the adjutant-general of the state, the colonels commanding regiments of the national guard and the colonels of organized regiments of the reserve military forces of the state. The commanding general shall be the president of the council, which council, except as herein otherwise provided, shall sustain the same relation to the military forces of the state and the governor as the general staff of the army sustains to the United States army and the president. The military council shall formulate plans for the organization, instruction, equipment and maintenance of the military forces of the state, provide for encampment and all other field and armory instruction and make allotments of funds and supplies appropriated or furnished for the support, equipment and maintenance of the military forces of the state. All appropriations made for military purposes shall be apportioned and expended by the council. Vouchers and accounts covering the expenditure of funds and appropriations for the support of such forces shall be audited and paid only when fully itemized, certified and approved by the executive officer of the council. Such council shall meet quarterly at such time and place as the members shall designate. Special meetings may be called by the governor or the president of the council. A majority of the members of the council on

duty within the state shall constitute a quorum for the transaction of its business. The council shall elect an executive officer, who shall keep full and detailed records of its proceedings, allotments and expenditures, and a statement of vouchers and accounts audited and approved shall be furnished each member quarterly. The salary of the executive officer shall be fixed by the council, to be paid from funds appropriated for the support of the military forces of the state, and such salary shall be in addition to any other compensation received by such officer from either the state or federal government."

The powers and duties of the Military Council are set out in the foregoing section. In addition to the powers and duties of the Military Council as set out in said Section 13824, supra, the lawmakers, by virtue of the provisions of an act of the legislature found at page 262, Laws of Missouri, 1931, have authorized the Military Council and governor to award certain badges and medals for military service to those who are qualified. Section one, page 262, Laws of Missouri, 1931, of said act provides as follows:

"The governor is hereby authorized to present, in the name of the state of Missouri, a conspicuous service medal, which shall be of suitable design, as may be determined by the governor, to individuals designated by him who have done and performed distinguished and conspicuous service or services which reflect honorably and creditably upon the state of Missouri."

Section two of said act provides in part as follows:

"The governor is hereby authorized, upon recommendation of the military council of the Missouri National Guard, to present, in the name of the State of Missouri, a meritorious service medal, which shall be of suitable design, as may be determined by the governor to individuals who have done and performed valorous or meritorious military service which reflects honorably and creditably upon the state of Missouri."* * * * *

Section three of said act provides in part as follows:

"Any person who is now or may hereafter become a member of the Missouri National Guard, and who has served at least ten years as such, may be designated by the adjutant general of Missouri, with the approval of the governor, as entitled to a medal for long and faithful service to be known as a 'long-service medal,' provided such service need not be continuous and service rendered in any of the military forces of the United States as a result of or in connection with membership in the Missouri National Guard shall be considered a part of such service."* * * * *

Medals awarded under this act are awarded in the name of the State of Missouri.

In our research on this question we fail to find wherein the lawmakers have by any other act authorized the award of any other military badges.

The Military Council has only such powers and duties as are conferred upon it by the statutes.

Volume 59 Corpus Juris, page 111, Section 118, provides in part as follows:

"* * * Generally speaking, state officers, boards, commissions, and departments have such powers as may have been delegated to them by express constitutional and statutory provisions, or as may properly be implied from the nature of the particular duties imposed upon them. But executive and administrative officers, boards, departments, and commissions have no powers beyond those granted by express provision or necessary implication."

In the case of the State of Missouri v. The Bank of the State of Missouri, 45 Mo. 529, the Court held:

"The agency being conferred by statute and growing out of it, must be ascertained from the statute, and cannot be varied or enlarged."

The powers and duties of the Military Council being conferred by statute cannot be varied or enlarged.

From a reading of chapter 33 of Title 10, U.S.C.A. on the awarding of military decorations and badges to those in the regular army, it is very evident that congress has reserved to itself the power to designate those to whom medals and other badges may be awarded and those who shall award such medals and badges.

The legislature of Missouri has the same relation to the national guard and its officers as does the national congress to the regular army, and from a reading of the statutes on this subject, it is evident that the legislature has intended to reserve to itself all such authority except what it has designated by the statute.

Hon. Lewis M. Means

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May 3, 1938

CONCLUSION

From the foregoing, this office is of the opinion that the Military Council of Missouri is without authority to present medals in the name of the State of Missouri to certain officers for faithful and efficient service over a long period of years.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

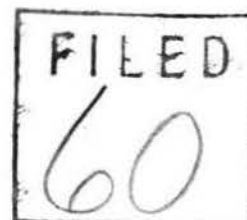
J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SOLDIERS' BONUS - S.A.T.C. (Student Army Training Corps) not
disqualified from receiving Missouri State
Soldiers' Bonus.

June 15, 1938

Honorable Lewis M. Means
The Adjutant General
Jefferson City, Missouri



Dear General:

You have asked the Attorney General's opinion on
the following question:

"Are the Members of the Student Army
Training Corps, who were enlisted
during the period of the World War,
that is, between April, 1917 and
November, 1918 entitled to receive
the State Bonus under the two con-
stitutional amendments authorizing
issuance and sale of Nineteen Mil-
lion and Six Hundred Thousand Dol-
lars of Missouri State Bonds, adopted
by vote of the People in 1921 and
1924 respectively for the purpose
of paying to each bona fide resident
of the State of Missouri, who served
honorably in the military or naval
forces of the United States between
the sixth of April, 1917, and the
eleventh of November, 1918, a Bonus?"

The training of enrollees in the Student Army Train-
ing Corps was undertaken pursuant to authority conferred by
Sections 1, 2, 8 and 9 of the Selective Service law ap-
proved May 18, 1917 (40 Stat. L, Pt. 1, p. 76.)

We do not quote the provisions of the Selective
Service law, but note that said Federal law and the General
Orders and Bulletins of the War Department pursuant thereto
obligated enrollees in the Student Army Training Corps (S.A.T.C.)
to perform the identical and same military duties required
of any soldier of the World War, and for said military ser-

vice they were enlisted and discharged as any other United States soldier of the World War, and with the same ceremony. At the conclusion of their service, their discharge showed whether their army service was honorable or dishonorable, based upon their service record.

Article IV, Section 44b of the Missouri Constitution provides a Missouri soldiers' bonus as follows:

" ** the General Assembly shall have power, for the purpose of paying to each bona fide resident of the State of Missouri who served honorably in the military or naval forces of the United States of America at any time between the sixth day of April, nineteen hundred and seventeen, and the eleventh day of November, nineteen hundred and eighteen, a bonus of ten dollars for each and every month or major fraction of a month, that such resident was in active service, *** The Legislature shall enact such laws as may be necessary to carry into effect this amendment. *** "

Student Army Training Corps soldiers are not mentioned in the constitutional provision. The legislative act carrying into effect the constitution on Missouri Soldiers' Bonus, is found at pages 7 and 8, Missouri Laws, 2d Special Session 1921. Section 1 of said legislative act follows closely the language of the constitution, and reads as follows:

"Each person, hereinafter called the 'soldier', who was a bona fide resident of the State of Missouri at least during the twelve months just prior to the 6th day of April, 1917, and who served honorably in the military or naval forces of the United States, including army nurses, at any time between the 6th day of April, 1917, and the 11th day of November, 1918, shall be entitled to receive from the State of

Missouri, out of funds created by this act, as a bonus, the sum of ten dollars per month for each month or major fraction of a month that such soldier was in active service: ** "

Section 2 of said legislative act reads as follows:

" ** Provided, that the word 'soldier' shall not be construed to mean or include persons who served as students in school or college training corps, who, in addition to military training, received some general educational instruction, unless such person shall have also had service of other character in the military or naval service of the United States, and then the time so spent as students in such school or college training corps shall be counted in computing service under this act: *** "

CONCLUSION.

The people intended and voted a bonus to those soldiers who served honorably, as shown by the constitutional amendment above quoted, and it was not within the constitutional power of the Legislature to eliminate Student Army Training Corps soldiers as beneficiaries of the Missouri soldiers' bonus by defining the word "soldier", thereby excluding them from constitutional benefits. That portion of the legislative act quoted from Section 2, supra, which purports to exclude Student Army Training Corps soldiers from the benefits of a Missouri Soldiers' Bonus, this department believes to be unconstitutional and of no force and effect.

In Section 1, supra, the Legislature followed the exact language of the Constitution, and gave to every

Hon. Lewis M. Means

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June 15, 1938

person who served honorable in the military or naval forces of the United States, a bonus. The bonus was for honorable service in military and naval forces of the United States and should not be defeated by any legislative definition of the word "soldier."

It is the opinion of this office that Missouri boys who served honorably in the Student Army Training Corps, as shown by their army discharge, and who are otherwise qualified to receive the constitutional soldiers' bonus, are not disqualified by reason of the fact that they served as soldiers in the Student Army Training Corps. These claims should be paid as any other soldier's claim is paid. The people by the constitutional amendment so intended.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

ARMORY: Missouri National Guard may spend armory appropriation on 99-year lease.

July 16, 1938

7-16



Honorable Lewis M. Means
The Adjutant General
Jefferson City, Missouri

Dear General Means:

We acknowledge your request for an opinion dated June 24, 1938, which request reads as follows:

"In regard to an armory site at Caruthersville, Missouri, a desirable site has been located in that city for the building of an armory; however, this land belongs to the St. Louis-San Francisco Railroad Company, and the only method in which it could be utilized in the building of an armory is on the basis of a 99-year lease, to the State of Missouri, for the use and benefit of the National Guard of Missouri as an Armory.

"An opinion is requested whether or not State money may be expended for the building of an Armory on this basis."

In our opinion addressed to you on January 4, 1938, this department held that it was legal for the State of Missouri to accept the gift of an easement on land from a municipality for the use and benefit of the Missouri National Guard as an Armory, so long as the gift, with its terms, limitations and conditions, be approved by the State Board of Education, as provided in

Laws Mo. 1933, page 252, Section 643. Said section reads as follows:

"Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real, personal or mixed, shall be made or offered to be made to this State, the State Board of Education, as constituted by law, shall be and are hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor, or assignor of said property and said officials constituting said Board, so that the right and title to shall pass to and vest in this State; and all such property so vested in this state and the proceeds thereof when collected, may be appropriated for educational purposes, or for such other purposes as the legislature may direct. The intention of this act is to abolish the commission heretofore created to accept devises, bequests, donations, gifts or assignments of money, bonds or choses in action, or of any property, real, personal or mixed, and to transfer such duties to the state board of education."

In the above law, we see that the State Board of Education has the power to accept the gift of personal property with its terms, limitations and conditions, and by the logic of the aforementioned opinion, we believe this gift of a 99-year lease may be legally made and accepted by the State Board of Education. A 99-year lease is nothing more than personal property (Chattel Real), coming within the purview of the Laws Mo. 1933, supra.

Article XIII, Section 7, Missouri Constitution, provides:

"The General Assembly shall provide for the safe-keeping of the public arms, military records, banners and relics of the State."

5 C. J., page 286, defines "armory" as follows:

"A place where arms and instruments of war are kept."

Section 13874, R. S. Mo. 1929, provides:

"Every organization of the national guard of Missouri shall be provided by the state with such arms, uniforms and equipments, camp and garrison equipage as may be necessary for the proper training and instruction of the force and for the proper performance of duty required by this chapter."

Section 13875, R. S. Mo. 1929, provides in part:

"Every arm, uniform or equipment supplied by or through the state under the provisions of this chapter, or in the fabrication of which the state has furnished a part, shall continue to remain the property of the state. *** "

In Laws Mo. 1937, page 108, Section 36, we find that the Legislature appropriated \$100,000 to the Missouri National Guard for use in conjunction with funds furnished by the Federal Government or by municipalities or from

Hon. Lewis M. Means

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other sources, in the building of the State owned armories, at points to be selected by the military council and approved by the Governor.

CONCLUSION

This department is of the opinion that where the State is the legal holder of a 99-year lease for the use and benefit of the Missouri National Guard as an armory, then the above cited appropriation may be expended on said leased land, for the building of an armory, if said site be selected by the military council and approved by the Governor.

The Constitution of Missouri makes it a duty of the Legislature to provide for the safekeeping of the public arms, and an armory is a place where public arms are kept. These public arms are the property of the public of Missouri, and the Missouri National Guard is authorized by Section 13874, supra, to provide camp and garrison equipage as may be necessary to preserve the military property of this State. An armory is reasonably a place of preservation of arms, uniforms and equipments when not in actual use, and it is for this purpose that the Legislature appropriated the \$100,000, supra.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE

SOLDIERS' BONUS: Residence for twelve months prior to April 6, 1917, should predicate all claims for Missouri bonuses.

December 1, 1938



Hon. Lewis M. Means
Adjutant General
Jefferson City, Missouri

Dear General:

We acknowledge your request for an opinion dated October 24, 1938, which reads as follows:

"Re: Kirkpatrick, Everett L.
Claim No. 154,780

"The above named World War veteran was divorced prior to entering service, but had two children by his first marriage. The veteran remarried and was later killed in service. His second wife then remarried in 1919, but is, at the present time, living. The children of this veteran, by his first wife, are now applying for his Missouri Soldiers' Bonus.

"Are these children the proper claimants under the Bonus Law? If not, who would the proper claimant be?"

Article IV, Section 44B of the Missouri Constitution provides the order of payment of Missouri Soldiers' Bonus as follows:

"* * * * The wife or husband, child, mother or father, in the order named and none other, of any deceased resident who served honorably in the military or naval forces, as provided in this section, shall be paid the sum or allowance that such deceased resident would be entitled to receive hereunder if such deceased resident had lived; * * * * and provided further that

December 1, 1938

no person shall be entitled to receive the bonus herein provided who was not a bona fide resident of the State of Missouri at least twelve months prior to the sixth day of April, nineteen hundred and seventeen, or who has received a state bonus from another state in the Union."

CONCLUSION

Under the facts submitted, we are of the opinion that the second wife of the deceased veteran is entitled to the Soldiers' Bonus under the Missouri Constitution if she can qualify as a resident of the State of Missouri during the twelve months prior to April 6, 1917.

If the second wife be disqualified on account of non-residence during that time, then the children of the deceased veteran are next entitled to the bonus of their father if they can qualify as the children of the deceased resident soldier, and prove themselves residents of the State of Missouri twelve months prior to April 6, 1917.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED By:

J. E. TAYLOR
(Acting) Attorney General

WOS:VAL

NEPOTISM: Under the Civil Rule, the degree of relationship of a third cousin is not such as is prohibited by Section 13, Article XIV, Const. of Missouri.

December 3, 1938



Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

This Department is in receipt of your letter of November 30th, in which you request an opinion based on the following facts:

"Mr. W. E. Hankins was elected Probate Judge November 8. He is a first cousin of W. S. Hankins who is the grandparents of Elaine Dodson. She is the present clerk of the Probate Court under Judge D. B. Meador.

"She is very efficient and has made an excellent clerk, however, that office in our county does not provide a salary for the clerk, it is just paid by the probate judge out of his own salary.

"I would like to know what is her relation to W. E. Hankins and can she serve as clerk under Judge Hankins who was elected Probate Judge at the November Term of Court or will the nepotism law prevent her from serving?"

Probate Judge elect, Mr. Hankins, being a first cousin of W. S. Hankins, the Grandfather of Elaine Dodson, if we are correct in determining blood relationship,

is a third cousin of the said Elaine Dodson.

Section 13 of Article XIV, Missouri Constitution, provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The question arises as to whether or not the clause, "or appoint to such service any relative within the fourth degree," would prevent Elaine Dodson from serving as Clerk of the Probate Court by appointment by W. E. Hankins, the parties being related to each other as third cousins.

There appear to be two methods of computing the degrees of relationship: One, the Cannon Law; the other by the Civil Law. We are enclosing an opinion rendered by this Department on October 31, 1933, to Miss Marjorie Neff Hoy, Superintendent of Schools, Marshall, Missouri, in which the rules are explained. You will note that it was the conclusion of this Department that we determined that the Civil rule should be applied to the Nepotism Act in the State of Missouri. Under the Civil rule the prohibited relationship does not extend below first cousins.

Hon. Emory C. Medlin

-3-

Dec. 3, 1938

Miss Dodson, being a third cousin to Mr. Hankins, who has the appointive power, we are of the opinion that the degree of relationship is not such as is prohibited by Section 13, Article XIV, supra.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG
Enc.

OFFICERS:
MUNICIPAL CORPORATIONS:
DE FACTO AND DE JURE
OFFICERS:
ACTS OF:

The official acts of municipal officers
whether they are acting as de jure or
de facto officers have the same force
and effect upon the third persons
and the public.

May 19, 1938

5-73



Mr. L. E. Merrill,
City Attorney,
Brunswick, Missouri.

Dear Sir:

This is in reply to yours of May 14, 1938, requesting an official opinion from this department based upon the following letter:

"In accordance with our conversation with Mr. Taylor, we are requesting a ruling on the following matter, pertaining to a City of the Fourth Class.

If a majority of the Board of Aldermen, at the time of their election, were indebted to the city for delinquent city taxes, but filed their oaths of office, were declared elected by the Board and assumed and carried on the duties of the office in the usual manner, were the acts of the Board in making orders, adopting resolutions and passing ordinances (including tax ordinances) a nullity, or could such ordinances be enforced on the theory that the aldermen were de facto officers?

If an alderman, who had served for several terms, was at the time of his first election, qualified with respect to the payment of taxes, but at successive elections was

disqualified in this respect, is he such an officer of the city as a hold over, that his acts would be valid?

We would appreciate very much your opinion on these matters."

The qualifications of a member of the board of aldermen of a city of fourth class are set out in the following sections: Section 6964, R.S. Mo. 1929 provides as follows:

"No person shall be an alderman unless he be at least twenty-one years of age, a citizen of the United States, and an inhabitant and resident of the city for one year next preceding his election, and a resident of the ward from which he is elected. Whenever there shall be a tie in the election of aldermen, the matter shall be determined by the board of aldermen; so, also, in case the election of an alderman be contested."

And Section 6969 R.S. Mo. 1929 provides as follows:

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and Constitution of this state and the ordinances of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office, or who is not a resident of the city."

The above qualifications are necessary before a person can legally be elected to and qualify for the office of an alderman of a city of fourth class, that is, before

he can become an officer de jure. If such person is elected without such qualifications and he assumes the duties of the office of alderman, then he is acting as a de facto officer.

In the case of *In re Oak Street; Kansas City v. McTernan*, 308 Mo. 1.c. 508, the court said:

"At the time of the passage of the Oak Street Ordinance the Lower House of the Common Council of Kansas City consisted of sixteen members. When the ordinance was voted upon it received a majority of one. One of those who voted for it was Harry Sandler who had previously moved from the ward in which he had been elected. Section 3, Article II, of the Charter provides that 'if, after his election he (a member of the Lower House) shall move from such ward, his office shall thereby be vacated.' The record shows that Sandler continued to attend the meetings of the Council and to participate officially in its proceedings, including the passage of the ordinance in question, for a long period of time after his removal from the ward from which he had been elected. The fact of his removal, however, was not at the time known to the other city officials, or to the public generally. Under the circumstances he was a de facto alderman, and for reasons of public policy his actions as such must be deemed valid and binding."

In the case of *Perkins v. Fielding*, 119 Mo. on the question of de facto officers, at 1.c. 159 the court said:

"Chief Justice Butler in the celebrated case of State v. Carroll, upon an exhaustive review of all the English and American authorities

of note, lays down the following rules, among others, upon the subject: 'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised. First. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. * * Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body.' State v. Carroll, 38 Conn. 449, loc. cit. pp. 471, 472. The principles announced in the able and exhaustive opinion in this case have been variously applied and the case universally followed in subsequent cases, and the language of the learned chief justice has become almost a text upon the subject for subsequent law writers. Many of the cases are cited and the application of the principles thereof pointed out in 5 Am. and Eng. Encyclopedia of Law, note 1, pp. 96 to 103 inclusive, and in note 1, 1 Dillon on Mun. Corp. (4 Ed.), sec. 276. See, also Adams v. Lindell, 5 Mo. App. 197, approved in 72 Mo. 192. Judge Dillon in the text to which the note is apprehended says: 'In this country the doctrine is everywhere declared, that the acts of de facto officers, as distinguished from the acts of mere usurpers, are valid, and the principle extends not

only to municipal officers generally,
but also to those composing the council,
or legislative, or governing
body of a municipal corporation."

* * * * *

Volume 46 Corpus Juris, page 1060, section 378,
the rule as to such officers is stated as follows:

"The acts of an officer de facto
are as valid and effectual where
they concern the public or the
rights of third persons, until
his title to the office is judged
insufficient, as though he were an
officer de jure, and the legality
of the acts of such an officer
cannot be collaterally attacked in a
proceeding to which he is not a
party."* * * * *

In the case of In re Bank of Mt. Moriah's Liquidation, 49 S.W. (2d) 275, l.c. 276, the rule is also set out in the following language:

"In the absence of a statute so
providing, it is generally held
that a failure to qualify, although
it affords cause for forfeiture of the office, does not
create a vacancy, and even though
it is irregular and improper to
induct one into office, without
giving the required bond, such a
one is legally in office, and so
remains until removed by judicial
process, and if the oath is taken
or the bond filed at any time before
proceedings are taken to
declare a vacancy, it is sufficient."

And in the same case at l.c. 277, the court said:

"* * * So far as third persons and

May 19, 1938

the public are concerned there is no practical difference between the acts of a de jure and a de facto officer. 22 R. C. L. pp. 601, 602; 46 C.J. pp. 1060, 1061."

In each of the questions which you have submitted, it appears that the aldermen who have not paid their taxes, would be within the classification of officers designated as de facto officers, and as stated in the above cases and citations so far as third persons and the public are concerned, there is no practical difference between the acts of a de jure officer and a de facto officer. In other words, the official acts of these aldermen have the same force and effect upon the third persons and the public regardless of whether they have properly qualified to the offices which they now hold.

CONCLUSION

This office is, therefore, of the opinion that the official acts of members of a board of aldermen whether such aldermen are officers de jure or de facto officers are valid and binding upon third persons and the public, and that all orders, resolutions and ordinances of such board of aldermen can be enforced regardless of whether the aldermen have properly qualified for the office in which they are now acting.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

TAXATION: Failure of Board of Aldermen and City Collector to follow statute pertaining to accounting between board and collector does not affect validity of city tax.

May 26, 1938

Mr. L.E. Merrill
Attorney at Law
Brunswick, Missouri



Dear Sir:

This will acknowledge receipt of your letter of May 14, 1938, on behalf of the Board of Aldermen of Brunswick in which you request an opinion on the following:

"If a collector of a city of the fourth class, fails to make a delinquent tax list annually, as required by Statute, but does make one upon his retirement from office covering a period of several years, will the fact that he failed to make a list annually make the back taxes un-collectible?"

The delinquent tax lists you refer to are those lists set out in Section 6996, R.S. Missouri, 1929, and termed as the "land and lot delinquent list" and the "personal delinquent list". The duties of the city collector and the board of aldermen in connection with these lists are set out in Section 6996, supra, as follows:

"It shall be the duty of the board of aldermen to require the collector, annually, on the first meeting of the board of aldermen in April of each year, or as soon thereafter as may be, to make out, under oath, lists of delinquent taxes remaining due and uncollected for each year, to be known as the 'land and lot delinquent list' and the 'personal delinquent list'. It shall be the duty of the board of aldermen, at the meeting at which said delinquent list shall be returned, or as soon as may be

thereafter, to carefully examine the same; and if it shall appear that all property and taxes contained in said lists are properly returned as delinquent, the board of aldermen shall approve the same and cause a record thereof to be entered on the journal, and cause the amount thereof to be credited to the account of the city collector. The board of aldermen shall cause the land and lot delinquent list and the personal delinquent list to be returned to the city collector, who shall be charged therewith, and who shall proceed to collect the same, in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes."

Section 6995, R.S. Missouri, 1929, provides the manner in which the city collector shall enforce the payment of the delinquent taxes mentioned in Section 6996, supra. This section reads as follows:

"Upon the first day of January of each year all unpaid city taxes shall become delinquent, and the taxes upon real property are hereby made a lien thereon. The enforcement of all taxes authorized by this article shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels, both before and after said taxes shall become delinquent: Provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector."

We are assuming that these taxes were properly assessed (Section 6994, R.S. Missouri, 1929); that a proper levy was made thereon (Section 6998, R.S. Missouri, 1929); and that these taxes are now delinquent (Section 6995, R.S. Missouri, 1929).

The question for determination is whether or not the annual return by the city collector of these delinquent lists at the first meeting of the board of aldermen in April; the examination of the lists by the board; the approval and entry of said lists in the journal; the crediting of the amount of taxes represented by these delinquent lists to the account of the collector; the return of said lists by the board to the collector for collection, are conditions precedent to invoking the procedure provided by law for enforcing payment of taxes.

In 61 C.J., page 1057, Section 1389, in speaking on this subject, it is said:

"* * * no defense can be founded on mere irregularities, errors, defects, or omissions of statutory duty, either in the assessment or in the proceedings which followed it, up to the commencement of the suit, which do not affect the substantial liability of defendant to pay the tax, * * *."

This rule of law has been held to be applicable in Missouri. State ex rel. v. Bank of Neosho, 120 Mo. 161; State ex rel. v. Cummings, 151 Mo. 49, 59; State ex rel. v. Stamm, 165 Mo. 73, 83.

In the Stamm case, supra, at l.c. 83, it is said:

"* * * Requirements that do not affect the rights or interests of the taxpayers, but made simply for the purpose of securing order, system and convenience in the dispatch of public business are directory in their character - a literal compliance with which is not essential to the validity of the law."

In State ex rel. v. Cunningham, 153 Mo., l.c. 651, it is held that if it is shown a suit for taxes is not based

May 26, 1938

on a valid assessment, the suit will be defeated. Thus, a valid assessment is a condition precedent. That a levy be made pursuant to a valid assessment is, of course, a condition precedent, because without a levy, the rate of taxation could not be ascertained. That the tax be delinquent is much in the same class as the levy. No demand for said taxes could be enforced unless the tax was past due and unpaid.

The things which the board and collector omitted to do here are "for the purpose of securing order, system, and convenience in the dispatch of public business", but this omission does not affect the substantial liability of the taxpayer. The provisions of Section 6996, supra, which were not complied with, relate only to an accounting between the board and collector, and in no way concern the taxpayer.

The conditions precedent to enforcing payment of these taxes are a valid assessment, a proper levy and that the taxes are past due and unpaid, which we have assumed are present here.

The fact that the city collector and board have complied with Section 6996, supra, at this late date is of no concern except that it renders a proper accounting between the board of aldermen and the collector for the delinquent taxes due and unpaid for each of these years, which taxes now may be credited to the account of the collector.

CONCLUSION

Therefore, it is the opinion of this department that the failure of the board of aldermen and the city collector to comply with the provisions of Section 6996, R.S. Missouri, 1929, does not affect the validity of the city taxes, and said taxes may be collected now in a proper proceeding except, of course, those that may be barred under the provisions of Section 9961, Laws of 1935, page 405.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General
LLB:VAL

SHERIFF: Fee for attending county court, when court meets with Board of Equalization, Drainage and Levee District Boards.

January 12, 1938

Hon. G.D. Miles
Sheriff, Dunklin County
Kennett, Missouri

Dear Sir:

This will acknowledge receipt of your letters of December 15, 1937, and January 8, 1938, in which you request an opinion as follows:

"The County Court of Dunklin County has been refusing to allow the sheriff of the county \$3.00 per day for waiting on said Court when it meets with Drainage District Boards, the Board of Equalization and various other Levee and Drainage District Boards.

"It is my understanding that when the County Court is in session, the members thereof draw their pay and when in session the sheriff is supposed to open court. Therefore, when meeting with such boards they are in session and the Sheriff is entitled to his \$3.00 for opening Court."

Section 1870, R.S. Missouri, 1929, is in part as follows:

"The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law."

Section 11789, R.S. Missouri, 1929, fixes the sheriff's compensation for such duties as follows:

"For attending each court of record or criminal court and for each deputy actually employed in attendance



upon such court the number of
such deputies not to exceed three
per day \$3.00"

Construing the two above statutes together, it is plain that it is the mandatory duty of the sheriff to attend each court of record or criminal court held in his county when it is in session, either in person or by deputy, and that his compensation is \$3.00 per day for each day in actual attendance.

The determination of the question here depends upon whether or not the county court is sitting as a court or as an administrative body in these instances above mentioned. If sitting as an administrative body, the sheriff is not entitled to a fee for each day they so sit, because an officer is not "entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed". State ex rel. v. Brown, 146 Mo. l.c. 406. The statute only provides a fee when the court is in session at a term thereof.

We shall consider the question as it pertains to the Board of Equalization first.

Section 9811, R.S. Missouri, 1929, is in part as follows:

"There shall be in each county in this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year: Provided, that in any county having adopted township organization, the sheriff of said county shall be a member of said board of equalization:"

Section 9818, R.S. Missouri, 1929, is as follows:

"The judges of the county court, the county surveyor, the county assessor, the sheriff, and the county clerk shall receive \$5.00 per day for each day they shall act as members of the county board of equalization: Provided, that this section shall not apply to boards of equalization who are paid a salary."

Dunklin County has township organization and under the above statutes, the sheriff is paid \$5.00 per day for acting, not as sheriff, but as a member of said board. The county court in this instance is not sitting as a court, but as the Board of Equalization and the sheriff is not entitled to a fee for attending said board under Section 11789, supra.

The county court is not authorized to sit with the Board of Supervisors of those Drainage Districts and Levee Districts organized under the provisions of Chapter 64, Articles 1 and 6, R.S. Missouri, 1929. These are districts organized by the circuit court. Nor is the county court authorized to sit with the Board of Supervisors of those Levee Districts organized under Article 7 of said chapter. In each of these three mentioned instances a Board is empowered to act for the District and we find no statutory authority for the county court to sit with or advise said board.

The districts organized under Chapter 64, Article 2, R.S. Missouri, 1929, are organized in the county court, and by Section 10843 of said article the court is "vested with the continuous management and control of said drainage district". In this district, there is no Board of Supervisors provided for.

In this type of district the county court sits as a court in the management and control of the district's affairs. This is illustrated by reason of Section 10815, R.S. Missouri, 1929, which provides that after the incorporation of said district "the court shall, by order entered of record levy" a tax to pay the expense incurred in organizing the district. Section 10816 provides that after

January 12, 1938

the district is established "the court shall, by an order of record" direct the viewers to view the land to establish the location of the various improvements and report to the court. This report is to be filed "with the clerk of the court". (Section 10817). The report is published by the clerk of the court, (Section 10819), and exceptions to the report must be filed with the county court (Section 10820). When the report is approved, the court shall "by order or record" levy the tax on the land. This whole article requires things to be done by the clerk of the county court, by order of record, by the Presiding Judge of the court and attested by the clerk, and certain things are required to be done at specific terms of said court. All this is indicative that the county court, in managing the affairs of this type of district, sits and acts only as a court of record and not as ex-officio members of the Board of Supervisors of said Drainage District.

CONCLUSION

Therefore, it is the opinion of this department that a county sheriff is entitled to draw the \$3.00 fee provided by statute for attending county court when that body is sitting as a court at a regular, adjourned or special term; that the county court does not sit as a court while acting as members of the County Board of Equalization; that there is no statutory authority for the county court to sit with and advise with the Board of Supervisors of those Drainage and Levee Districts organized under the provisions of Chapter 64, Articles 1, 6 and 7, R.S. Missouri, 1929. Under Article 2 of this chapter, the county court is the body which manages and controls the affairs of this type of district and sits as a court while doing so, entitling the sheriff to his statutory compensation for attending court while it so sits.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

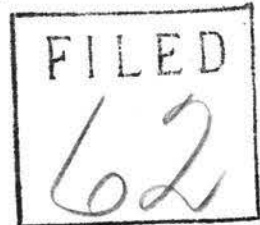
APPROVED BY:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

COUNTY COURT) County Court may not abandon compound
SCHOOL FUND LOAN) interest thereon and accept simple in-
terest in lieu thereof.

January 20, 1938



Hon. W.L. Mitchell
Judge of County Court
Carroll County
Bosworth, Missouri

Dear Sir:

This department is in receipt of your letter of January 3, 1938, in which you request an opinion as follows:

"I would be pleased if you would give me a legal opinion in regard to whether the County Court has the right to compromise interest on County School Loans.

"These notes are written interest payable yearly and if not so paid to be compounded at the same rate of interest.

"Have we the right to accept straight simple interest as a compromise."

Section 9243, R.S. Missouri, 1929, is in part as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent. per annum, on unencumbered real estate

security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund;"

Section 9250, R.S. Missouri, 1929, is as follows:

"Whenever there shall be in the county treasury any money belonging to the capital of the school fund of any township therein, the county court of such county shall loan the same for the highest interest that can be obtained, not exceeding eight nor less than four per cent. per annum, upon conditions and subject to the restrictions hereinafter set forth."

The two above sections make the county courts of the several counties trustees of the county school fund and the township school fund.

Section 9251 provides the manner in which township funds shall be invested. By Section 9245 the county school fund is required to be invested in the same manner and under the same rules and regulations that apply to the township school fund. Section 9251 is in part as follows:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, * * * * *
* * * * * the bond shall * * * * *
specify the time when the principal is payable, rate of interest and

the time when payable; that in default of payment of the interest, annually, or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal."

In State ex rel. v. Johnson, 138 Mo. App. 1.c. 314, it is said:

"The county courts of Missouri are creatures solely of statutory origin and have no common law or equitable jurisdiction."

Also, being solely of statutory origin, said courts have only the authority to do what is permitted to be done by the statutes. Montgomery County v. Auchley, 103 Mo. 492. We find no statute authorizing the county court in any manner to compromise the interest due on a school fund loan.

This question has been before the courts of this state in the case of Montgomery County v. Auchley, 103 Mo. 492, 1.c. 503, where it said:

copy 24

"In Veal v. County Court, 15 Mo. 412, the county court had loaned school funds at ten-per-cent. interest, and afterwards, on the petition of the inhabitants of the township to which the funds loaned belonged, the court reduced the rate of interest to six per cent. This court held that this order reducing the interest was illegal, and Judge Scott, in referring to these funds and the nature of the trust assumed by the county courts, in regard to them, said: 'In relation

to these funds the county courts are trustees. They have no authority to dispose of the principal intrusted, or any of its interest, otherwise than is prescribed by law. There is no difference in this respect between the principal and interest of these funds. If they can give away the one, they can give away the other. * * * The welfare of the state is concerned in the education of the children. She has provided and is providing means for that purpose, not only for those now in existence, but for those who may come after them. The fund, as has been said, is a permanent one, and, if every man, woman and child in a township should petition the county court to give away, that which is by law intrusted to it for the education of its children, it should without hesitation reject their prayer."

The compound interest which may become due on a school fund loan is as much a part of the principal as in the simple interest and under the Auchley case, supra, the court has no authority to dispose of the same, otherwise than is directed by law, i.e., to collect it when it becomes due.

CONCLUSION

Therefore, it is the opinion of this department that the county court has no authority to accept less than is actually due on a county or township school fund loan, and may not abandon compound interest due thereon and accept simple interest in lieu thereof.

Respectfully submitted,

APPROVED by:

AUBREY R. HAMMETT
Assistant Attorney General

J.E. TAYLOR (Acting) Attorney General

LLB:VAL

LOTTERY: The plan "Sho-Bonus" is a lottery.

SHO*BONUS: A lottery.

February 23, 1938

Hon. Franklin Miller
Circuit Attorney
City of St. Louis
Municipal Courts Building
St. Louis, Missouri



Dear Sir:

We have your request of February 15, 1938, for an opinion with reference to the legality of the use of a scheme or plan known as "Sho-Bonus, Inc." We have carefully examined the statement attached to your letter with reference to the plan of operation. The plan proposes to distribute weekly prizes up to Five hundred dollars in money to persons submitting correct answers to a list of three questions. From your letter it appears that the elements of prize and consideration are conceded to be present in this contest, and that the sole question is whether or not the element of chance is sufficiently present in order to constitute the contest a lottery.

There appears to be no rule or yardstick by which the correct answers to the questions submitted are to be determined by the judges. The selection of the correct answers is left to the uncontrolled discretion of the donor of the prize, or a committee selected for that purpose.

Commenting upon this phase of lotteries, we find the following statement in 45 Harvard Law Review, page 1212:

"It is somewhat surprising to find a fairly large number of decisions involving the award of prizes in the uncontrolled discretion of a judge. All of them agree that the contest is a lottery."

In Commonwealth vs. Plissner (1936), 4 N.E. (2nd) 241, the Supreme Court of Massachusetts held a grabbing machine played by the skill of the operator was a lottery. In the approved charge of the trial court we find the following, l. c. 245:

"That means that it is not necessary that a game should be a lottery because chance should predominate or that skill should predominate. As you will hear me say later, if there is chance as an effective and active cause in the game, even though skill we will say might be ninety per cent and chance the rest the game is still a lottery. * * * Assume * * * that by nature or by experience, or by both, a player should come to have and be able to exercise the very greatest degree of skill which the construction of that machine permits to be used, and that he actually exercises that skill to the extreme limit required in order to win, required possible in order to win * * * then ask yourselves this question * * * does there still remain before the player can succeed, 1st. Any opportunity for the taking effect of one or more forces over which by reason of the construction of the machine the player can have no possible control? * * * 2nd. A sure and certain possibility that such uncontrollable forces will take effect at each and every operation of the machine by reason of the nature and construction of the mechanism? * * * 3rd. A certainty that if those uncontrollable forces do take effect the player will be unable to win his prize?"

Recently the Supreme Court in State vs. Globe Democrat Publishing Company, 110 S.W. (2) 705, in an opinion by Ellison speaking for the entire Court, l. c. 713, said:

"Hence a contest may be a lottery even though skill, judgment, or research enter therein to some degree, if chance in a larger degree determine the result."

The mere fact that this contest calls for the correct answer to the question propounded does not relieve it of its lottery characteristics. The contest is open to all persons ten years of age or over. It therefore is an unequal contest, and would be a mere matter of chance for a ten year old child in submitting correct answers to win over the answers which may have been submitted by a highly educated person. In the Globe Democrat case supra, this situation was commented upon, l. c. 718, as follows:

"Obviously, if some abstruse problem comparable to the Einstein theory were submitted to the general public in a prize contest on the representation that no special training or education would be required to solve it, the contention could not be made, after contestants had been induced to part with their entrance money, that the element of chance was absent because there were a few persons in the world who possessed the learning necessary to understand it."

The plan "Sho-Bonus" is so obviously a lottery that we will not comment upon the many phrases therein. As typical of the plan we call attention to Rule No. 6 to be observed by the judges in a Sho-Bonus contest:

"All other qualifications being equal the judges will consider time at which card is deposited in Box of Sho-Bonus as an element; that is proximity to ten o'clock a.m., noon, three o'clock p.m. and eight o'clock p.m."

Hon. Franklin Miller

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February 23, 1938

A time element similar to this was condemned as an element of a lottery in State ex rel. Home Planners vs. Hughes, 299 Mo. 529.

CONCLUSION

It is therefore the opinion of this office that "Sho-Bonus" as outlined in your letter and the written memorandas attached thereto, constitutes a lottery in violation of Section 4314 R. S. Missouri 1929.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

COUNTY COURT: Must turn over proceeds of bond issue for poor relief to Social Welfare Board under Section 12938 R.S. Missouri 1929.

March 17, 1938

3-17

Mr. John W. Mitchell
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Dr. Mitchell:

This Department is in receipt of your letter of March 7th, wherein you state as follows:

"Early this year the State Social Security Commission advised our County Court that the funds at its disposal would be adequate for only 60% of the relief needs of this County. After having canvassed the situation fully the County Court decided to call a special election for the purpose of authorizing a bond issue of \$285,000 with which to provide funds necessary to meet the remaining 40% of the relief needs of this County until the State Commission should be able to take care of all of them. At an election held on February 26th the County voted in favor of the bond issue. The question now arises as to the best method of making these funds available.

During January and February the State Commission agreed to carry the full relief load with the understanding that if the bonds carried the Court would in some manner reimburse the State for the extra money expended, and would thereafter take care of 40% of the relief needs in the County.

As I understand it the procedure followed by the State Commission in making payment for food, clothing and other items furnished to the relief clients is that the local director hands to the various parties needing them orders for these items, and that these orders are taken to approved stores to be filled. These stores in turn send them to Jefferson City and receive directly from the Treasurer's office remittances for the amount of such orders.

The County Court is now faced with the problem of determining the method of disbursing the proceeds of this bond issue in such a way as to supplement the expenditures made by the state.

Section 12938 to 12945, inclusive, R. S. 1929, as you know, create a "Social Welfare Board" for Buchanan County.

While the act is general in its terms, this county is the only one affected by it, as a matter of fact. Section 12938 provides that, "said board shall have exclusive control over the distribution and expenditure of any public funds set aside and appropriated by such cities and counties for the relief of the temporarily dependent."

Last November, upon a request from our Welfare Board for an opinion, your department in a letter dated November 16, 1937, addressed to Mr. J.E. Corby as President of the Social Welfare Board of St. Joseph, advised that the State Social Security Act does not repeal, expressly or impliedly the sections referred to above. However, since the State Social Security Commission has taken over relief in Buchanan County, the Welfare Board has been confining its activities to the care of the sick poor.

The question has now been raised as to whether or not the portions of the act quoted above make it mandatory for the County Court to pay to the Welfare Board all of the proceeds of the bond issue, and we desire your opinion on the point.

If it is not necessary that those funds be disbursed exclusively through our Welfare Board, what other means may be used by our County Court?

It has been suggested that possibly the State Social Security Commission might be a proper channel through which disbursement might be made, and if in your opinion it is not necessary that these funds be turned over to the Welfare Board, will you please advise us whether or not it would be permissible for the State Social Security Commission to disburse them, subject to the appropriation orders of our County Court.

The majority of the directors of the Welfare Board prefer not to handle the bond money. Their objection arises from the fact that if the money is turned over to them and by them placed in the hands of the State Commission, or its local representative, the Welfare Board would, on the face of the record, appear to have received the money and have disbursed it, when in fact all of the money would have been expended under the direction of the State Commission, and in accordance with policies with which the local Board had nothing whatever to do. As some of them have expressed it, "The Welfare Board's objection to this method is that all expenditures will be made by the Buchanan County Social Security organization, yet the Welfare Board's receipt for money so drawn would be given to the County Court."

Since the bonds will be sold shortly we would appreciate it if you will let us have your opinion on these questions as soon as possible."

March 17, 1938

As we understand your problem, the county court has voted poor relief bonds, which kind of bonds in the case of State ex rel. Gilpin et al. vs. Smith, 96 S. W. (2) (Mo.) 40, were declared to be "for county public purpose" within the constitutional requirement that taxes can be levied and collected for public purposes only.

Prior to the special election for the purpose of authorizing the bond issue it was agreed, so we are advised, that if the State Social Security Commission would carry the full relief load for the months of January and February, and the bond issue passed, the amount of funds usually apportioned by the commission for relief purposes to Buchanan County would be cut down in proportion to the amount expended in January and February over and above the ordinary allotments.

Section 12938 R. S. Missouri 1929 gives the Social Welfare Board of St. Joseph, Missouri, exclusive control over the distribution and expenditure of any public funds set aside and appropriated by the city and county for relief of the temporarily dependent, in part as follows:

"In all counties in this state that now or may hereafter have located within said counties a city or cities of the first class, there is hereby created and established a board which shall be styled 'The social welfare board of the city of _____.' All powers and duties connected with and incident to the betterment of social and physical causes of dependency, the relief and care of the indigent, and the care of sick dependents, with the exception of the insane and those suffering with contagious, infectious and transmissible diseases, and excepting those persons who may be admitted to the county poorhouses of such counties, shall be exclusively invested in and exercised by said board. Said board shall have power to receive and expend donations for social welfare purposes and shall have exclusive control over the distribution and expenditure of any public funds set aside and appropriated

by such cities and counties for relief of the temporarily dependent."

You suggest that if the conclusion should be reached that it is not mandatory under the above section that the Social Welfare Board expend the funds, whether it would be permissible for the State Social Security Commission to disburse them.

Section 10 of the Laws of Missouri 1937, page 473, provides in part as follows:

"For the purpose of establishing and maintaining county offices, or carrying out any of the duties of the State Commission, the State Commission is authorized to enter into agreements with any political subdivision of this State, and as a part of such agreement the State Commission may accept moneys, services or quarters as a contribution toward the support and maintenance of such county offices. Any funds so received shall be payable to the State Commission and deposited in the proper special account in the State Treasurer's office, and become and be a part of state funds appropriated for the use of the State Commission."

Section 20 of the Laws of Missouri 1937, page 476, provides in part as follows:

"The State Treasurer shall be treasurer and custodian of all funds and moneys of the State Commission and shall issue checks upon such fund or funds in accordance with such rules and regulations as the State Commission shall prescribe."

Thus if any moneys were received by the Social Security Commission they would have to be deposited in the

Mr. John W. Mitchell

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March 17, 1938

State Treasurer's Office and become a part of the state funds appropriated for the use of the state commission. It is evident that such would be contrary to the purposes for which the funds were voted, viz, relief funds for Buchanan County.

Section 12938, supra, uses the word "shall," and when considered with the words "exclusive control" we are of the opinion that the legislature intended the use of the word to indicate a mandate. State ex rel. Stevens vs. Wuderman, 246 S.W. 189, 295 Mo. 566.

From the foregoing, we are of the opinion that Section 12938, R. S. Missouri 1929, makes it mandatory for the county court to turn over the proceeds of the bond issue for poor relief to the Social Welfare Board for distribution and expenditure for the relief of the temporarily dependent.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

TAXATION: An annual franchise tax is required to be paid by every corporation organized and existing under the laws of this state in each year.

March 21, 1938



State Tax Commission
of Missouri
Jefferson City, Missouri

Attention: Jesse A. Mitchell

Dear Sir:

This will acknowledge receipt of your request for an opinion, reading as follows:

"Is a corporation incorporated December 23, 1937, to which certificate of authority to do business was granted December 30, 1937, but did not actually commence business until January 3, liable for corporation franchise tax for the year 1938?"

Your attention is directed to Section 4641 of R. S. Mo. 1929 reading, in part, as follows:

"For the taxable year of 1929 and thereafter every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri."

Obviously from the above quoted portion of the statute, it is clear that every corporation organized under the Laws of this state is required to pay an annual franchise tax.

It is, further, provided, under the provisions of Section 4643 of R. S. Mo. 1929, in part, that:

"The taxes provided for in this article shall be paid on or before the 15th day of May in each year and shall be due and payable to the state treasurer without notice, who shall make out and deliver a receipt therefor, which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this article for the year ending 31st day of the following December."

It will be noticed that when the taxes provided for have been paid that the receipt made out for such taxes shall recite that the corporation, paying the tax, has paid its annual franchise tax for the year ending the 31st day of the following December. The amount of taxes to be paid annually, by every corporation, is determined by the amount of their outstanding capital stock and surplus as of December 31st of each year. This date is but the "yardstick" for determining the amount of tax. Section 4642 of R. S. Mo. 1929.

If a corporation is organized and existing under the Laws of this state, it is required to file a report, as provided for in Section 4642, supra, on or before the 1st day of March of each year. Thereafter, on the 20th day of March of each year, it is the duty of the State Tax Commission to assess the amount of franchise tax based upon the report filed. Section 4643, supra.

From these statutory considerations, which we believe to be plain, it indubitably follows that the franchise tax imposed upon all corporations organized under the Laws of this state, is an annual tax which must be paid every year that the corporation is in existence and the tax which any corporation is to pay is based upon the amount of its outstanding capital stock and surplus. The Supreme Court in the case of *State ex rel. vs. State Tax Commission*, 282 Mo., 213 l. c. 220, made this observation:

"The reference to the amount of the authorized capital stock and to the amount of the surplus are made, solely, for the purpose of pointing out a

March 21, 1938

method of determining the amount
of the tax."

Thus, it follows that, a corporation which had its certificate of authority to do business as of December 30, 1937 would be required to pay an annual tax for the year 1938 and, as before pointed out, under the provisions of Section 4641, 4642 and 4643, supra, we necessarily assume from your request for an opinion that the corporation, about which you inquire, had a capital stock as of December 31, 1937 and the tax should be measured on this basis as of that date.

CONCLUSION

In view of the above, it is our opinion that a corporation, incorporated December 23, 1937, which corporation did not actually commence business until January 3, 1938, is liable for the payment of a corporation franchise tax for the year 1938, as provided for by Section 4641 R. S. Mo. 1929.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

(Acting) Attorney General

RCS:LB

- PEDDLERS : (1) Merchant who takes merchandise from one farm
LICENSE : sale to another to sell at auction must have
peddler's license.
(2) Auctioneer's license necessary, if facts warrant,
under Chapter 111, R. S. 1929.

December 28, 1938

Honorable Joe. H. Miller
Representative
Carroll County
Carrollton, Missouri



Dear Mr. Miller:

In reply to your letter of December 22d relative to the opinions rendered by this Department based on the business conducted by Dickson Brothers of your city, we recall that this was a very perplexing question. The writer wrote the opinion on June 7, 1933, mentioned in your letter. Later a further request was made by the then Prosecuting Attorney of Carroll County and an opinion was rendered, as stated in your letter, on May 10, 1937, to Honorable Richard H. Musser, Prosecuting Attorney, Warrensburg, Missouri, in which the activities of the Dickson Brothers was discussed and in which the opinion of the writer was overruled and the following conclusion reached:

"It is, therefore, our opinion that the persons mentioned in your letter come within the definition of a 'peddler' as defined by the statutes, and required to secure a license as required by Chapter 96, R. S. Mo. 1929."

You may consider the opinion written by Assistant Attorney-General Hewitt as the official opinion of this Department. Therefore, in answer to your question No. 1, under the opinion written by Mr. Hewitt, it would appear that they could be compelled to purchase a peddler's license.

With reference to your question No. 2, relating to an auctioneer's license, Chapter 111 of the Revised Statutes

Dec. 28, 1938

of 1929, Sections 13718 to 13742, inclusive, deals with public auctioneers. It appears that this chapter has never been enforced and is now obsolete. We note that the present Revision Commission of the Legislature makes the following reference to Chapter 111:

"Sections 13718 to 13742, inclusive; no change. However, it has been suggested by one member of the Commission who examined this chapter that it be repealed because it is obsolete."

However, as the statutes now remain they have not been expressly repealed and the fact that they may be obsolete or have not been in force does not repeal them or wipe them out from our consideration. Therefore, if the operations of the Dickson Brothers constitute facts which would come within the purview of the auctioneers' statute, then they should buy auctioneer's license to sell their products.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

SCHOOLS: The notice of election to vote on bond issue should contain the time the polls open and also the time they close.

3/10

March 9, 1938.



Honorable Charles A. Moon
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This Department is in receipt of your letter of March 4, wherein you request the opinion of this Department as follows:

"The County School Superintendent of Greene County has requested an opinion from your office in connection with Sections 9198 and 9283, Revised Statutes, Missouri, 1929, regarding the voting of a bonded indebtedness in the rural school districts.

"It seems that some of the school districts have taken the position that the polls at a Special School Election, for the purpose of voting a bonded indebtedness, should be held open all day as is the case in an election of this kind in the city.

"Hence, he would like to know if it is not proper to call the Special Election at the district schoolhouse at 2 o'clock, P. M., by special notices posted, according to law, transact the special business by those present, and adjourn the meeting?"

Section 9283, R. S. Mo. 1929, refers to the annual meeting. The powers and the various business objects of the meeting are contained in Section 9284, R. S. Mo. 1929. The pertinent part of Section 9283, supra, is as follows:

"The annual meeting of each school district shall be held on the first Tuesday in April of each year, at the district schoolhouse, commencing at 2 o'clock p. m. * * * * *

Section 9198, R. S. Mo., 1929, seems to be the section under which the proposed bond election is to be conducted. Said section contains the following provision:

"For the purpose of purchasing school house sites, erecting schoolhouses (library buildings) and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose. Notice of said election shall be given at least fifteen days before the same shall be held, by at least five written or printed notices, posted in five public places in the school district where said election shall be held, and the amount of the loan required, and for what purposes; it shall be the duty of the clerk to sign and post said notices. The qualified voters at said election shall vote by ballot. * * * * *

In the decision of State v. Consolidated District No. 1, 238 S. W. 819, it is held that the statutes affecting

the organization, functions and powers of a district are not to be strictly construed. Likewise, is the decision to the same effect, relating to country school districts, in State v. McKown, 290 S. W. 123. In an election of any nature usually the tests relating to the proceedings on election day are: Have the voters been given an opportunity to register their choice on any proposition, or exercise their right of franchise on any matter; and, is the election without fraud?

We think the matter, as contained in your letter, is fully discussed and decided in the case of State ex rel. Muns v. Hackmann, 283 Mo. 469, l. c. 476, as follows:

"It is insisted the polls should have been opened at seven o'clock a. m. and kept open until six o'clock p. m. instead of from two o'clock p. m. to six o'clock p. m. They were opened and closed at the hour fixed by the order of the board and the notice of election. The position of respondent is that the board had no power to fix the hours it did and that, therefore, the election is void. It is stipulated that the number of qualified voters in the district was approximately four hundred; that only once in seven years had the number of votes cast exceeded the number cast in the election in question; that there was no congestion at the polls and that 'the officers of said election could easily have accommodated twice the number of voters that actually voted.' There is no contention that any voter was prevented from voting by reason of the hours fixed by the board or that the result was in any way affected. The statute (Sec. 10777, R. S. 1909) fixes no hours for opening and closing the polls at bond elections. Election by ballot is provided and

the form of the ballot is prescribed. It is argued that since the hours are not prescribed, 'then such election shall be conducted in the manner prescribed by law for other elections by the same body.' (State ex rel. v. Hackmann, 218 S. W. 1. c. 324.) If this principle be conceded to be applicable, the 'other elections' provided by the statute become pertinent. At the annual election in town districts (Sec. 10879, R. S. 1909) it is provided that the polls shall be open from seven o'clock a.m. to six o'clock p. m. If this were the only provision for the elections in such district, the question presented would be easily solved, under the concession already made. It is not the only one. In Section 10870, Revised Statutes 1909, it is enacted that the election for disorganizing a town district shall be held at a meeting, after notice, and if two-thirds of the resident voters and taxpayers vote at such meeting for dissolution, the district stands dissolved. In the same article (Sec. 10865, R. S. 1909) the method of organizing city, town and consolidated school districts is provided. The voting is by ballot and it to be done at a meeting held for that purpose, pursuant to notice. Respondent does not point out any reason for selecting one rather than another of these methods under the rule he invokes.

"By Section 10920, Revised Statutes 1909, the State Superintendent of Schools is required to cause to be distributed to school officers and

authorities, copies of the school laws, separately bound, 'with instructions for carrying into execution of such laws.' It is stipulated that in his instructions for carrying on an election under Section 10877, the State Superintendent had long before furnished a form of notice of election which fixed the opening hour at two o'clock p. m. This 'instruction' relators followed in calling the election here involved, as many school boards, doubtless, had previously followed it in calling like elections. Of course, the State Superintendent cannot amend a statute, but an administrative construction of a doubtful statutory provision is entitled to weight, particularly after it has been acquiesced in by the Legislature for years and securities issued and bought and sold in dependence upon it. There is a reason for the provision that at annual elections the polls shall be kept open from seven a. m. to six p. m., which reason does not apply to bond elections called for special dates; i. e., such elections are held in conjunction with municipal elections at which the time during which the polls shall be open is fixed by other statutes. In the circumstances, there is no sound reason which compels a holding that the established practice which has long prevailed in pursuance of instructions authorized by the Legislature so conflicts with the law that the act of the relators in following it renders the election in this case void. The alternative writ is made peremptory. All concur."

March 9, 1938

Bearing in mind the general principles which we have heretofore mentioned, we are of the opinion that it would be proper for the Board to call the special election at the district schoolhouse at 2 o'clock P. M., and that the same should be incorporated in the notice of the election. But, as Section 9198, supra, provides for the voting to be by ballot, we think the notice should also contain the time for closing the election as this will give everyone qualified to vote in the district an opportunity to do so; and that the logic as contained in the decision of State ex rel. Muns v. Hackmann, supra, should be followed.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

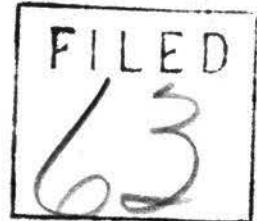
J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

LIQUOR CONTROL: County court not authorized to return fee
paid county by applicant when applicant's
application for state license is afterwards refused.

July 11, 1938

Hon. Merrill E. Montgomery
Prosecuting Attorney
Sullivan County
Milan, Missouri



Dear Sir:

This will acknowledge receipt of your request
for an official opinion which reads as follows:

"Our County Court have usually
issued permits to sell either hard
liquor or malt liquor whenever the
applicant obtained a license from
the State. By order of record our
Court has fixed County License fees
at \$35.00 for a five per cent beer
license and \$50.00 for package liquor
or hard liquor vendors.

"Recently an applicant for a five per
cent beer permit wished to renew his
license, he advised the County Court
that he had been advised that his ap-
plication for renewal of his State Li-
cense had been granted. Thereupon he
deposited \$35.00 with the County Clerk
who issued him a County License. Some-
time later he was advised that his ap-
plication for renewal of his state
license had been denied and he was un-
able to secure a State License. There-
after he applied to the County Court
for a refund of his \$35.00 theretofore
deposited for County License.

"The County Court would like to know if
they, under the law, are empowered to
refund this money to the applicant after
the same has been paid and County License
duly issued?"

July 11, 1938

In an opinion rendered by this department on February 14, 1938, to George E. Heneghan, St. Louis County Counselor, we passed on the proposition of whether the county court has authority to issue a liquor license to a dealer or whether the county court is confined to the mere collection of a fee, in the sum permitted, as the court may by order of record determine. We said in this opinion:

"Section 25, Laws of 1935, page 276, is in part as follows:

'In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, or in case such premises are located in the City of St. Louis, to the collector of revenue of said city, a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such state permit or license) as the county court, or the corresponding authority in the City of St. Louis, as the case may be, shall by order of record determine.'

It is true, as you have stated in the body of your letter, the repeal of Section 24, Laws of 1933, Ex. Sess. Acts, page 77, and the enactment of Section 25, supra, has made the provisions of Section 25, supra, confusing as to whether or not the county courts of this state may now issue a license or only collect a fee for the privilege of selling liquors within a county.

The section itself at no time refers to a license to be issued, but we think the reasonable interpretation to be given the provisions of this section is as follows:

The county court is authorized to charge such dealer in liquors a certain sum. This is to be done by an order of record.

The payment of this sum is a prerequisite to engaging in the business of selling liquors in the county, (as we shall illustrate later). This being true, it is necessary that the person paying said sum to the county receive something as evidence that he has complied with Section 25, supra, and the order of the court made pursuant thereto. The necessity of a person having something as evidence that he has paid the county charge is illustrated by reference to a ruling of the Supervisor of Liquor Control to the effect that each applicant for a state license must, before said state license is issued, submit proof that he has paid the charges made by counties or cities of this state. This evidence, we think, may be in the form of a receipt, permit, license or a certified copy of the order of the county court concerning said liquor dealer, showing payment by him of the charge fixed by the court. It may also be, we think, by any other means which will effectuate the rule above referred to.

The mere application of one of the above terms to the evidence given by the Court to the dealer when he pays this charge does not make it that. However, it may well be termed any one of these terms since, in effect, its only use is to enable the dealer in liquors to obtain his state license, and the payment of the fee is to provide the county with revenue.

As heretofore stated, the payment of the charge made by a county is a prerequisite to engaging in the liquor business, not only because of the rule of the Supervisor aforementioned, but also for this reason. This department ruled, in an opinion rendered to G. Logan Marr, Prosecuting Attorney of Morgan County, on August 28,

1935, that a person may be prosecuted for engaging in the liquor business without paying the charge or fee to the county. A conviction of this offense would have the effect of automatically revoking that person's state license under the provisions of Section 30, Laws of 1933, Ex. Sess. Acts, page 88.

Therefore, upon this question, it is the opinion of this department that although Section 25 of the Liquor Control Act does not provide that the county court issue any license when a dealer in liquors pays the county charge or fee, the county court may and should give the person something in the form of a receipt or permit as evidence so that that person may present the same to the State Department of Liquor Control when he applies for his state license."

The above, we think, amply illustrates that the liquor laws of the state only permit the collection of certain fees and is a revenue in so far as the county is concerned.

In State ex rel. v. Jackson, 84 S.W. 2nd 988 (Mo. App.), the court, in speaking of county courts and their powers, said:

"Such court is a creature of the Constitution, and its powers are limited by the terms of the various statutes defining its powers. It has no common law or equitable jurisdiction."

With this rule of law in mind, and treating the liquor act as it pertains to counties as a revenue measure only, we proceed to this question. Has the county court authority to return the fee paid in under these circumstances?

We assume the fee paid the county court was voluntarily paid without protest, but even though it was not, under the ruling in Neumer v. Jackson County, 271 Mo. 594,

July 11, 1938

the applicant is still not entitled to have the fee returned. In this case, it is said at l.c. 600:

"In order to recover from a municipal corporation a tax or fee paid to it involuntarily and under protest one of the essential prerequisites (among others), of the right to recovery, is, that it must appear that the tax or fee was illegal."

The fee charged here is legal. Section 25, Laws of 1935, page 276, permits the county court, by order of record, to fix and determine the amount to be paid by a liquor licensee at any sum not in excess of the amount required to be paid by the licensee into the State Treasury for the state permit. The fee required of an intoxicating malt liquor dealer for consumption on the premises is \$35.00 (Section 22, Laws of 1935, page 274), and that is the amount the county court charged and was entitled to receive from this applicant.

In 33 C.J., page 571, Section 179, it is stated:

"As a general rule a person who has paid the fee for a liquor license on making his application therefor cannot recover it back upon the subsequent refusal of the license, in consequence of his failure to comply with other conditions, or for other sufficient reasons."

The presumption is that the Supervisor of Liquor Control had sufficient reasons for refusing this applicant a state license and was authorized to do so.

A number of the authorities reviewed in the Corpus Juris citation above hold that such a refund may be made if the statute contemplates and authorizes it. This brings us back to what is said in State ex rel. v. Jackson, supra. A study of the statutes pertaining to the regulation and control of intoxicating liquors reveals no such authority, and without statutory authority, the county court cannot act.

Hon. Merrill E. Montgomery - 6 -

July 11, 1938

Section 9981, R.S. Missouri, 1929, authorizes county courts to refund moneys collected under an illegal levy, but this section does not apply because the fee was legally determined and collected.

CONCLUSION

Therefore, it is the opinion of this department that the county courts are not authorized to refund to an applicant for a state liquor license the fee paid by him to the county, when his application for the state license is subsequently denied.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

- TAXATION: (1) How collector may be relieved of illegal taxes on his books.
SCHOOLS - (2) Money illegally collected for one district can not be credited to district where it rightfully belongs, but must be credited as indicated.
(3) Error in extension of school tax may be corrected in supplemental tax book.
(4) Taxpayer not entitled to credit for what he paid by reason defective tax book unless the same was credited to district where it actually belongs.
(5) Tax so collected can not be refunded.

December 3, 1938

Honorable Alfred F. Moeller
Prosecuting Attorney
Ste. Genevieve County
Ste. Genevieve, Missouri



Dear Sir:

This will acknowledge receipt of your letter of November 16, 1938 requesting an opinion as follows:

"In 1935 the City of Ste. Genevieve by an election extended its limits to include considerable additional territory. On the 1937 and 1938 County Tax Books the tax payers in this extended area were assessed as being in the School District of the City of Ste. Genevieve and the school taxes were figured on the rate levied by the School District of the City of Ste. Genevieve. Last week the Circuit Court in this County declared the said City Extension election held in 1935 to be invalid. Now these tax payers who were in the extended area are coming to the County Collector and offering to pay their 1937 and 1938 School Taxes provided they are figured at the rate in force in the rural districts to which they formerly belonged. The County Collector is charged up with these taxes according to the higher rate in force in the City School District and what we desire to know is just what procedure should be gone through so that the Collector's Tax Books and Tax Bills can be changed so that they will show the amount due by these tax payers according to the rate in force in the rural district into

which they go by reason of the extension being held invalid.

"Some of these tax payers during the year 1937 paid their taxes including the school tax levied according to the rate in the City School District and the Collector desires to know whether these people who actually paid their taxes have any recourse on him for the difference between what they paid and what they would have paid in the other district."

Your letter, as we see it, presents the following questions:

(1) By what method may the tax records of the Collector be corrected in order that the Collector will not stand charged with the taxes on the property in the extension area, in the City School District?

(2) How may those who were erroneously taxed in the City School District be reached so that they will pay the proper tax in the Rural School District, and may that which was erroneously paid for taxes in the city district be transferred or credited for the taxpayer to the rural district?

(3) May the taxpayers who paid taxes in the City School District, and whose property is situated in the areas affected by the city limits extension invalidation, recover the amount of tax wrongfully collected from them?

You do not inform us whether the territory affected by the extension ordinance, complied with the provisions of Section 9344 R. S. Mo. 1929 and voted to join the city school district as is authorized after the city limits were extended. However, this does not affect this opinion because in either event - the failure to comply with statute, or the invalidity of the extension election - the area annexed to the city was not and is not a part of the city school district.

We assume that the area affected by the extension election did not join the city school district under the provisions of Section 9342 R. S. Mo. 1929 by voting to do so, as authorized,

notwithstanding the extension election. If the area affected joined the city district under this statute it is still a part thereof, because a city limits extension election is not a necessary prerequisite under this law for a rural area to join the city school district.

We shall consider questions one and two first, and, before any attempt at a disposition can be made, it is necessary to determine whether under these circumstances the taxes assessed on the property in the extension area amounts to erroneous assessment or erroneous taxation.

In State ex rel v. Brown 172 Mo. 374 a very similar question was involved. In that case the curator of a minor was assessed for school taxes on his ward's property by the assessor in District No. 2, it being the proper district. The county clerk in making up the "school tax book" extended said assessment in District No. 4 and delivered said tax book to the collector. The curator brought a mandamus suit to compel the collector to accept his tender of the rightful amount of tax due (there was a different rate in District No. 2 than in No. 4, as here) and credit said payment tendered to District No. 2 as if the assessment had been extended by the clerk in the right district. The court held that mandamus would not lie for the reason the collector could only accept such taxes as were extended by the clerk on the tax book and no extension had been made on said assessment in District No. 2.

In the disposition of this case the Supreme Court quoted with approval from the trial court's written opinion, as follows (l.c. 380):

"The assessor is not required or authorized to determine the school district of a taxpayer; the 'assessor's book' which he makes up - legally made up - contains no such information. The assessor has to do with no particular tax, but his duty ended when he has ascertained and listed all the taxable real and personal property in his county, * * *".

The opinion then points out when the wrong first arose, that is, when the county clerk extended the tax, and said:

December 3, 1938

"* * * in this case there was no erroneous assessment complained of, it is simply an erroneous taxation alleged. If plaintiff is taxed in the wrong district or wrong county then it is illegal and its collection can not be enforced."

Applying what is said in the Brown case to the instant question it is clear "it is simply erroneous taxation" about which those in the extension area now complain.

Now follows the reason why this distinction is important. In School District No. 46 v. Stewartville School District 110 S. W. (2d) 399 (Mo. App.) it is held that county courts have no jurisdiction to correct matters of erroneous taxation. The court cited Sections 9808, 9980 R. S. Mo. 1929 and Section 9946 Laws 1933 p. 424 and held that said sections confer on the county courts authority only to correct erroneous assessments, not erroneous taxation. The court said (l.c. 403):

"There is no constitutional or statutory authority giving jurisdiction to county courts in matters of erroneous taxation."

Thus, there seems to be no way for the collector's tax books to be corrected. However, those who were fortunate not to have paid the erroneous taxes in the city school district, are not liable therefor because in the Brown case it is so held (see quotation supra). And those who have paid said erroneous taxes are not relieved from paying them in the rural district. In the Brown case, it is said (l.c. 380):

"The payment of an illegal tax by him (the curator) would not relieve him from the payment of a tax where it legally belongs; * * *".

Sections 9264, 9265 R. S. Mo. 1929 make it the duty of county collectors to collect all current school taxes, placed on the general tax books by the county clerk, and in returning the delinquent land list to return therewith all land school taxes remaining unpaid. Both current and delinquent

school taxes are to be collected in the same manner as current and delinquent state and county taxes.

In the Brown case the court in speaking of the duty of the collector to collect these taxes said (l.c. 380):

"* * * under the authority of the 'school tax book' certified to the collector, he is bound, in the discharge of his duties, to proceed and act in accordance with its commands."

The collector being bound to proceed in accordance with the "school tax book", it is his duty to proceed to, at least, attempt to collect all taxes extended thereon, because that is its command, even though it is a foregone conclusion that payment of these taxes in the city school district can not be enforced. When a court of competent jurisdiction declares said tax to be illegal, then of course the collector would no longer be charged therewith.

Another way which the discharge of the collector might be effected, if equity can be invoked to avoid a multiplicity of suits, is for the taxpayers to seek to restrain the collection of the illegal taxes by injunction.

In Michael v. City of St. Louis 112 No. 610 a number of property owners brought an injunction suit to enjoin the collection of certain assessments for benefits to the property of plaintiffs for opening a street. The court held that such action would lie and stated as follows (l.c. 619):

"The only community among them (the plaintiff taxpayers) is in the question at issue to be decided by the court; in the mere external fact that all their remedial rights arose at the same time, from the same wrongful act, are of the same kind, involve similar questions of fact, and depend upon the same questions of law." 1 Pomeroy on Equity Jurisprudence (2Ed.) Sec. 260. Such a community of interest in the questions

to be decided is now generally held to be sufficient to call for the exercise of equitable jurisdiction to prevent a multiplicity of suits in this class of cases, and to this doctrine we now agree."

In the instant case it is clear that a community of interest exists among the taxpayers in the extension area, because their rights arose at the same time from the same wrongful act, are of the same kind involving identical questions of fact and depending on the identical questions of law - these being the extension election and the declaration by the circuit court that the same was invalid.

When a court of competent jurisdiction enjoins the collection of said school taxes then of course the collector could no longer be charged therewith.

These are our suggestions on how the collector may relieve himself of the illegal taxes with which he stands charged.

Continuing the second question: What should be done in order to effectuate the collection and payment of the taxes rightfully due the rural school district from the taxpayers (both those who paid the illegal tax and those who did not) in the extension area?

In the Brown case, it is settled that the collector can do nothing on this point. It is said there (l.c. 381):

"The facts as disclosed in this case show that the county clerk extended the taxes to the respective school districts; whether his action was in pursuance of the provisions of the statute, whether legal or illegal, the collector was not answerable for the acts of the clerk. After the tax books were adjusted and turned over to the collector, he had but one duty to perform; that was to collect the taxes and apply them as indicated by the tax book. The collector

December 3, 1938

has no power over the tax books, he is not authorized by any statute that has been brought to the attention of this court, to alter or change the tax books at pleasure."

This case answers that part of question two concerning whether the taxes erroneously paid in the city district can be transferred or credited for the taxpayer in the rural district because it is held the collector must collect the taxes "and apply them as indicated by the tax book." Also neither can the collector change said books to show the extension of these taxes in the rural district.

The "illegal action" (though unintentional) of the county clerk resulted in the taxes on the property in the extension area being extended to the wrong school district. We say, advisedly, "illegal action" because the clerk is presumed to know the law and thus know that the extension election was invalid.

In the Brown case it is further said (l.c. 381):

"If the county clerk had no right or authority to assign the * * (taxpayer) to district No. 4 (the wrong district), and assess a tax against him according to the rate fixed by said district, then such taxation is simply illegal and void."

The county clerk in the instant case had no right to assign these taxpayers to the city district and such assignment being absolutely void, legally it stands as if the clerk had taken no action and made no assignment or extension of said taxes.

Section 9878 R. S. Mo. 1929 provides as follows:

"When for any cause there has been a failure to levy the state, county, school or other taxes, or any portion thereof, or to extend and authenticate the same for the use of the collector, or to make

out and deliver to the collector a proper tax book for the collection of the same, as required by law, in any county for any year or years, the clerk of the county court of such county for the time being, when so required for such state taxes by the state auditor, and for such county, school or other taxes by the county court, shall make a supplemental tax book for such year or years. * * *

This section then provides the manner in which this supplemental tax book is to be made and has a proviso attached as follows:

"Provided, that whenever such taxes or any portion of them shall have been paid upon defective or illegal tax books, the amounts so paid shall not be charged in such supplemental tax books, and when any such taxes have been paid in full upon any property, the same, with the description of said property and the name of the owner thereof shall be omitted from such supplemental tax book."

This section furnishes ample authority for the county clerk, in a supplemental book, to extend the taxes on the property in the area affected by the extension ordinance in the rural school district where it rightfully belongs. The proviso furnishes no relief to those who paid the tax in the city school district either in part or in full. We construe it to mean that the exception provided applies when the tax paid on defective tax books was in fact credited to the subdivision actually entitled to the same, because any other construction will result in the rural school district losing a portion of its revenue for the years in question and operate to excuse those who paid the city district tax from paying the tax to whom it really belongs - the rural district. It was these parties own wrong which causes them this loss. They are presumed to know the law and know the extension election was invalid. The payment of an illegal tax does not

December 3, 1938

relieve one from the payment of a tax where it actually belongs, and the collector must apply the illegal tax collected by him as indicated by the tax book, that is, to the city school district (see quotation Brown case, supra).

The third question is answered by the statutes. Those taxpayers, in the affected area, who paid the illegal tax in the city school district, are not entitled to have said amounts refunded them at this time. The provision of Section 9981 R. S. Mo. 1929 prevents such a refund except under certain circumstances, which do not exist here. These conditions are: That the levy shall have been declared illegal by the Supreme Court of Missouri and that the money illegally collected is still in the county treasury or within the control of the county court.

CONCLUSION

Therefore, it is the opinion of this department that: The collector may only be relieved of the illegal taxes charged to him on his book when a court of competent jurisdiction declares said tax to be illegal either in a direct suit to enforce collection of said taxes or by the taxpayers enjoining the collector from doing so; that the money illegally collected for the city district can not be credited to the rural district, but must be applied to the city school district; that by preparing a supplemental tax book these properties may be extended in the right school district and; that the tax collected for the city school district can not be refunded to those who paid said illegal city school taxes at this time.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
LLB:RT

TAXATION:

Authority of a county to levy a tax, in addition to the constitutional maximum, to pay outstanding warrants.

February 21, 1938

Mr. Morgan M. Moulder,
Prosecuting Attorney,
Camdenton, Missouri.



Dear Sir:

Your letter of February 16th, last, requesting an opinion from this office, is received, which letter is as follows:

"Camden County has a total assessed valuation of about \$7,500,000.00. The Constitution and the limitation of taxes to be levied, as provided in Section 9873, Revised Statutes of Missouri, 1929, permits a levy not exceeding forty cents on the one hundred dollar valuation for county purposes. The amount received from the forty cent levy is no more than is necessary to pay current expenses.

"Prior to the enactment of the budget laws controlling the expenditures in the counties of this state, Camden County for many years spent slightly more than its income, which caused and created an indebtedness amounting to about \$25,000.00 in outstanding back warrants which were not paid at the time the new budget law went into effect. Under the present budget law and system the county has no balance whatsoever to apply on the payment of said outstanding back warrants.

"Section 9868, Revised Statutes of Missouri, 1929, provides that the prosecuting attorney of any county, upon the request of the county court of such county, may present a petition to the circuit court or judge thereof in

vacation requesting an order for an additional levy and collection of taxes for other purposes, which would enable Camden County to levy an additional ten cents for the purpose of paying said back warrants and past indebtedness which is outstanding against the county.

"Does Section 9868, Revised Statutes of Missouri, 1929, authorize, if the proceedings therein provided for are followed and complied with, Camden County to levy and collect ten cents or any amount in excess of forty cents for the purposes of paying the past indebtedness consisting of the outstanding warrants hereinbefore mentioned?"

Your question, as appears from your letter, is whether or not Camden County can levy an additional tax, under Section 9868, R. S. Mo. 1929, in addition to the forty cents which it appears from your letter it has or will levy for the current year.

Section 11 of Article X of the Constitution of Missouri provides, among other things, as follows:

"Taxes for county * * * purposes may be levied on all subjects and objects of taxation; * * *. For county purposes the annual rate on property, * * * in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation."

Said Section 9868 provides, among other things, as follows:

" * * * that the assessment, levy and collection thereof (of taxes) will not be in conflict with the Constitution and laws of this state."

In the case of State ex rel. v. Wabash Railroad Co., 169 Mo. 563, Ray County levied a tax, under Section 7654, R. S. Mo. 1889 (now Section 9868, R. S. Mo. 1929), of an additional twenty cents, over and above the constitutional limit of forty cents to which it was entitled for general purposes, to pay out-

standing warrants. Hence, the facts in the above case are substantially identical with the case at hand. The court in the above case said, among other things (l. c. 573):

"The vital question to be considered in this case is with respect to the validity of the levy in question Ray county having more than six million dollars and less than ten million dollars valuation, was limited to a levy (which was made) of forty cents on the one hundred dollars, by the express terms of section 11, article 10, of the Constitution of the State, and, unless the special levy of twenty cents in addition thereto was authorized by section 12 of the same article of the Constitution, or by section 7654, Revised Statutes 1889, it must be held invalid."

Again, the court said (l. c. 577):

"Now, if under such circumstances, the county court had the power to make a special levy of twenty cents on the hundred dollars valuation of property in the county in addition to the levy of forty cents, the constitutional limit, it could of course upon the same theory and by the same authority levy fifty or one hundred per cent and thus ignore those wholesome provisions of our Constitution which were intended to protect the property rights of the people, and to prevent its confiscation by an evasion of that instrument. That no such purpose was contemplated by the statute is indisputable, but what was meant thereby was that a special levy in addition to a general levy, when the latter does not come up to the constitutional limit, may be made for the purpose of paying past indebtedness of the county, provided it, including the general levy, or the levy for general purposes, does not exceed the constitutional limit."

We might add here that a number of later decisions from our Supreme Court follow and sustain the above cited case in the principle that a county cannot levy a tax in excess of the maximum constitutional rate.

CONCLUSION.

Hence, in view of your letter stating that Camden County will be required to levy the full and maximum rate of forty cents allowed it by the Constitution in order to pay necessary current expenses, it is our opinion that the county is not authorized under the section referred to, namely, Section 9868, to levy an additional tax of ten cents, or any other amount, for the purpose of paying the outstanding back warrants you mention.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

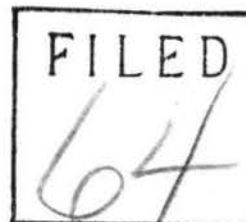
JWB:HR

SCHOOL FUND MORTGAGE:
SALES OF FORECLOSURE:

Sales under foreclosure of school fund mortgages can only be had on some day during the term of the circuit court.

March 22, 1938

3-27-38



Mr. L. I. Morris,
Prosecuting Attorney,
Lafayette County
Lexington, Missouri.

Dear Sir:

This is to acknowledge receipt of yours of March 19, 1938, requesting an official opinion from this department which is as follows:

It is respectfully requested that your office supply me with an opinion based on the following set of facts referring to Revised Statutes of Missouri, 1929, Sections 9252 and 9254.

John J. Price, County Clerk, Lafayette County, Missouri, wishes an opinion on the question of the necessity of holding foreclosure sales under school fund mortgages during a term of the circuit court of the county. Under the above sections he wishes an opinion whether or not such foreclosure sale can be held at a time when the circuit court is not in session."

Section 9252 R.S. Mo. 1929 provides for the form of school fund mortgage and the legal notice is necessary for foreclosure of school fund mortgages and is as follows:

"Form of mortgage--notice of sale--fees, how paid.--Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or

any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction foreclosing the mortgage. In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

When the county court determines that it is necessary to sell lands under foreclosure which have been mortgaged for school funds, it proceeds by virtue of the provisions of Section 9254 R.S. Mo. 1929, which is as follows:

"County court may make order of sale, when.--Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the

effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

The foregoing section provides that a certified copy of the order of the county court directed to the sheriff to sell the mortgaged lands shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court and shall be proceeded with accordingly. Section 1198 R.S. Mo. 1929 which sets out the procedure to be followed by the sheriff in selling real estate under executions, is as follows:

"Sheriff in selling real estate shall proceed how--notice to be given--sales, where made.--When real estate shall be taken in execution by an officer, it shall be his duty to expose the same to sale at the courthouse door, on some day during the term of the circuit court of the county where the same is situated, having previously given twenty days' notice of the time and place of sale, and what real estate is to be sold and where situated, by advertisement in some newspaper printed in the county which may be designated by the plaintiff or his attorney of record, if there be one regularly published, weekly or daily, and if not, by at least six printed or written handbills, signed by such sheriff, and put up in public places in different parts of the county; and the printer's fee for such advertisement shall be taxed and paid as other costs:" * * * * *

If the certified copy of the order of the county court for the sale under foreclosure of the lands under the school fund mortgage has the effect of a fieri facias on a judgment of foreclosure by the circuit court and the proceedings for such sale are in accord with circuit court proceedings on judgments, then it would seem that the sheriff shall follow the proceedings set out in said Section 1198, supra, that is, sell the land on some day during the term of the circuit court.

In the case of McClurg v. Dollarhide, 51 Mo. 347, 1.c.

349, the court had under consideration Section 30, Laws of 1855, page 1425, which section is almost identical to Section 9254 R.S. Mo. 1929, and there the court said:

"* * * * Section 30, same page, provides for the foreclosure of a Mortgage, before the County Court, and provides that a copy of the order, foreclosing the Mortgage, shall have the same effect as a fieri facias on a judgment of foreclosure in the Circuit Court, and shall be proceeded on accordingly by the Sheriff." * * * * *

And on page 350 of the same case in speaking of the provisions of said Section 30, Laws of 1855 (now Section 9254 R.S. Mo. 1929) the court said:

"The other executions, authorized to be issued from the County Court, have the force and effect and must be proceeded on in like manner, as executions issued by the Circuit Court. It is so well known that lands cannot be sold on executions except during the sessions of the Circuit Court, that a notice to sell at a County Court would be wholly disregarded, and a sale under such notice might be ruinous to all parties for want of bidders." * * * * *

In the case of Grant v. Huston, 105 Mo. 97, l.c. 101, the court, in discussing said Section 30, page 1425, R.S. Mo. 1855, now Section 9254 R.S. Mo. 1929, said:

"It is agreed there was no court in session at the date of the sale. Where the county court by virtue of section 30, page 1425, Revised Statutes 1855, orders the sheriff to sell the mortgaged premises, he should make the sale during a session of the circuit court, and it has been held that a sale not thus made under such an order is void. McClurg v. Dollarhide, 51 Mo. 347; Wilcoxon v. Osborn, 77 Mo. 622-632." * * * * *

Mr. L. I. Morris

-5-

March 22, 1938

In our research on the foregoing points, we fail to find where the courts have changed the above rulings.

CONCLUSION

By virtue of the provisions of the foregoing statutes, and of the cases cited, supra, this office is of the opinion that the sheriff can only sell lands under foreclosure of school fund mortgages on some day during the term of the circuit court of the county in which such lands are located.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

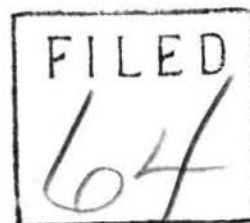
TWB DA

MORTGAGES: Mortgages of a Building and Loan Association are not taxable.

April 14, 1938

4-15

Mr. Albert F. Moore,
Assessor of Perry County,
Perryville, Missouri.



Dear Sir:

We have your letter of April 11th requesting an official opinion from this department, as follows:

"Please give me your opinion on the law of assessing mortgages owned by the Perry County Savings and Loan Association. Are they assessable or no?"

In compliance with your request, we wish to say that we have ascertained from the office of the Secretary of State that the Perry County Savings and Loan Association is organized and chartered as a building and loan association, and such being the case, we believe your question is answered by the following statutory provision, together with the following two decisions by the Supreme Court of Missouri.

Section 9768, R. S. Mo. 1929, reads as follows:

"All parties holding stock or shares as owners or in trust in any building and loan association in this state, on which no loan has been obtained from such association, shall be required to give a just and true list of the same to the assessor, with the actual cash value of each share on the first day of June in each year, and the tax shall be levied upon said shares, and collected from such holder

4/14/38

or depositor of the same, as taxes on other personal property; and any failure on the part of such owner, holder or depositor of such shares shall subject such holder to the same penalties now provided for failure to give to the assessor a true list of all taxable property, verified by affidavit."

In the case of Kansas City v. Building and Loan Ass'n., 145 Mo. 50, the court construed the above statute as excepting a building and loan association from taxation, the court saying at page 52, as follows:

"The property of building and loan associations is excepted from assessment and taxation by State law; that law providing for the assessment and taxation of such corporations by assessing the shareholders on their shares, and from them collecting the tax."

In the later case of State ex rel. v. Lesser, 237 Mo. 1. c. 326, the court said:

"The reason for making exceptions (from property taxation) of banks, insurance companies, steamboat companies and building association is the difficulty in reaching the tangible property in those concerns; the stock is treated as representing the property and taxed in lieu of taxing the property." (The matter in parenthesis ours.)

Hence, we conclude that the mortgages owned by the Perry County Savings and Loan Association are not assessable as such for taxation.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR

SPECIAL ROAD DISTRICTS: Tax may not be levied on property subsequent to date of levy.

May 26, 1938



Hon. L. I. Morris
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Sir:

This department wishes to acknowledge your request for an opinion under date of May 25, 1938, wherein you state as follows:

"At the request of the Lafayette County Court and the Assessor your opinion is asked in the following matter.

The Higginsville Special Road District of Lafayette County, Missouri, is holding a bond election for the purpose of raising funds to improve the roads within that district. The election is to be held May 31, 1938.

It is respectfully requested that you inform us whether or not a tax may be levied on the property of this district for the current year. The court wishes to know whether or not the 1937 tax can be assessed and levied in this district."

We assume that the Higginsville Special Road District of Lafayette County, Missouri, is holding a bond election for the purpose of raising funds to improve the roads within the district under the authority of Section 7961 R. S. Missouri 1929, which provides in part as follows:

"If it shall appear that two-thirds of the voters voting at such election on said question shall have voted in favor of the issuance of said bonds, the board of commissioners of the special road district, or the county court, as the case may be, shall order and direct the execution of the bonds for and on behalf of such special road district or township, and shall provide for the levy and collection of a direct annual tax upon all the taxable property in said district or township sufficient to provide for the payment of the principal and interest of the bonds so authorized as they respectively come due. It shall be the duty of the clerk of the board of commissioners on or before the first day of May in each year, or the state auditor immediately thereafter, in case the clerk of the board of commissioners should fail or neglect, on or before the first day of May of each year, so to do, to certify to the county court of the county or counties, wherein such road district is situated, the amount of money that will be required during the next succeeding year to pay interest falling due on bonds issued and the principal of bonds maturing during such year. On receipt of such certificate it shall be the duty of the county court, or courts, at the time it makes the levy for state, county, school and other taxes, to, by order made, levy such a rate of taxation upon the taxable property in the road district, in such county or counties, as will raise the sum of money required for the purposes aforesaid. On such order being made it shall be the duty of the clerk of the county court, or courts, to extend such rate of taxation upon the tax books, against all of the taxable property in the district in such county or counties, and the same shall be collected by the collector of the revenue at the time and in the manner, and by the same means as state, county, school and other taxes are collected. At the time the county court is required to determine and levy the rate of taxation for state, county, school

and other taxes, to determine, order and levy such a rate of taxation upon the taxable property in any township in such county as may have outstanding bonds issued under this section as will be sufficient to pay interest and principal falling due during the next succeeding year. It shall be the duty of the clerk of the court to extend upon the tax books of the county such rate of taxation upon and against all of the taxable property in such township, and when so extended the same shall be collected by the collector of the revenue at the time, in the manner, and by the means that state, county, school and other taxes are collected. All of the laws, rights and remedies of the state of Missouri for the collection of state, county, school and other taxes, shall be applicable to the collection of taxes herein authorized to be collected."

The above statute provides that the Board of Commissioners must on or before the first day of May in each year, or the State Auditor immediately thereafter in case the Board should fail or neglect, certify to the County Court wherein the road district is located, the amount of money that will be required during the next succeeding year to pay the interest and principal on bonds.

Assuming that the bond issue obtained the necessary two-thirds vote, it might be said that it would be impossible for the Board or the Auditor to comply with the mandate of the statute inasmuch as the election was at a date subsequent, viz, May 31, 1938. As we view the statute, however, the same is merely directory for the reason that the date set by the Legislature does not seem to be essential as we will more fully show during the course of this opinion.

We find support for our view in the rule enunciated by the Court in the case of State ex rel. Hamilton vs. Hannibal and St. J. Railway Company, 113 Mo. 297, 1. c. 308, 21 S.W. 14, thus:

"When statutes direct certain proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed.' In such case the statute is said to be directory. Sedgwick on Construction of Statutory and Constitutional Law, pp. 316, 317, 318; Dwarris on Statutes, 608-611; Beck vs. Allen, 58 Miss. 156; Counties vs. Railroad, 65 Ala. 394; Pond vs. Negus, 3 Mass. 230; Williams vs. School District, 21 Pick. 75."

The statute further provides that upon receipt of the certificate it is the duty of the County Court at the time it makes the levy for state and county purposes to levy upon the taxable property in the road districtas will raise the sum of money required by reason of the bond issue to improve the roads.

We must therefore determine the date of levy by the county court for state and county purposes.

Section 9871 R.S. Missouri 1929 (Section 12863 R. S. Missouri 1919) provides that the county court ascertain the sum necessary to be raised for county purposes and to fix the rate of taxes necessary to raise the amount needed:

"As soon as may be after the assessor's book of each county shall be corrected and adjusted according to law, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book."

Section 9874 R.S. Missouri 1929 (Section 12866 R. S. Missouri 1919) provides that at the May Term of each year the County Court is to appropriate, apportion and subdivide the revenue in part as follows:

"The county courts of the several counties of this state are hereby authorized and empowered, at the first regular term of such court after the taking effect of this chapter, and at the May term every year thereafter, to appropriate, apportion and subdivide all the revenues collected, and to be collected, and moneys received and to be received, in the various counties in the state, for county purposes,* * *"

In the case of State vs. St. Louis San Francisco Railway Company, 300 S.W. 274, 1. c. 276, the Supreme Court in construing the above statutes determined that the levy by the County Court must be made at or before the May Term of Court, and said:

"Although the statute does not specifically provide that the county court shall make the levy of taxes for county purposes at any particular time, such time is quite limited perforce of other provisions. Section 12863, R.S. 1919, requires the county court to determine the sum necessary to be raised for county purposes and to fix the rate necessary to raise that amount as soon as may be after the assessor's books shall be corrected and adjusted according to law. This must be at or before the May term of each year, because, at that term, the county court is authorized and empowered to appropriate, apportion, and subdivide all of the revenues collected and to be collected, etc. Section 12866 R.S. 1919. The legislative intent that the levy should be made at or before the May term is thus quite manifest. State ex rel. Wabash Railroad Co., supra, loc. cit. 141 (158 S.W. 27)."

Section 9746 R.S. Missouri 1929, provides that property held June 1st is liable for taxes:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

The Court in the railway case supra, in holding that the levy to be made for county purposes at the May Term of Court is governed by the last assessment, which in this case would be June 1, 1937, said:

"Thus the county court is at least authorized and empowered to make the levy for county purposes at its May term and, in fixing the rate of such levy, the court is governed by the last assessment, which means the last assessment completed at the time such levy is made. It can mean nothing else. If the assessment for the current year is completed at the time the levy is made, well and good. That assessment can be used as the measuring rod to ascertain the rate which can legally be levied. If the assessment for the current year is not complete at that time, then the completed assessment for the previous year must be used."

The levy must therefore be made at or before the May Term of the County Court, based on the last assessment.

We have found only one Missouri case, City of Westport vs. McGee, 128 Mo. 152, which is in point in holding that property is not taxable for the current year if brought in after taxes have been levied. The Court said:

May 26, 1938

"A lien is given for municipal taxes, but there is nothing in the statute that justifies the claim that the lien for the city taxes relates to the date of the county assessment. On the contrary the city council must by ordinance establish the rate of taxes upon the county assessment, and there is no lien until the tax is levied and extended by the city council on its tax book. The question here is, were these lands within the corporate limits when the tax was levied. If they were, they are subject to city taxation. If lands are brought into the city after taxes have been levied upon the property of the city, the lands subsequently brought in are not subject to that levy.* * *"

Assuming that the bond issue has carried and the County Court has not yet adjourned its May Term, then if the Board certifies to the County Court during said term the amount of money that will be required, we are of the opinion that the County Court may yet and during the May Term make its order levying the tax on the property of the District for the current year based on the 1937 assessment.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

COUNTY ROAD AND BRIDGE)
FUND:) Where county has no highway engineer
and county surveyor has not been
designated by county court to supervise
or substitute for engineer, road and
bridge funds shall be placed in one
general road fund under Section 7890,
R. S. 1929, but must be apportioned to
the various road districts under
Section 7891, R. S. 1929.

June 2, 1938.

Mr. J. R. Moss
Clerk, County Court
Maries County
Vienna, Missouri



Dear Sir:

This Department is in receipt of your request
for an opinion of May 28th, which is as follows:

"I am in dire need of a written
opinion in regard to the appor-
tionment of funds collected by the
Collector from the general road
fund.

"Since our Highway Engineer has
been disposed of by a vote of the
people, and there is no road boss
to give bond in each road district
for the handling of the district
money, should the money collected
for road and bridge purpose be
apportioned to the common road
districts or placed in one general
road fund to be used at the dis-
cretion of the County Court."

Your county having dispensed with the services
of county highway engineer, it becomes necessary to resort
to the terms of Section 8020, R. S. Mo. 1929, to determine
how matters relating to roads and bridges shall be governed;
said section being as follows:

"In all counties in this state that
may vote against the county highway

engineer law in the manner prescribed in section 8019 of this article, all matters relating to roads and highways and the expenditures of the public funds thereon shall be governed by the laws then in force in such counties, except that part of the law pertaining to the appointment of the county highway engineer. In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court; and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day he may be actually employed or engaged as such county highway engineer. The county court may empower the county highway engineer, or the county surveyor when acting as county highway engineer, to employ such assistants as may be deemed necessary to carry out the court's orders and at such compensation as may be fixed by the court, not to exceed the sum of four dollars per day for deputy county highway engineer nor more than three dollars per day for each other assistant for each day they may be actually employed."

The construction of the above quoted statute and the effect of the same is construed in the case of *Spurlock*

v. Wallace et al., 204 Mo. App. 674, l. c.677, as follows:

"Section 10572, Revised Statutes 1909, is somewhat ambiguous, as it provides for an Ex-officio County Highway Engineer and defines certain duties as therein specially set out or as may be ordered by the county court. Reading this section by itself, it would appear that there is some reason for appellant's contention, but when the whole section is read in connection with other sections relating to roads, and highways, we are inclined to the construction placed upon the law by the trial judge. It appears that the road, highway and bridge laws were amended in 1909, practically setting up a new system, running through which were certain duties provided for a county highway engineer. It was provided, however, in section 10571 that if a majority of those voting on the proposition at such election voted against the county highway act, then this article and the provision of the law relating to the appointment and duties of a county highway engineer shall not be enforced in such county. Douglas county had voted against the highway engineer act, therefore any duties of a county highway engineer were dispensed with. In section 10572, Revised Statutes 1909, it is provided that all matters relating to roads and highways, and the expenditure of public funds thereon shall be governed by the laws then in force in such counties except that part of the law pertaining to the appointment of the county highway engineer. The latter part of this section also throws light,

as it provides that the county court may empower the county highway engineer or county surveyor to employ such assistance as may be deemed necessary 'to carry out the court's orders.'

"The first road and highway law of Missouri that we find, governing counties such as Douglas, for a county highway engineer, appears in Session Acts of 1907, page 401. Under this act there was no election given to the people to determine for themselves whether there would be a county highway engineer. This law was amended in the 1909 act, which did give the people of the county the right to determine for themselves whether such an officer was desired. The Law of 1907 provided that the compensation for a highway engineer would be not less than \$300, nor more than \$2000, per year, while the Amendment of 1909, under section 10572, permits the county court to make a per diem charge.

"If the contention made by appellant should be upheld, then we must necessarily hold that to vote under section 10571, and to thereunder abolish the highway engineer act, meant simply a change of the manner and amount of compensation to be paid to the party acting as highway engineer, as the appellant is contending that he is duty bound to perform exactly the same service that the highway engineer would have performed even though the people have voted out this law. We cannot lend sanction to this narrow construction, as it would appear that the purpose of sections 10571 and 10572, Revised Statutes 1909, was to permit the people of a county to abolish the office of highway engineer yet to leave it possible for the surveyor to perform the duties that the highway engineer would have performed

had the law not been voted out,
* * * * *

Having determined by the above decision that the county court may order warrants drawn direct to the road overseers without having them approved by the county surveyor if the officer of the highway engineer is abolished, it becomes necessary to consult the statutes relative to the road and bridge levies.

Section 7890, R. S. Mo. 1929, provides as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

By the provisions of the above statute it is plain that the funds derived thereunder are paid into the county treasury as other funds of the county, and by the decision of *Spurlock v. Wallace, et al.*, quoted supra, we are warranted in the conclusion that the county court can exercise its own discretion in paying out the funds in this section. But Section 7891, R. S. Mo. 1929, contains somewhat different provisions. The first portion of it permits the county court to levy not in excess of twenty-five cents on each one hundred dollars valuation to be used for road and bridges. The provisions are as follows:

"* * * Provided, however, that all that part or portion of said tax

which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: Provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: * * * * *

The phrases, "or other road district," contained in the first proviso, and "the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise," found in the second proviso, appear to indicate beyond doubt that it was the intention of the Legislature to have each road district, special or otherwise, apportioned its pro rata part derived from the levy under Section 7891, supra.

June 2, 1938

Conclusion.

We are, therefore, of the opinion that under Section 7891, supra, the road and bridge funds derived under the levy should be apportioned to the common road districts instead of being placed in one general road fund, the same to be paid out in a like manner as mentioned above.

Referring again to Section 7890, it would appear that Section 7867, R. S. Mo. 1929, likewise governs the disposition of the funds; said section being as follows:

"All taxes derived from the levy authorized by section 7890, R. S. 1929, are hereby appropriated to the use of the county court in each county where levied, to be used at the discretion of said court for the construction and maintenance of roads and bridges located within the confines of the county highway system herein provided for as well as all other roads and bridges in such county."

We are, therefore, of the opinion that the funds derived under the levy of Section 7890, supra, should be placed to the credit of the county road and bridge fund and the county court can exercise its own discretion in paying out the funds derived from this section.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

ROADS: Territory embracing only part of a town cannot be incorporated under Section 8024, R.S. 1929.

August 5, 1938

Hon. L.I. Morris
Prosecuting Attorney
Lafayette County
Lexington, Missouri



Dear Sir:

This will acknowledge receipt of your inquiry of recent date which reads as follows:

"At the special request of Odessa Special Road District No. 2, Odessa, Lafayette County, Missouri an opinion is asked on the following set of facts:

'Odessa Special Road District No. 2 is a duly organized Road district under the provisions of Missouri Revised Statutes of 1929, Section No. 8024. This section provides for the organization of such special districts. As a matter of fact, three such special districts were organized and each of the three took in one third of the city of Odessa, Missouri. Each of the three operated under this section (8024) and after a few years existence No. 3 District voted back into the County system. This leaves two existing Districts at the present time.

District No. 2 desires to vote bonds for resurfacing the 60 miles of road in that district but before doing so and before making an application for Federal Funds they wish to know whether under the existing circumstances, these two districts can exist in the city of Odessa.

August 5, 1938

The district wishes to know whether the fact that the two remaining districts (either or both) have complied with the provisions of the section mentioned (8024), in that there are two of them and the two exceed the 8 miles square mentioned in this section. The area of the two is double that specified and they wish to know whether either or both districts will have the right to submit the bond question to the voters of the district'."

As we read your letter, there are two special road districts supposedly incorporated under Section 8024, R.S. Missouri, 1929, each of which embraces only a part of the City of Odessa, and the other part of said city is not in a special road district. The question is, are the two special road districts, each of which contains a part only of the City of Odessa, legally incorporated?

We think it axiomatic that in the absence of statutory authority, no body of people can create themselves a political corporation. Only such corporations can be created as are authorized by statute. In 43 C.J. 79, it is said:

"Except in so far as it is controlled by constitutional provisions, the legislature has the power to determine what bodies shall be incorporated; and the body seeking incorporation must show itself to be substantially within the terms of the legislative requirement."

We must then look to the statutes to see what territory can be organized as a special road district of the class under consideration. Section 8024, R.S. Missouri, 1929, reads as follows:

"Territory not exceeding eight miles square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized as hereinafter set forth into a special road district: * * *"

It will be noted that by the foregoing statute, "territory not exceeding eight miles square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized" into a special road district. Territory containing part of a city, town or village is not authorized to be incorporated into a special road district. Section 8026, R.S. Missouri, 1929, provides that the mayor and members of the city council of any city or town within such special road district, together with the county court of the county, shall jointly select commissioners for such special road districts. Reference to Section 8034, R.S. Missouri, 1929, will show that the commissioners of such special road districts are authorized to expend a portion of the revenue of such districts in grading and repairing the roads or streets within the corporate limits of any city within said special road district. Section 8041, R.S. Missouri, 1929, refers to licenses collected by any city within such special road districts.

We think it is clear that before any territory can be organized into a special road district under Section 8024, such territory must have within its boundaries a city, town or village. No provision is made in said section for incorporating territory which contains a part of a city, town or village.

43 C.J. 80 reads in part as follows:

"However, it is within the power of the legislature, subject only to such constitutional restraints, if any, as may exist, to determine the nature and extent of the territory to be incorporated, and in some instances it has exercised this power by prescribing the minimum or maximum area which may be incorporated, or by prescribing the nature and character of the territory which may or may not be incorporated."

By Section 8024, the legislature of this state has determined the nature and extent of the territory which may be incorporated into a special road district, ^{by} prescribing a maximum of territory which may be so incorporated, and by

August 5, 1938

declaring that such territory must contain within its boundaries a city, town or village. Before any territory can be incorporated under this section, it must come within such limitations as to the nature and extent of the territory set forth in said section.

In the case of State ex rel. v. McReynolds, 61 Mo. 203, the court was considering whether under a statute authorizing county courts to incorporate towns and villages and their commons, the county court could incorporate agricultural lands adjacent to such towns and villages. In connection with the discussion of such question, the court said at l.c. 210:

"It, I think, follows that the county court under the act of the legislature first referred to, only had power to incorporate towns and villages as laid out and surveyed into lots, streets, alleys or other public grounds and commons belonging thereto, as laid out and designated for public uses, and that any attempt by the county court to incorporate the farming lands of the country, even in the vicinity of a town, would be wholly without authority and inoperative."

We think the foregoing case follows the general doctrines heretofore referred to, to the effect that only such territory as comes within the statute authorizing incorporation can be incorporated, and that an attempted incorporation of territory not authorized to be incorporated is void.

In the case you refer to, there are two special road districts presumably incorporated under Section 8024 of the Statutes, but the territory represented by such districts was not territory which could be incorporated under Section 8024.

Bonds issued by a special road district which is not legally incorporated would not likely be registered nor could they be sold. It would, therefore, seem unwise for such a district to attempt to vote bonds.

Hon. L.I. Morris

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August 5, 1938

CONCLUSION

It is, therefore, the opinion of this office that territory which comprises only a part of a city, town or village cannot be incorporated under the provisions of Section 8024, R.S. Missouri, 1929.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

POLITICAL PARTY COMMITTEE: Action of individual members of committee not taken at a committee meeting is invalid.

October 28, 1938

10-28



Mr. Morgan M. Moulder
Prosecuting Attorney
Camdenton, Missouri

Dear Sir:

We have your letter of October 27, 1938, asking for an opinion of this office, which letter reads as follows:

"There existed on the Republican ticket a vacancy for the office of Constable of Russell Township. Eight of the fourteen individual members of the Central Republican Committee of Camden County, Missouri signed and certified the nomination of one Lester Woodall to fill said vacancy. The signatures of said members of said Committee were obtained at their homes in various parts of the county and while they were not in meeting as a Committee. The Central Republican Committee of Camden County did not while in meeting as a Committee certify and nominate Lester Woodall as the Republican nominee for Constable of said township, but more than a majority of the individual members of the Committee signed the certificate of nomination and the same was filed with the Clerk of the County Court.

Can the members of a political party committee certify nominations to fill vacancies while they are not meeting together as a body and as a committee?

The Clerk of the County Court informs me that he has caused the name of Lester Woodall to be printed on the sample ballots and in the publication notices of the election.

If said certificate of nomination, signed by the individual members of the Republican Committee, when they were not in session as a committee, is invalid, then what would you advise the Clerk of the County Court to do?"

In answer to your request beg to say that we have been unable to find any authority or court decision either from this State or any other, directly passing on the proposition you state. Hence, it is necessary to resort more or less to fundamental principles and analogies.

Where a committee is provided for consisting of a multiple number of individuals we take it that a committee action comprehends a meeting of the individuals of the committee at some time and place whereby they can interchange ideas and discussions upon whatever matter or proposition is before them, and reach a result by vote or other indication, and the result is the action of the committee as a collective group and not as individuals who make up the committee.

We note that by Section 10240 R.S. Missouri 1929, with reference to persons nominated at a primary election who thus become nominees eligible for election, a certificate of nomination is required to be made out and executed by the presiding officer and secretary of the political committee of the nominee's party, for use by the county clerk in publishing notice thereof.

Section 10268 R.S. Missouri 1929, provides for filling of vacancies both before and after a primary by the party committee. We are disposed to believe that the action by the party committee in designating a party nominee by reason of occurring vacancy operates the same as if a party had been nominated by a primary, and that consequently a certificate of nomination is as much required under Section 10268 as is required under the aforesaid Section 10240, and that consequently a certificate of nomination signed by individual members of the committee, even though it be to the extent of a majority, is not conforming to the statutory requirements which call for

such certificate to be signed by the presiding officer and secretary of such committee.

We do not believe that committee action can be taken unless the members thereof, or at least a majority of them, meet at some designated place within the territorial limits that they are entitled so to meet.

We believe an analogous situation presents itself with reference to school boards which in fact are nothing more or less than committees elected by the residents of particular school districts, and which persons when so elected are legally denominated school directors or school board members. It is well established that a school board action cannot be taken unless the constituent members of such board meet and collectively act as a school board or board of directors. In this connection we cite you the case of Decker vs. School District No. 2, 101 Mo. App. 1. c. 119, wherein the Court said:

"The evidence conclusively shows that, in making the settlement of plaintiff's account with him, they did not act individually but collectively and as the board of directors of the school district, and we think the district is conclusively bound by their action on that occasion."

It is to be seen that the Court in the above case noted that the members concerned did not act individually but on the other hand collectively, which we believe is an indirect way of saying that the school board in the case could not have legally acted as individuals.

CONCLUSION

It is our conclusion that the individual action of the members of the Republican Committee of Camden County in nominating one Lester Woodall as Republican nominee for constable is

Mr. Morgan M. Moulder

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October 28, 1938

invalid and the Clerk of your Court would not be justified in having such name printed on the ballot for the coming election.

Respectfully submitted,

J. W. BUFFINGTON
Assistant Attorney General

APPROVED:

J.E. TAYLOR
(Acting) Attorney General

JWB:MM

ROADS: The proper remedy to question the validity of the organization of a special road district under Section 8024, R. S. Mo. 1929, is quo warranto by the prosecuting attorney of the county.

December 6, 1938

12-12



Honorable L. I. Morris
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Sir:

We have received your letter of December 5, 1938, which reads as follows:

"At the request of the Lafayette County Court an opinion is requested upon the following set of facts.

"Referring to your opinion of Aug. 5, 1938 concerning the Odessa Special Road District at which time the opinion was that District No. 2 was not incorporated properly under the provisions of Section 8025 R. S. Mo. 1929.

"This district having been improperly organized the question arises as to the proper method of dissolution. I refer you to Section 8057 R. S. Mo. 1929 which provides for a petition notice and election.

"The question before the court is whether such an election is necessary in the preceding case or whether a failure of the County Court to further recognize this decision is sufficient."

Dec. 6, 1938

The opinion mentioned in your request, I assume, is the opinion written by Harry H. Kay, Assistant Attorney General, on August 5, 1938, in which he held that the territory embracing only part of a town can not be incorporated under Section 8024, R. S. Mo. 1929. You also ask in your request if an election would be necessary to dissolve the Odessa Special Road District, in view of the above opinion and which you designate as a decision. Opinions given by the Attorney General's office are merely advisory holdings and should not be considered as adjudications in any manner.

If the county court should ignore the organization of the special road district for the reason that it is void and invalid according to the opinion above set out, and proceed to incorporate another road district in the proper manner, there would still be the objection that the first incorporation of the road district which was properly held invalid by this office may possibly be in effect. If such would be the case, there would be two road districts--the first one which would be questionable, and the second one, if the proper procedure was followed, which would be valid. In case a bond election was held on the second incorporation of a special road district, it is very probable that the buyers of the bonds or the state auditor, who registers the bonds, may set up the fact that the incorporation of the road district as it now stands might have been valid, and the second incorporation, which I presume you intend to incorporate, would then be subject to the same criticism as your present road district.

The incorporation of your present road district did not follow Section 8024, R. S. Mo. 1929, for the reason that it did not include any city, town or village, but only included a part of the city of Odessa. This statute must be strictly construed, and in the case of State, at Inf. of Gentry, Atty. Gen. v. Hughesville Special Road Dist. No. 11, 6 S. W. (2d) 594, 1. c. 596, the court said:

"The special road district contemplated by article 8, c. 98, R. S. 1919, is 'a political subdivision of the state for governmental purposes'--a municipal corpora-

tion. Section 10834. It is brought into existence through the exercise of legislative power. State v. Thompson, 315 Mo. 56, 285 S. W. 57. The proceedings prescribed by statute for its organization must be scrupulously followed. State v. Colbert, 273 Mo. 198, 201 S. W. 52."

In your request you ask if it would be proper to dissolve the incorporation as set out in Section 8057, R. S. Mo. 1929. This section has been amended by Section 8057, Session Laws, 1935, page 343, and reads as follows:

"If any district shall have adopted the provisions of this article the question may be resubmitted after the expiration of four years upon the petition of fifty resident taxpayers of said district at the next general election, or at a special election to be held for that purpose at such time as the County Court may order. The County Court shall give notice of such election and of such submission by publishing the same in some newspaper published in the County--such notice to be published for two consecutive weeks, the last insertion to be within five days next before such election; and such other notice may be given as the Court may think proper. The County Court shall have the ballots for such election printed and shall have printed on such ballots 'For the disorganization of the Special Road District', 'Against the disorganization of the Special Road District', with the direction 'Erase the clause you do not favor.' If a majority of the votes upon such proposition be cast against it said district shall be disincorporated and the operation of the law shall cease in said district. In all other respect said election, and the result thereof, shall be governed by the provisions of Article 9, Chapter 42, Revised Statutes of Missouri, 1929."

The amendment merely sets out more specifically the mode and manner of holding the election for the dissolution.

In order to dissolve the incorporation of a special road district under Section 8057, supra, the county must stand on the proposition that it has adopted the provisions of Article 9, Chapter 42, R. S. Mo. 1929, but according to the opinion of this office as rendered on August 5, 1938, the road district had not adopted the provisions of Article 9 for the reason that the territory set out in the petition for organization of the special road district did not contain any city, town or village. A further reason for not following the provisions of Section 8057 for the dissolution of a special road district would be that in case the voters voted against the dissolution of the special road district, the present road district would be in the same situation as at the present time. This Section 8057 also provides that in order to use this method of dissolution, the road district must have been in operation for a period of not less than four years, and since the opinion as heretofore mentioned holds that the organization of the special road district was invalid, it could not have been in operation for a period of four years. Another reason why Section 8057 should not be used for the purpose of the dissolution of the special road district would be that it would be more expensive than the proper legal procedure for the determination of the legality of the special road district as it now is situated at the present time.

The proper remedy to obtain a final and quick adjudication as to the legality of the organization or incorporation of the special road district would be by quo warranto, for the reason that the record proper in the case, without the use of intrinsic evidence, would show on its face that the territory mentioned in the petition for a special road district did not include wholly any city, town or village. This quo warranto proceeding could be filed in the Circuit Court of Lafayette County, and it would not be necessary that it be filed in the Supreme Court. This was the holding in the case of State, on Inf. of Killam, Pros. Atty., et al. v. Colbert et al., 201 S. W. 52, 1. c. 54, 273 Mo. 198, where the court said:

"It is argued by respondents that the county court had authority to pass upon the facts showing whether or not it had jurisdiction, and, having found the facts in favor of its jurisdiction, the finding is conclusive. This finding of the court was a mere conclusion from the finding that a proper petition was filed and proper notice served. And it may be conceded that the county court did have jurisdiction of the subject-matter and of the parties interested, authorizing it to incorporate a road district. But, under the authorities, it must not only have acquired jurisdiction, but must act within the limits of the jurisdiction so acquired. If, having jurisdiction of the subject-matter, it proceeded to render a judgment in excess of its jurisdiction, then the judgment is a nullity.
* * * *

"Respondents cite several cases in support of their position. All these are cases where the facts found by the court to give it jurisdiction are either specifically found in every respect, or else there is a finding in general terms from which the specific facts necessary to confer jurisdiction are presumed to have been found, and in all the cases cited there were collateral attacks upon the judgments. A quo warranto proceeding is a direct attack upon, and in fact the appropriate direct proceeding by which to attack, the validity of the county court's order incorporating the district. State ex rel. v. Wilson, 216 Mo. loc. cit. 275, 115 S. W. 549; State ex inf. Fleming, 158 Mo. loc. cit. 561, 59 S. W. 118; State ex rel. v. Mining Co., 262 Mo. 503, 171 S. W. 356."

Dec. 6, 1938

The above case should be distinguished from the case of State ex inf. Mayfield, Pros. Atty., ex rel. D. M. Cook v. Dougan, 284 S. W. 997, 305 Mo. 383, in which case the record proper did not show want of jurisdiction of the county court to make an order in compliance with the organization of a special road district without the showing of intrinsic evidence outside of the record.

CONCLUSION

In view of the above authorities, it is the opinion of this department that if the county court should rely upon the opinion of this office dated August 5, 1938, concerning the Odessa Special Road District and proceed to properly incorporate another special road district which would include the whole city of Odessa, it might result in the same situation as the present road district and thereby make the bonds, if issued, non-saleable.

It is further the opinion of this department that by following the opinion of this office as written August 5, 1938, concerning the Odessa Special Road District, if an election for the dissolution of the special road district under Section 8057, Session Laws, 1935, page 343, was held and defeated, the same situation would remain as now exists in reference to the sale of bonds, if issued for the improvement of roads in the special road district as now situated.

It is further the opinion of this department that a writ of quo warranto filed in the Circuit Court by the Prosecuting Attorney of Lafayette County attacking the orders of the County Court made by reason of said organization of the special road district is the proper, speediest and less expensive procedure for testing and obtaining a final adjudication of the organization of the Odessa Special Road District under Section 8024, R. S. Mo. 1929.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

COUNTY BUDGET ACT: County Treasurer cannot pay unregistered warrants out of Class 2 when there are registered warrants outstanding payable out of Class 1.

December 15, 1938



Honorable Bryan Moss
Route 1
Hillsboro, Missouri

Dear Sir:

We have your letter of December 8, 1938, which reads as follows:

"As I have been elected County Treasurer of Jefferson County I would like to have an opinion or advice in regard to the following.

"It is my understanding that it has been a custom to pay Petit Jury and Inquest fees when same are presented to the Treasurer, same being charged to Class 2 of the Budget.

"Jefferson County operates on anticipated revenue and I am wondering if it is legal to pay the above when you have registered warrants outstanding in Class No. 1.

"I would like to hear from you as soon as possible as I take over the duties of Treasurer on January 1st, 1939."

Jefferson County, according to the Federal Census of 1930, has a population of 27,563 and is governed by Sections 1 to 8, inclusive, of the Session Laws of Missouri, 1933, page 340, which is known as the County Budget Act. Sections 2 and 5, Session Laws of 1933, page 340, were amended by the Session Laws of 1937, page 422. Class 1 of Section 2 of said law reads as follows:

"The county court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes."

Class 2 of Section 2 of said laws reads as follows:

"Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this act. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1.

"In estimating the amount required in class 2 the county court shall set aside and apportion in the budget a sum not less for even years than the sum actually expended in the last even numbered year and for odd years an amount not less than the amount that was actually expended during the last preceding odd numbered year."

Class 1 of Section 2 contains the phrase or sentence, "Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes." This means that if any money is available, it should be first apportioned to Class 1 before available money is appropriated to any other class of the fund to complete the full apportionment or appropriation to that fund. In other words, sufficient money must be apportioned out of the general fund which would be subject to warrants first out of the fund or cash on hand set aside for Class 1 in preference to other classes. This does not mean that if the complete apportionment or appropriation to Class 1 under the Budget Act has been exhausted, then more money should be subject to warrant which would deprive the other classes of their full apportionment or appropriation.

Section 1, Laws of Missouri, 1933, page 340, states as follows:

"The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

Section 2, Class 1, Session Laws of Missouri, 1937, page 422, states as follows:

"Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes."

Section 2, Class 2, Session Laws of Missouri, 1937, page 422, states as follows:

"This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1."

Reading all together, it clearly shows that the Legislature intended to direct the county court that morally Class 1 and Class 2 should have a full and sufficient apportionment and appropriation in preference to any of the other classes.

This apportionment must be considered the same as an appropriation and is so described in Sections 9 to 20, inclusive, of the 1933 Budget Act which apply only to counties of more than fifty thousand population. Funds can not be reallocated from the funds of one class to another unless there is a balance in a certain fund and the objects of its creation are and have been fully satisfied.

The proceeding of reallocation of funds in counties of less than fifty thousand population is governed by Sections 12167 and 12168, R. S. Mo. 1929, which are not in conflict with the Budget Act of 1933 or 1937. Sections 12167 and 12168 read as follows:

"Sec. 12167. Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

"Sec. 12168. Nothing in the preceding section shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

In your request you say that warrants payable out of Class 1 have been registered and unpaid when at the same time petit juror and inquest fees have been paid out of Class 2 appropriation. I am assuming that the juror or inquest fees were paid on scrip or warrants that were not protested and registered.

Jurors are to be paid out of Class 2 under the method prescribed in Sections 8765 and 8767, R. S. Mo. 1929, which read as follows:

"Sec. 8765. Upon the demand of such juror, the clerk shall give him a scrip, verified by his official signature, showing the amount which such juror is entitled to receive out of the county treasury."

"Sec. 8767. The treasurer of the county is hereby required, upon the presentation to him of any scrips given by the clerk aforesaid, to pay the same out of any money in the treasury appropriated for county expenses,

in the same manner and subject to the same rules as county warrants; and said scrip shall be received by the sheriff, collector or other proper officer in the payment of any debt due the county."

Inquest fees are paid according to Section 11636, R. S. Mo. 1929, and are payable out of Class 4. Section 11636 reads as follows:

"The county court may authorize and require the coroner to pay, at the view or inquest itself, the legal fees due to jurors, witnesses and interpreters at the same, out of money to be advanced to him, from time to time, out of the county funds, * * *."

It will be noticed that jury scrip shall be paid in the same manner as warrants and that the county court sets aside a certain amount for the performance of the duties of the coroner under Class 4 of the Budget Act.

When the county becomes indebted to anyone under any of the six classes set out in Section 2, Laws of 1937, page 422, it orders the clerk to draw a warrant on that fund as set out in accordance with Section 12169, R. S. Mo. 1929, which reads as follows:

"When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, and unless otherwise provided by law, in the following form:

"Treasurer of the county of _____: Pay to _____ dollars, out of any money in the treasury appropriated for ordinary county expenditures (or express the particular fund, as the case may require).

"Given at the courthouse, this _____ day
of _____, 19____, by order of the county
court.

Attest: C D, clerk. A B, president."

The county court sets aside and apportions a certain sum to each of the six classes as set out in Section 2, Session Laws of 1937, page 442, and Section 2, Session Laws of 1933, page 344, after taking into consideration the finances of the county under information furnished by the clerk of the county court under Section 4, Laws of Missouri, 1933, page 343, which mainly recites the estimated receipts and outstanding indebtedness. When the estimated receipts are not paid in as expected, it becomes necessary to issue warrants upon funds when there is no money to pay said warrants. When warrants are presented to the county treasurer and there be no money in the county treasury for that purpose out of that fund set aside for that particular class, the treasurer must register same under Section 12171, R. S. Mo. 1929, which reads as follows:

"No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

By presuming that the fund apportioned to Class 1 of Section 2 of the Budget Act is now exhausted and the warrants are now being protested and registered, they should be entered in accordance with the provisions of Section 12139, R.S. Mo. 1929. The Budget Act of 1933 does not provide for a transfer of funds in counties under fifty thousand population, as it does in Section 16 which applies to counties over fifty thousand population. Warrants protested and registered can be paid out of their respective funds in

counties under fifty thousand population only when the funds are transferred under the provisions of Section 12168, supra, which is possible where other classes, except Class 6, have a surplus.

Conclusion.

In view of the terms of the Budget Act, we are of the opinion that in counties under fifty thousand population it is not illegal for warrants to be issued under Class 2, Section 2, Laws of Missouri, 1937, page 422, if the warrants are not in excess of the amount allotted in the estimate to Class 2, but warrants issued in Class 2 should not be paid until all outstanding registered warrants have been paid in Class 1.

It is further the opinion of this Department that when Class 1 has outstanding registered warrants and no funds are in Class 1, but funds are in Class 2, then the funds of Class 2, or of any other Class, should be transferred to Class 1. In other words, in order to preserve the priorities, the warrants issued in Class 1 should receive priority of payment over any other warrants issued in any other Classes.

Respectfully submitted

W. J. BURKE
Assistant Attorney-General

APPROVED:

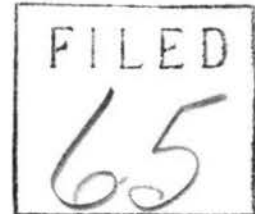
COVELL R. HEWITT
(Acting) Attorney-General

WJB:HR

LECTIONS:
OFFICERS:
WOMEN HOLDING OFFICE OF
TRUSTEE IN VILLAGES:

Women may be elected to the office of
trustee in towns and villages.

January 10, 1938



Mr. Charles E. Murrell, Jr.,
Prosecuting Attorney,
Adair County,
Kirksville, Missouri.

Dear Sir:

This office acknowledges receipt of your request
for an official opinion which is as follows:

"I would like to have an
opinion on the following
question: Can women vote
and hold the office of
trustee in towns and
villages in the State of
Missouri.

The question bothering me,
is the effect of town
ordinances passed by trust-
ees where there is a woman
member of the board of trust-
ees. I would like to call
your attention to the follow-
ing statutes: Sections 7093,
and 7139 R.S. Mo. 1929, and
also to Section 2 of Article
8, of the Constitution of
Missouri."

Section 7093 R.S. Mo. 1929 provides as follows:

"No person shall be a trustee
who shall not have attained
the age of twenty one years;
who shall not be a male cit-
izen of the United States;
who shall not be an inhabitant
of the town at the time of
his election, and reside there-
in for one whole year next

January 10, 1938

preceding; who shall not be a householder within the limits of such town; and every trustee shall hold his office for the term of one year, and until a successor is elected and qualified."

Section 7139 R.S. Mo. 1929 provides as follows:

"All male persons, of the age of twenty-one years, residing within the limits of any incorporated town or city, and who shall have resided within the same for sixty days next preceding an election, if otherwise qualified by the Constitution and laws of this state, shall be entitled to vote at all elections of town officers; and no property qualification shall be required by any person to render him eligible to any office in any city or incorporated town."

Article 8, section 2 of the Constitution of Missouri provides as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison

shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the rights of voting."

Constitutional Amendment number 1 of 1921, page 195
Laws of Missouri, 1921 first and second extra sessions is
as follows:

"Proposed constitutional amendment enabling women to hold any office in this state.

JOINT AND CONCURRENT RESOLUTION submitted to the qualified voters of Missouri an amendment to the Constitution thereof so as to enable women to hold any office in this state.

Be it resolved by the Senate, the House of Representatives concurring therein, as follows:

That at the special election to be held in this state on August 2, 1921, there shall be submitted to the qualified voters of the state for adoption the following amendment to the Constitution thereof:

No person shall be disqualified from holding office in this state on account of sex, and those provisions in the Constitution of Missouri requiring that persons, to be eligible for certain offices, must have been qualified voters for a certain number of years, shall not apply to women who have the necessary qualifications of citizenship until after the nineteenth amendment to the Constitution of the United States shall have been in effect an equivalent number

January 10, 1938

number of years.

For proposition No. 2 at August election (Constitutional Amendment No. 1), 159,230; against, 147,751."

From your inquiry it appears that there is a confusion in the provisions of Sections 7093 and 7139 R.S. Mo. 1929 and with the constitutional provisions relating to the rights of women to vote, however, upon an examination of the provisions of the constitution and the constitutional amendment above cited, it appears that women have been given the right to vote and the right to hold office.

"In *Rose v. Sullivan* (1919) 56 Mont. 480, 185 Pac. 562, where the question presented was, 'Can a woman, otherwise qualified, be denied the right to hold the office of county auditor because of her sex,' under a statute providing, in effect, that the auditor should be some 'male person,' it was held that since the Suffrage Amendment had effect to strike from the constitutional provision describing the qualifications for voters the word 'male,' and any person qualified to vote is eligible to be elected to state office, it also had the effect to strike from the statute the word 'male,' so that women are now eligible to be elected to the office of auditor."
(At 71 A. L. R., page 1334)

It further appears that there is a conflict in the sections of the statutes hereinbefore cited and in the provisions of the constitution and the constitutional amendment. Volume 12, *Corpus Juris*, page 725, section 97, is as follows:

"While a new constitution is, by its very nature, intended to supersede a prior constitution, it is not intended to supersede the entire body of statutory law. To the extent, therefore, that existing statutes are not expressly or impliedly repealed by the constitution, they remain in full force and effect. However, statutes

January 10, 1938

may be nullified, in so far as future operation is concerned, by a constitution as well as by statute; and the constitution, as the highest and most recent expression of the law-making power, operates to repeal, not only all statutes that are expressly enumerated as repealed, but also all that are inconsistent with the full operation of its provisions."

In the case of Kansas City, Ft. Smith and M.R. Company, v. Thornton, 152 Mo. 570, 575, we find that the court said:

"***** It is the duty of the courts to enforce the organic law and to brush aside any statute which conflicts with it whether it was passed before or after the Constitution was adopted ***."

CONCLUSION

It is therefore the opinion of this department based upon the constitutional provisions hereinbefore cited and the cases cited that women have a right to vote and to hold the office of trustee in towns and villages in the State of Missouri provided they have the other qualifications prescribed for voters and office holders.

Respectfully submitted,

TRYE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

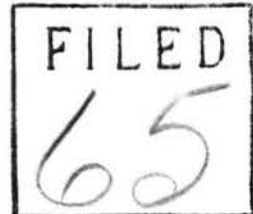
TWB:DA

MOTOR VEHICLES:

Section 7774 is to be treated as a
criminal statute.

February 17, 1938

2-19



Mr. Charles E. Murrell, Jr.,
Prosecuting Attorney,
Adair County,
Kirkville, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated
February 11, 1938 requesting an opinion which is as follows:

"I would like to have an opinion from
your office, on the following questions:

- (1) Is the seller of a motor vehicle,
who sells a motor vehicle, and fails to
deliver a Certificate of Title, subject
to prosecution under the Criminal Laws?
- (2) Is Section number 7774 to be treat-
ed as a Criminal Statute upon the violation
of the terms of said Section?"

Section 7774 of Article I, chapter 41 of R.S. Mo. 1929
reads as follows:

"***** In the event of a sale or
transfer of ownership of a motor vehicle
or trailer for which a certificate of
ownership has been issued the holder of
such certificate shall endorse on the
same an assignment thereof, with warranty
of title in form printed thereon, and
prescribed by the commissioner, with a
statement of all liens or encumbrances
on said motor vehicle or trailer, and
deliver the same to the buyer at the
time of the delivery to him of said
motor vehicle or trailer. The buyer
shall then present such certificate,
assigned as aforesaid, to the commis-
sioner, at the time of making appli-
cation for the registration of such
motor vehicle or trailer, whereupon
a new certificate of ownership shall
be issued to the buyer, the fee there-
for being \$1.00. *****"

February 17, 1938

The word "shall" has been interpreted in the case of State ex rel Stevens v. Wurdeman, 246 S.W. 189, paragraph 7; 295 Mo. 566:

"These are criminal statutes, and should be strictly construed in the interest of the liberty of the citizen. The statute says the defendant 'shall be entitled to be discharged' save in the two excepted situations, supra. Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute. Especially is this true in a statute calling for strict construction."

Section 7786, paragraph D specifically sets out punishment in various sections of article I, chapter 41 and then sets out a punishment of the violation of other provisions of the article. Section 7786, paragraph D of article I, chapter 41 reads as follows:

"(d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

In Section 7774 a provision is made, however, as to dealers of any cars which does not require a certificate as provided in the body of Section 7774. This provision reads as follows:

"***** Four months after this law takes effect and thereafter, it shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless, at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void.*****"

Mr. Charles E. Murrell, Jr. -3-

February 17, 1938

Provided, however, that no such certificates shall be required in the case of new motor vehicles or trailers sold by manufacturers to dealers. Dealers shall execute and deliver bills of sale in accordance with forms prescribed by the commissioner for all new cars sold by them. On the presentation of a bill of sale, executed in the form prescribed by the commissioner, by a manufacturer or a dealer for a new car sold in this state, a certificate of ownership shall be issued. *****."

CONCLUSION

It is the opinion of this office that a seller of a motor vehicle who fails to deliver a certificate of title, is subject to prosecution under the criminal laws and it is also the opinion of this office that Section 7774 is to be treated as a criminal statute upon the violation of the terms of said section.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

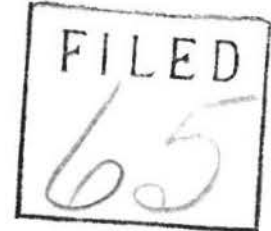
J. E. TAYLOR
(Acting) Attorney General

WJB:DA

LICENSE TAX: A village cannot subdivide merchants as a class and levy an unequal tax on a subdivided class.

February 23, 1938.

Mr. Arthur C. Mueller,
Prosecuting Attorney,
Hermann, Missouri.



Dear Sir:

We have your letter under date of February 9th requesting an opinion from this office, together with the copy of the ordinance submitted us, which letter is as follows:

"Will you kindly give this office your opinion on the following question:

"Can a village, existing as such under the laws of Missouri, acting through its board of trustees legally pass an ordinance to impose and collect a tax on gasoline sold at retail within the limits of the village?"

As a preliminary matter, we will first say that the tax mentioned is not levied on gasoline as such, but only indirectly so as an occupation tax, to be paid by the person, firm, or corporation, who sells the gasoline at retail, and such vendor is classed as a merchant.

In the above respect the case of Viquesney v. Kansas City, 266 S. W. 700, is in point, the court saying at page 702:

"The first question for determination is whether the tax of 1 cent a gallon on the gasoline sold by the dealer is a property tax or an excise or occupation tax. Where a tax is imposed and is measured by the amount of business done or the extent to which the privilege is

conferred or exercised by a taxpayer, irrespective of the value of his assets, it is an 'excise tax.' * * *

"Where a tax is measured by the gross receipts of the business, the amount of premiums received by an insurance company, the number of carriages kept by a livery stable, the number of passengers transported by a street railway company, and other taxes of that nature, it is 'occupation tax'--one form of excise tax. It has been applied to the volume of gasoline sold, such as the tax we have under consideration here."

Section 7097, R. S. Mo. 1929, relating to villages, provides, among other things, as follows:

"Such board of trustees shall have power * * * to license, tax and regulate merchants."

No authority is given under said section to regulate gasoline vendors, gasoline filling stations, or the like.

Section 7287, R. S. Mo. 1929, which applies to all cities, towns and villages, provides as follows:

"No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

Section 7097, referred to, constitutes the charter of a village so far as the authority to levy a license tax is concerned, and the occupation of a gasoline filling station, or gasoline vendor, or the like, is not specified therein.

The real question involved in your inquiry, as we see it, is whether or not the village of Morrison has a right to classify the different kinds of merchants so as to make gasoline merchants a special class, or subdivision of the

general class, in view of the fact that there is no statutory or charter power granted towns or villages so to do.

We are persuaded to the belief that the case of *Kansas City v. Grush*, 151 Mo. 128, is controlling in the matter before us. In this case Kansas City undertook by ordinance to classify into a distinct class the seller of or dealer in produce for the purpose of levying a different license tax. The substance of the court's opinion is that a produce dealer is a merchant and one of the general class and could not be specially dealt with. In this respect the court said, l. c. 135:

"Nor is there any reason why a merchant who deals altogether in produce should be required to pay \$50 for the privilege of carrying on his business in addition to his ad valorem tax, while his neighbor who deals in groceries, hardware or dry goods is wholly exempt from a license tax. Both are merchants, and neither is subject to more burdens than the other. No doubt exists as to the power of the legislature or of a special charter to divide the various occupations into different classes, and that a tax upon all persons belonging to one class would not be obnoxious to the Constitution merely because another class was not taxed, but when as in this case the ordinance singles out a part of a legal class, to wit, merchants, and imposes a burden upon it, and exempts all others of the same class, then those against whom this unjust discrimination is directed may justly complain of the violation of the constitutional guaranty of equality of taxation, and equal protection of the laws."

While this decision shows a distinction in tax as between the produce dealer and other merchants to the extent that the other merchants were exempted entirely from the tax, yet we believe the same principle would be involved if the grocery, hardware or dry goods merchants had been required to pay some tax but less in amount than the produce merchant.

Hence, under the above authority, we do not believe that the village of Morrison, having levied a flat tax of twelve dollars per annum on all merchants, or the counter part thereof, namely, dealers in goods, wares and merchandise of any kind, as appears by the ordinance submitted, has the authority to classify or subdivide merchants as a class so as to embrace a gasoline merchant or dealer in a subdivision thereof. However, there may be considerable doubt in this view, and for this reason we allude to the following cases, which are in time of decision subsequent to the Grush case, as follows:

City of St. Charles v. Schulte, 264 S. W. 650;
Viquesney v. Kansas City, supra;
Ex parte Asotsky, 5 S. W. (2d) 22;
Automobile Gasoline Co. v. City of St. Louis,
32 S. W. (2d) 281.

In City of St. Charles v. Schulte, supra, the court held that St. Charles had a right to collect a license tax on vendors of soft drinks, depending on the nature of the drink sold, and could classify the amount of tax accordingly. However, from a reading of the opinion in this case it does not appear that the issue was specifically raised and presented in the case as to whether or not St. Charles had sufficient charter right to reclassify or subdivide such vendors.

The next case above referred to, namely, the Viquesney case, shows that in the motion for rehearing the court had taken into consideration the charter power of Kansas City to divide the various occupations into different classes, hence, impliedly recognizing that such power to divide should exist in the charter.

The next case above referred to, namely, Ex parte Asotsky, a decision en banc, shows that the city had such charter power to divide into different classes, and which charter power was taken into consideration in the decision of the case; and this decision further recognizes the absence of such power at the time the Grush case was decided, and hence differentiates it from the principal opinion for such reason, as said by the court at page 25:

"Petitioner relies on Kansas City v. Grush, 151 Mo. 128, 52 S. W. 286. It was there held that the city had no power to license eo nomine a produce dealer

engaged in the business of buying and selling potatoes, apples, etc. The city only had power to license, etc., merchants as a class. Respondents have pointed out that the charter in force when that ordinance was passed did not authorize the city to divide the occupations, businesses, etc., into different classes, and hence the Grush Case is not controlling."

In the last of the above cases referred to, namely, *Automobile Gasoline Co. v. City of St. Louis*, the opinion shows that the City of St. Louis had the necessary specific authority to divide, subdivide or classify the various occupations which it was authorized to tax, so whatever the St. Louis opinion might say relative to a city, town or village which is not given such charter power to divide would be obiter. In this last named case it will be noted that the Grush case is considered and the observation made that Kansas City at the time in question was not authorized to divide occupations into different classes. In discussing the St. Charles case, the opinion says this, l. c. 286:

"In any event the reasoning and the conclusion reached in the St. Charles Case clearly sustains the view that authority given to a city by its charter to classify enumerated subjects of taxation does not violate either the constitutional or statutory provisions above referred to."

In reading the St. Charles case we do not find therein what the court in the City of St. Louis case says is there, as shown by the excerpt last above quoted. However that may be, the St. Louis case certainly appears to hold not only in the principal opinion, but also by the discussion it makes of the Grush case and the St. Charles case, that authority should be given in the charter of a city, town or village before it can undertake a subdivision of the merchant class.

CONCLUSION.

In view of the above statutory provisions, the ordinance which you have submitted, and the above cases referred to in connection therewith, we are inclined to believe that the village

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of Morrison does not have sufficient authority, under the circumstances, to pass the proposed ordinance. However, we are frank to say that this conclusion is reached with some doubt, in view of the seeming conflict which appears to exist more or less in the court rulings hereinabove referred to, and as a consequence a future court decision may be the only way in which the question could be conclusively determined.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR

CIRCUIT CLERKS:

Circuit clerks and recorders in counties of more than 20,000 and less than 200,000 cannot be separated by another election under Section 11538.

March 21, 1938

Mr. Richard H. Musser,
Prosecuting Attorney,
Johnson County,
Warrensburg, Missouri.



Dear Sir:

This will acknowledge receipt of your request dated March 17, 1938, for an official opinion, which is as follows:

"I have been asked by the Democratic Committee of this County to determine whether or not there is any possible means of divorcing the offices of the Circuit Clerk and the County Recorder which were merged by a majority of 40 in the 1936 election in this County.

A number of people in this County deem it advisable to do this. May we have your opinion, please as to whether it is possible to have a referendum vote on this in the election this fall and what course would be the best to pursue."

Section 11538, Laws of Missouri, 1933, page 360 provides as follows:

"In any county now or hereafter having a population of 20,000 and less than two hundred thousand inhabitants, the question of combining the offices of circuit clerk and recorder may be submitted or resubmitted, to the qualified voters at the general election to be held in the year 1936, or any four or multiple of four years thereafter. Such question may be submitted by the county court upon its own motion, and shall be submitted by the court upon

the petition of tax paying citizens who comprise at least one per cent of the qualified voters of the county. * * * * * If a majority of those voting on such question vote in favor of abolishing such office, then after the expiration of the term of office of the recorder then in office, the circuit clerk of such county shall be ex officio county recorder and subject to all the provisions of this chapter pertaining to counties of less than 20,000 inhabitants."

And Section 11541, Laws of 1933, page 362, reads as follows:

"At the general election to be held in the State of Missouri in 1934 and every four years thereafter, in all counties where the office of Circuit Clerk and Recorder are separate, a recorder of deeds shall be elected."

Section 11538, supra, mentions a fact that a vote may be had in counties having a population of twenty thousand (20,000) and less than two hundred thousand (200,000) inhabitants and may be submitted in the year 1936, or resubmitted every four years or any multiple of four years thereafter. This section only applies to the submission or resubmission of the combining of the office of circuit clerk and recorder and not for the separation of the circuit clerk and recorder.

The constitutionality of this section was upheld in the case of State ex inf. Crain, Prosecuting Attorney, ex rel. Peebles, v. Moore. In this case which was in the nature of a quo warranto, E. K. Peebles was elected recorder of deeds of Christian County at the general election in November, 1934, but the Secretary of State refused to commission him because of the enactment of Laws of Missouri, 1933, page 360, making the circuit clerk ex officio recorder in counties containing less than twenty thousand (20,000) inhabitants. Christian County is one of these, its population according to the census of 1930 being thirteen thousand one hundred sixty nine (13,169). At the same election L. L. Moore was elected circuit clerk. In due course he qualified and was commissioned as circuit clerk and ex officio recorder under the new law, and entered upon the performance of the duties of both offices. The appellant who

was elected recorder of deeds through the prosecuting attorney instituted the quo warranto proceeding in the Circuit Court of Christian County to oust the respondent Moore from office of recorder. The cause was submitted on an agreed statement of facts presenting only one question--whether the Laws of Missouri, 1933, page 360, was constitutional. The circuit court upheld the law and it was affirmed by the Supreme Court, the opinion being written by Chief Justice Ellison and concurred in by the Supreme Court.

The population of Johnson County, Missouri, according to the 1930 census was twenty two thousand four hundred thirteen (22,413) and having over the population of twenty thousand (20,000) as set out in Section 11538, the county court on its own motion or upon petition of tax paying citizens who comprise at least one per cent of the qualified voters of the county could by proper advertisement have the question submitted to a vote of the county.

The court in passing on the constitutionality of Section 11538, went further and tested the constitutionality of all of the sections and in their opinion in paragraph 2 they stated and not by dictum but specifically passed on other questions in reference to the Law of 1933 in regard to recorder of deeds.

In the case of State v. Moore, supra, in which Christian County was involved which had a population of less than twenty thousand (20,000) inhabitants and did not come under the section, the Laws of 1933, page 360, in reference to the election for the purpose of combining the circuit clerk and the recorder, but the court, on account of the constitutionality of the whole act being attacked, decided to pass upon the constitutionality of each paragraph of Section 11538 as amended.

Paragraph 2 of the same case reads as follows:

"* * *His contention is that the act attempts to delegate legislative power to the county court, by permitting that court to adopt or reject the law requiring the office of recorder to be a separate office in counties having 20,000 inhabitants or more. It is to be doubted whether appellant is entitled to raise that question, since Christian County, in which he claims the office of recorder does not have a population large

March 21, 1938

enough to bring it within the provisions of section 11538. Citizens Mut. Fire & Lightning Ins. Soc. v. Schoen (Mo. Sup. Div.2) 93 S.W. (2d) 669, 670. But nevertheless we shall consider the assignment because appellant maintains the whole law is rendered void by the alleged defect."
* * *

Also in paragraph 7 of the opinion in that case the Court further said:

"* * * * * In other words, the statute does not delegate to the people the power to discontinue and recreate the separate offices of recorder at pleasure, but only permits them to vote on the question of joining the two offices; and when there has been such joinder it would seem the voting power of the people under the section is exhausted."

In view of this opinion by the Supreme Court, and which was plainly passed upon, Section 11538 only applies to the combination of the office of circuit clerk and recorder of deeds and does not apply to the separation once they have been combined under Section 11538. In other words, in the opinion of this case that one vote by the people combining two offices exhausts any further vote upon the question.

CONCLUSION

In view of the above authorities and the pointed decision in the case of State v. Moore, it is the opinion of this office that it is impossible to have a referendum vote or another election on this question at the election this fall.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

Elections: Last day for candidates to file for August
Primary : Primary, June 3, 1938.

March 24, 1938



Hon. Chas. E. Murrell, Jr.
Prosecuting Attorney
Adair County
Kirkville, Missouri

Dear Sir:

We acknowledge receipt of your letter of March 22, 1938 in which you request the opinion of this office as to the last day in which candidates may file for office for the August, 1938 primary election.

Section 10254 R. S. Mo. 1929, provides:

"The primary shall be held at the regular polling places in each precinct on the first Tuesday of August, 1910, and biennially thereafter, for the nomination of all candidates to be voted for at the next November election."

Section 10257 R. S. Mo. 1929, provides in part, as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, * * * "

The general rule is, that where a statute requires that an act be performed a fixed number of days previous to a specified day, the last day should be excluded and the first day included in making the computation. The primary elections will be held on Tuesday,

Hon. Chas. E. Murrell, Jr.

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March 24, 1938

August 2, 1938. It will, therefore, according to the above rule, be necessary for all candidates to have their declarations filed with the proper officials before midnight, Friday, June 3, 1938.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

CRH:LB

ELECTIONS: Clerk of election who was not a legal voter
at such election does not invalidate the election.

April 21, 1938

Honorable Chas. E. Murrell, Jr.,
Prosecuting Attorney,
Adair County,
Kirksville, Missouri.



Dear Mr. Murrell:

This is to acknowledge receipt of your letter of April 15th, in which you request the opinion of this department on the questions therein set forth, your letter is as follows:

"I would like to have your opinion on the following matter. The town of Brashear, Missouri, which is located in Adair County, recently held an election for the purpose of electing a Board of Trustees. The present Board appointed three judges, and the judges in turn appointed two clerks. It now appears that one of the clerks had, approximately one week prior to the date of the election, which was April 5, moved outside of the corporate limits of the town. She took the matter of her acting as a clerk at the election up with the Board of Trustees, who advised her to go ahead and act. It appears that her residence outside of the corporate limits has been made with her intention of that being her home. Brashear, Missouri, is a town governed by a Board of Trustees of five. It has a population of approximately five hundred.

"The question is this. 1. Was the clerk whose residence was outside the corporate limits of the town qualified to act as clerk of the election? 2. What effect does this have upon the persons elected and can they qualify? 3. If the new member of the Board of Trustees are not elected and can not qualify, do the old trustees retain their membership on the Board of Trustees.?"

"I wish to call your attention to sections 10207 and 7140, R. S. Mo., 1929.

"By an ordinance of the City of Brashear, these trustees are required to be sworn in on or before the 25th of this month, that is, April, and I therefore must have an opinion on or before that date.

"I would appreciate any special effort that your office may make in this matter to immediately notify me."

We shall answer questions in your letter in the order in which they are submitted.

I.

Was the clerk whose residence was outside the corporate limits of the town qualified to act as clerk of the election?

The town of Brashear, according to your letter is organized as a village under the provisions of Article 9, Chapter 38, R. S. Mo. 1929. Section 7136 of said Article provides:

" * * * for the appointment of three qualified voters as judges of the election, to superintend and conduct all elections for trustees, * * *"

and Section 7140 provides that:

"That judges of election shall appoint a clerk of the election * * *."

Section 10207, under the general election laws, provides:

"No person shall be qualified to act as a judge or clerk of any election unless he shall be legally entitled to vote at such election and, shall moreover be able to read and write."

CONCLUSION

It is, therefore, our opinion that the person, mentioned in your letter, who acted as clerk of the election held in the

village of Brashear on April 5th, who was not a resident of the town on the date of the election, and not legally entitled to vote at such election, was not qualified to act as such clerk.

II.

What effect does this have upon the persons elected to the Board of Trustees, that is, are they duly elected and can they qualify?

Assuming that the clerk of election was not qualified to serve as clerk at the election held April 5th, we are of the opinion that that fact alone would not invalidate the election held at that time. The general rule of law with regard to irregularities is stated in *Bowers vs. Smith*, 111 Mo. 1. c. 61, in the following language:

"If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. * * * In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial."

and in *Horsefall vs. School District*, 143 Mo. App. 541 1. c. 545, it is said:

"* * * that when a statute expressly declares any particular act to be essential to the validity of an election, then the act must be performed in the manner provided or the election will be void. * * * but if the statute merely provides that certain thing shall be done and does not prescribe what results shall follow if these things are not done then the provision is directory merely, and the final test as to the

legality of either the election of the ballot is whether or not the voters have been given an opportunity to express, and have fairly expressed their will. If they have, the election will be upheld, or the ballot counted as the case may be." (Cases Cited)

and it is held in *Sanders vs. Lacks*, 142 Mo. l. c. 255, that no voter should be disfranchised on account of a mere irregularity occasioned by the neglect or misconduct of election officers, over whose conduct he has no control, unless the legislature has declared such irregularity fatal.

The St. Louis Court of Appeals in *O'Laughlin vs. City of Kirkwood*, 107 App. 302, announced the rule that, in order to annul the result of an election, it must be shown that some mandatory statute was violated or that the election was conducted in such an irregular manner that the true sentiment of the voters was not expressed by it or that it was impossible to know whether the true sentiment was expressed.

In *State ex rel. Thompson vs. Arnold*, 278 Mo. l. c. 684, the Supreme Court said:

" * * * The well established rule, here applicable, is that an election irregularity is not fatal to the validity of the whole return of the precinct unless made so by the statute on the subject or unless the irregularity is such as 'probably prevented a free and full expression of the popular will.' (*Bowers v. Smith*, 111 Mo. 45, l. c. 61-62; *Hehl v. Guion*, 155 Mo. 76, l. c. 83; *Nance v. Kearbey*, 251 Mo. 374, l. c. 383; *McCrary on Election* (4 Ed.), p. 171; 9 R. C. L. p. 1093, par. 102; 15 Cyc. 372, 373)"

We do not find that the section of the statute, which provides that the clerk of the election shall be legally entitled to vote at such election, is mandatory, nor do we find that such fact invalidates the election.

Applying the rules, as stated above, we come to the conclusion that the irregularity of one of the election clerks,

not being a legal voter of the town of Brashear on the day of the election, did not of itself invalidate the election of the officers elected at that time, absent any fraud.

It is, therefore, our opinion that the persons who were elected by the voters of Brashear on April 5th, under the facts stated in your letter, if otherwise qualified, were duly elected.

III.

Since it is our opinion that the new members of the Board of Trustees were duly elected and can qualify, it is unnecessary to answer your third question.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:LB

CITIES, TOWNS AND VILLAGES: Powers and Duties of Board of
BOARDS OF PUBLIC WORKS: Public Works in Cities, Towns
and Villages.

April 26, 1938

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Mr. Walter L. Mulvaney
Rock Port, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of April 14th, in which you request the opinion of this department. Your letter is as follows:

"The City of Rock Port is erecting a municipal power and light plant and distributing system, which will go into operation within a few weeks. Our city council wishes to appoint a board of public works, as provided by the Missouri statutes, but it is not clear as to the relation the board will have to the city council. Some of the questions arising are:

1. Will the board of public works have the power to execute contracts, or can the city be bound only by the signature of the mayor and clerk authorized by resolution of the council?
2. Will the board of public works have the power to issue checks or pay salaries of employees, or other expenses incurred in the operation of the plant, or do all bills have to be passed by the board and then the council, who orders the city clerk to issue city warrants?
3. Could a board of public works be limited in authority so as to have control of a power and light plant but not the city water works, by ordinance?

4. Does the council have any supervisory power over the board after they are appointed?"

The powers and duties and provisions of law with reference to Boards of Public Works are set forth in Section 7651 et seq., Article 31, Chapter 38, Revised Statutes 1929.

Section 7651 provides, in part:

"Any city of the third or fourth class, and any town or village, and any city now organized or which may hereafter be organized and having a special charter, and which now has or may hereafter have less than 30,000 inhabitants, shall have power to erect or to acquire, by purchase or otherwise, waterworks, gas works, electric light and power plant, steam heating plant, etc."

and said Section 7651 further provides that the municipal corporations of the above classes may provide by ordinance for a board of public works to consist of four persons, electors of such city, town or village who have resided therein for a period of two years next before their appointment, who shall be appointed by the mayor of such city, town or village and confirmed by the common council in such manner as other appointive officers of such city, town or village are appointed and confirmed.

Section 7654 provides that upon the establishment of a board of public works, by ordinance, such board shall have the power, and it shall be its duty to take charge of and exercise control over any waterworks, gas works, electric light and power plant, steam heating plant or any other device or plant for furnishing light, power or heat, telephone plant or exchange, street railway or any other transportation, conduit system or any other public utility whatever which may be owned by such city, town or village at the time such board is so established, or which may be thereafter established or acquired by such city, town or village, by purchase or otherwise and all appurtenances thereto belonging, and shall enforce the performance of all contracts and work, and have charge and custody of all books, property and assets belonging to or appertaining to such plant or plants.

Therefore, upon the creation of a board of public works under Section 7651 and the appointment and qualifications of the members of such board, the board has the power and it is its duty to take charge of and exercise control over all of the public utilities mentioned in Section 7654. In the absence of any further grant of powers to the board in the ordinance creating it, it would be limited to the powers as set forth in Section 7654, that is, it would have authority to take charge of and exercise control over all of the utilities owned by such city. Under the provisions of Section 7655 the common council of said city may grant certain other powers to the board of public works which powers are set forth in Section 7655 in the following language:

"Said board shall also exercise such other powers and perform such other duties in the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance. Said board shall make all necessary regulations for the government of the department not inconsistent with the general laws of this state, the charter of such city or the ordinances thereof."

These additional powers which may be granted to the board of public works, by the council, by ordinance, are matters and things pertaining to the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city looking to the successful operation of such utility by the board. With this brief outline of the statutes, with reference to the board of public works, we come to the questions asked by you in your letter.

1st Query: We do not think that the board of public works has the power and authority to execute all contracts and thereby bind the city. Section 7659, R. S. Mo. 1929, provides that all contracts shall be submitted to the common council for approval.

2nd Query: We think that the answer to your second query is found in Section 7657, R. S. Mo. 1929, which says:

"All bills of such board and all salaries of its employees shall be

allowed and paid in the same manner that bills and salaries of other officers and employes of such city are allowed and paid."

As all bills and salaries of the officers of the city are paid upon the approval of the town council, it is our opinion that the board of public works has no authority to issue checks and pay salaries and bills except such as are approved by the council of such city.

3rd Query: In answer to your third query, we are of the opinion that upon the creation of the board of public works, by ordinance, it is its duty to take charge of and exercise control over all of the municipally owned public utilities of such city, and it was not the intention of the legislature to permit the town council to delegate to the board of public works control over one of its public utilities and retain the control of the other public utilities in the hands of the town council, in other words, the board would have control over all of them or none of them. It must be remembered that the board of public works is a board of limited powers and not a governing body of such city and has only such powers as may be given to it at the time of its creation under Section 7651 and Section 7654 and the additional powers of superintendence that may be granted to it by the town council under Section 7655.

In answer to your fourth query, as to whether or not the council has supervisory power over the board after the board is appointed, is question to our minds too general for us to render an opinion. However, we might say that matters pertaining to the operation of the public utilities mentioned above may be delegated to the board of public works by the town council and so long as the ordinances are not repealed which, of course, the council may do at any time, the powers given to the board of public works must be exercised by it without hindrance of the town council.

It will be noted that a great many of the sections of the statutes, with reference to the board of public works, have the following clauses therein, namely, Section 7656, "as provided by ordinances", Section 7658, "as may be provided by ordinances", Section 7659, "under such restrictions and regulations as may be provided by ordinance",

Mr. Walter L. Mulvaney

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April 26, 1938

Section 7660, "subject to the ordinance of such city, town or village", so it will be seen that under these sections of the statutes the city may delegate to the board of public works broad powers or it may circumscribe its duties and powers within well defined degrees.

We find it difficult to outline, in this opinion, the powers and duties of the board and the limitations which it may have without examining the ordinances of such city and reading same in connection with the statutes.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

CRH:LB

CRIMINAL COSTS:

Complaining witness in a misdemeanor before a justice of the peace on a charge of careless and reckless driving is not liable under Section 3444, R. S. Mo. 1929 for costs where defendant is acquitted but costs must be paid by the county.

May 23, 1938



Mr. Arthur C. Mueller,
Prosecuting Attorney,
Gasconade County,
Hermann, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated May 19, 1938 for an official opinion from this department which request is as follows:

"Will you kindly give this office your opinion on the following question:

"A" files a sworn complaint before a Justice of the Peace charging "B" with careless and reckless driving of an automobile on the highways of this State. The Prosecuting Attorney files his information and the case is tried before a jury and the defendant is acquitted. Who is liable for the costs, the complaining witness or the County?

I will thank you for your promptness in this matter."

Section 3444, R.S. Mo. 1929 reads as follows:

"When the proceedings are prosecuted before any justice of the peace, at the instance of the injured party, for the disturbance of the peace of

a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the justice on his docket as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the prosecuting attorney be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing complaint."

This section sets out certain misdemeanors which require the justice of the peace to enter the name of the complaining witness on his docket as a prosecutor, and further sets out that in such cases the prosecutor, that is the complaining witness, shall be adjudged to pay the costs in case of an acquittal. The section further states that in any other case of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter a judgment for costs against the complaining party. This section further says that in other

cases of acquittal the costs shall be paid by the county except when the prosecution was commenced complaint and the prosecuting attorney declines to file an information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint.

This Section 3444, supra, only applies to personal offenses and not public offenses. In the case of State of Missouri, Respondent, v. Nettie Flick, Defendant; Otto Drum et al., Appellants, 167 Mo. App. 6, l.c. 7, the court held:

"It is provided in section 5095, R. S. Mo. 1909, that no indictment for trespass not amounting to a felony, except for petit larceny, or for libel or slander, shall be preferred unless endorsed by the name of the prosecutor. Section 5057 makes the terms and restrictions as to endorsement of witnesses in cases of indictment, applicable to an information. And so does section 5063; and it makes the prosecuting witness, in such cases, liable for the costs if the prosecution fails. A prosecution for keeping a bawdyhouse is not one of the offenses where the prosecuting witness must be endorsed on the indictment, and hence he does not become liable for costs. (State v. Bean, 21 Mo. 267; State v. Raymond, 86 Mo. App. 537.)

Section 5380 provides that every person who shall institute a prosecution to recover a fine, penalty or forfeiture, shall be adjudged to pay the costs if the defendant is acquitted. This section does not apply to a public offense such as keeping a bawdyhouse. (State v. Lavelle, 78 Mo. 104; State v. Hulatt, 31 Mo. App. 302.)"

Sections 5095, 5057 and 5063, R.S. Mo. 1909, respectively, are now Sections 3542, 3504 and 3510, R.S. Mo. 1929, which designates the procedure of assessing the costs under grand jury indictments pertaining to misdemeanors and not upon informations.

Section 3446, R.S. Mo. 1929 reads as follows:

"All proceedings upon the trial of misdemeanors before justices of the peace shall be governed by the practice in criminal cases in courts of record, so far as the same may be applicable, and in respect to which no provision is made by statute."

Under this section the rule as set out in *State v. Flick*, supra, should be followed in interpreting Section 3444, supra, which applies to the procedure of assessing costs of trials in the justice courts.

In the case of *City of Greenville v. Farmer*, 195 Mo. App. 209, 1.c. 213, the court said:

"* * * Section 5380 provides that every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be adjudged to pay all costs if the defendant is acquitted although he may not be entitled to any part of the same. This section would seem to come nearer the case in hand than any so far mentioned; but it has been held that it applies only to offenses personal and not public and in cases where the informant is the person injured. (See, *State v. Lavelle*, 78 Mo. 104; *State v. Huiatt*, 31 Mo. App. 302.)"

Section 5380, R.S. Mo. 1909 is now Section 3829, R.S.

Mo. 1929. Section 3829, R.S. Mo. 1929 reads as follows:

"Every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be adjudged to pay all costs if the defendant is acquitted although he may not be entitled to any part of the same."

Careless driving, under which your defendant was tried, is not a personal offense as set out in Section 3444, supra, but is a public offense. In the case of State ex rel. Frans E. Lindquist, Relator, v. John P. Butler, Judge, Respondent, 133 Mo. App. 566, an original proceeding by mandamus was issued against the defendant who was judge of the twelfth judicial circuit to approve and certify a certain bill of costs. In that case at l.c. 568 and 569 held:

"The controversy, if any, the respondent having filed no brief or argument, arises upon a construction of sections 2778 and 2836, Revised Statutes 1899. The first section reads as follows: 'When the proceedings are prosecuted before any justice of the peace, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the justice on his docket as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case

of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the prosecuting attorney be liable for costs. In other cases of discharge* or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint.'

The second reads as follows: 'If, upon the trial of any indictment or information, the defendant shall be acquitted or discharged, and the prosecutor or prosecuting witness shall be liable to pay the costs according to law, judgment shall be rendered against such prosecutor for the costs in the case, and in no case shall the same be paid by either the county or State.'

The language of section 2778 is plain to the effect, that, in prosecutions for petit larceny, the injured party, or as otherwise designated, the prosecuting witness, is not liable for the costs of the proceeding wherein the defendant is discharged. Section 2836 is not in conflict with section 2778. Construed together, the former is

merely directory. That is, in case the defendant is acquitted or discharged, judgment shall be rendered against the prosecutor wherein he is liable for the costs according to law, i.e., under section 2778, or in all cases not amounting to a felony and except for petit larceny. And the negative language in section 2836, viz., 'and in no such case shall the same be paid by either the county or State' merely refers to cases where the prosecutor is liable for the costs according to law, i.e., section 2778.

It follows, therefore, that it was the duty of the respondent judge, to approve of said fee bill, and it is ordered that a peremptory writ of mandamus be issued commanding him to do so. All concur."

Sections 2778, R.S. Mo. 1899 referred to in the above case is now Section 3444, R.S. Mo. 1929, and Section 2836, R.S. Mo. 1899 referred to in the above case is now Section 3833, R.S. Mo. 1929.

Section 3833, R.S. Mo. 1929 reads as follows:

"If, upon the trial of any indictment or information, the defendant shall be acquitted or discharged, and the prosecutor or prosecuting witness shall be liable to pay the costs according to law, judgment shall be rendered against such prosecutor for the costs in the case, and in no such case shall the same be paid by either the county or state."

According to the ruling in the case of State ex rel. Lindquist v. Butler, supra, the county is liable for the costs even taking into consideration Section 3833, supra, where the charge on which the defendant was acquitted, was a misdemeanor and did not come within the offenses set out in Section 3444, supra, wherein said section it said the prosecutor shall be adjudged to pay the costs in case of an acquittal.

CONCLUSION

In view of the above authorities, it is the opinion of this department that when a complaining witness swears to a complaint before a justice of the peace charging the defendant with careless and reckless driving of an automobile on the highways of this state, he is charging a public offense and not a personal offense.

It is also the opinion of this department that after the complaining witness has filed a complaint on a public offense, the judge shall not be compelled to enter his name as a prosecutor under Section 3444, supra, and after the prosecuting attorney has filed an information, under the complaint, in case of an acquittal, the complaining witness is not liable for the costs but must be paid by the county.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

COURT COSTS:

In a proceeding to preserve the peace, either the complainant or defendant may be adjudged to pay the costs and in no event shall the county be liable for costs. Prosecuting attorney need not appear for complainant in such cases.

May 24, 1938

Mr. Arthur C. Mueller,
Prosecuting Attorney,
Gasconade County,
Hermann, Missouri.



Dear Sir:

This will acknowledge receipt of your request for an official opinion from this department which request is as follows:

"Will you kindly let me know who is liable for costs in peace bond proceedings as specified in section 3401 to 3413, R.S. Mo. 29? Is it mandatory upon the prosecuting attorney to appear for the complainant in such cases?"

Section 3402, R.S. Mo. 1929 provides as follows:

"Whenever complaint shall be made in writing, and upon oath, to any such magistrate, that any person has threatened or is about to commit any offense against the person or property of another, specifying the offense and person complained against, it shall be the duty of the magistrate to issue a warrant, under his hand, reciting the complaint, and commanding the officer to whom it is

directed forthwith to apprehend the person so complained of, and bring him before such magistrate."

Under this section only a complaint under oath is required and it is not necessary to file an information.

In the case of State ex rel. v. Brooks, 167 Mo. App. 619, a mandamus action was brought to compel a judge to vacate and annul an order dismissing an action for a peace bond where the judge dismissed the action on the ground that the complaint was insufficient to state a cause of action. The court in holding that the duty of the judge to hear the cause was a ministerial act and said:

"We are of the opinion that, on the facts so stated, the trial court erred in quashing the alternative writ. The complaint was undoubtedly sufficient, for it was in writing and upon oath, and stated that the defendant had threatened the person of the complainant, which was all the statute required. That being so, it was the duty of the justice to proceed and perform the duties enjoined upon him by the statute, among which was the duty to 'cause the matters charged in the complaint to be inquired into by a jury.' These duties are prescribed and defined by the statutory provisions above set forth with such precision and certainty as to leave nothing to the exercise of discretion or judgment. They are specific duties, clearly, unmistakably and imperatively enjoined by law. They are mere ministerial duties, and mandamus is a proper remedy to compel performance."

Section 3403, R.S. Mo. 1929 provides as follows:

"Upon such person being brought before such magistrate, it shall be the duty of the magistrate to summon all witnesses which either party may require, and cause the matters charged in the complaint to be inquired into by a jury, of six competent men. If the jury find that there is good reason to fear the commission of the offense charged, then they shall render a verdict of guilty against the defendant, and the magistrate shall thereupon require the defendant to enter into a recognizance, in such sum, not exceeding one thousand dollars, as he shall direct, with one or more sufficient sureties conditioned that said defendant will keep the peace toward the people of the state, and particularly toward the complainant, for such time as shall be specified in said recognizance, which shall not be less than three months nor more than one year from the date thereof; and the defendant shall be liable for costs, as in other cases of conviction."

Also in this section no mention is made as to requiring an information and the whole proceeding is inquired into on the facts set out in the complaint. Although this section provides that where a bond to preserve the peace is required, the defendant shall be liable for the costs as in other cases of conviction. The authorities, nevertheless, say that although the defendant in such a procedure on a finding of guilty is liable for the costs as in other cases of conviction, yet it is not a criminal procedure.

In the case of State ex rel. Shockley v. Chambers, 278 S.W. 817, the Springfield Court of Appeals affirmed the requiring of a peace bond and said:

"It is insisted by appellant that, in a proceeding of this character, the criminal procedure should prevail, and hence the refusal of the court to instruct that, unless defendant should be found guilty beyond a reasonable doubt, he should be acquitted, was error. As far as we are advised, this question has not been passed upon by the Supreme or appellate courts in this state. The rule elsewhere seems to be that such a proceeding is not, strictly speaking, a criminal prosecution. 8 R. C. L. 283; 9 C. J. 393. It is not based upon the commission of a crime, but is a prohibitive remedy. Its purpose is to prevent crime and not to punish for a crime committed. Our statute (section 3747, Stat. 1919) provides that a warrant may issue upon complaint in writing under oath that 'any person has threatened or is about to commit any offense against the person or property of another.' It will be observed that the statute does not apply to all threatened violations of the law, but is restricted to offenses against the person or property of another. The protection offered is, to some extent at least, if not altogether, a personal protection.* * * * *

While this proceeding is not strictly a criminal proceeding, yet it partakes to some extent of that nature, and it seems to us unreasonable to give the prosecution a greater advantage in this proceeding than the plaintiff would have

in an ordinary civil action. It is our conclusion, however, that, since the statute only requires the jury to find that there is 'good reason to fear the commission of the offense charged,' they can, very appropriately, find that fact upon a preponderance of the evidence only, and should not be required to find it beyond a reasonable doubt."

In the case of *Ex parte Chambers*, 290 S.W. 103, a writ of habeas corpus was issued against the sheriff of Pulaski County, Missouri, for the release of Chambers who was required to give bond in the case of *State ex rel. Shockley v. Chambers*, supra. The sheriff had attempted to imprison Chambers for the nonpayment of costs in the above proceeding to preserve peace as in other criminal cases, but the court of appeals said:

"* * * * In fact our search, and that of able counsel on both sides, has unearthed but two decisions from other states, hereinafter referred to, dealing directly with the point in hand. This court held in *State ex rel. v. Chambers*, 278 S.W. 817, that a proceeding to require the giving of a peace bond is not, strictly speaking, a criminal proceeding. It is a proceeding to prevent the commission of a crime and to afford protection personal to the individual complaining. The whole proceeding is governed by statute to which we must look for guidance. Section 3748 provides that, upon conviction, 'the defendant shall be liable for costs, as in other cases of conviction.' Section 3756 authorizes appeal from the justice. Section 3757 provides that, if the judgment is affirmed, the court shall require a new recognizance

'and render judgment against the defendant for all costs in the case.'

These proceedings, to require petitioner to give a peace bond, were commenced in the justice court, affirmed on appeal to the circuit court, and again affirmed on appeal to this court. We are of the opinion, therefore, that the payment of costs in this case is governed by the provisions of section 3757, which simply directs judgment for costs against defendant upon affirmance of the conviction. But, even though section 3748 applies, as assumed by respondent, it is our opinion that section is no different in its meaning and intent from section 3757, and cannot be construed as authorizing the issuance of a capias execution. Unless it does so authorize, there is no law under which the payment of costs in such cases can be enforced by imprisonment. The words 'defendant shall be liable for costs, as in other cases of conviction,' while authorizing a judgment against defendant for costs, does not, except possibly by inference, authorize the collection of costs by imprisonment, as in criminal cases. Such an inference, in our opinion, should not be indulged in, especially when construing a statute of this character. The costs for which defendant may be liable is one thing, and the manner in which the collection thereof may be enforced is another. The intent of the Legislature to authorize imprisonment for costs in a proceeding not strictly criminal should clearly appear."

Section 3748, R.S. Mo. 1919 referred to in the above case is now Section 3403, R.S. Mo. 1929. Therefore, if the costs should be adjudged against the defendant and he is held liable for the costs, it would be necessary to issue executions as in a civil case and not by the issuance of a *capias* execution. Since the procedure is not a strictly criminal proceedings, the county is not liable for the costs of the proceeding in any event. Statutes requiring the county to pay costs in criminal proceedings must be strictly construed and the county is only required to pay costs in certain cases where the proceedings are strictly criminal. In the case of a proceeding to preserve the peace, the county is not in any way a party in interest, and the proceeding is a personal controversy between the person who files the complaint and the defendant. In adjudging who shall pay the costs in such a proceeding the civil rules of the payment of the costs must prevail.

Section 2203, R.S. Mo. 1929 provides as follows:

"If the plaintiff is a non-resident of the county, or shall become a non-resident after the commencement of a suit, or if from any cause the justice shall be satisfied that he is unable to pay the costs, the justice shall rule the plaintiff, on or before the day in the rule named, to give security for the payment of costs in such suit; and if the plaintiff fail on or before the day in such rule named to file the obligation of a responsible person of the county whereby he shall bind himself to pay all costs that have or may accrue in such action, or to deposit a sum of money equal to the costs that have accrued and will probably accrue in the same, the justice of the peace, on motion, shall dismiss the suit unless security is given before the motion is determined."

This section is a provision for the security for costs in civil cases in justice courts and is a provision that the justice of the peace may require after the complaint is filed and before trial. In view of the decision in the case of State ex rel. Brooks, supra, which holds that a justice may be forced to file a proceeding to preserve the peace by means of mandamus it would be necessary for the complaint to be filed and then the justice of the peace can require a security for costs.

Section 11316, R.S. Mo. 1929, in describing the duties of a prosecuting attorney, reads as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses."

* * * * *

This section, among other things, provides that:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned," * * * * *

Under the holding in the case of Ex parte Chambers, supra, this is not a criminal proceeding and the county is not interested in the prosecution of such a proceeding. It is not necessary for the prosecuting attorney to appear

May 24, 1938

in the case except when a recognizance to keep the peace has been broken. It then becomes the duty of the prosecuting attorney to proceed upon the recognizance in accordance to the terms set out in Section 3409, R.S. Mo. 1929. Section 3409, supra, reads as follows:

"Whenever evidence of such conviction shall be produced to the court in which the recognizance is filed or taken, it shall be the duty of the court to order such recognizance to be prosecuted, and the prosecuting attorney shall proceed thereon accordingly."

CONCLUSION

In view of the above authorities, it is the opinion of this department that in proceedings to preserve the peace if a conviction is had the defendant shall be liable for costs as in other cases of convictions.

It is also the opinion of this department that if the defendant is not convicted upon the complaint issued according to Section 3402, supra, and is acquitted, the party who filed the complaint will be responsible for the costs as in civil cases under the procedure prescribed in justice of the peace courts.

It is further the opinion of this department that it is not mandatory for the prosecuting attorney to appear for the complainant in proceedings to preserve the peace but must appear and bring action upon a recognizance where such recognizance has been deemed broken under all of the sections of Article III, chapter 29, R.S. Mo. 1929.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

OFFICERS: One person may hold both the office of
Justice of the Peace and Township Committeeman.

June 10, 1938

6-11



Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Mr. Murrell:

We have received your letter of June 7th,
which reads as follows:

"I would like to have an opinion from
your office on the following matter:
can a man legally file for two
separate offices in Missouri? The
situation is as follows, one Harry
Brown of Novinger, Adair County,
Missouri, has filed for Justice of
Peace of his township and has also
filed for Committeeman for his town-
ship. I would like to have this opin-
ion at your earlist convenience as we
do not want the ballots printed or
the notices in the paper if there is
any chance Mr. Brown will have to
withdraw from the ballot for one of
the offices."

We are enclosing a copy of an opinion of this
office written on January 8, 1935 which rules that, one
person may hold the offices of both Public Administrator
and Justice of the Peace at the same time. This opinion
sets out the rule that one can hold two offices provided
the constitution or statutes do not prohibit and provided,
also, that there is no inconsistency in the functions of
the two offices in question. The enclosed opinion also
sets out, in full, the powers and duties of a Justice of
the Peace. We need then, only to inspect the duties of

a committeeman to determine whether the two offices in question are incompatible.

The powers and duties of a committeeman are set forth, by the Supreme Court of Missouri, in the case of State ex rel. Ponath vs. Hamilton, 240 S. W. 445. In holding that a committeeman is a public officer, the court said:

" * * * They are required to receive and disburse the filing fees required to be paid by candidates (sections 4828, 4991, R. S. 1919); they prepare and submit lists from which judges and clerks of election are to be appointed (sections 4779, 4851, 5120, 5121, R. S. 1919); they fill vacancies on the tickets and to that extent exercise the powers of electors (sections 4815, 4816, 4838, 5004, R. S. 1919); they nominate candidates for vacancies on the board of aldermen of the city of St. Louis (sections 21 and 22, R. C. St. L. 1914); they appoint challengers and watchers at elections (sections 4776, 4840, 4842, 5003, 5004, 5007, 5162, R. S. 1919); they elect their own officers, constitute the congressional committee, and elect the state committee (section 4848, R. S. 1919). * * * "

Neither the constitution nor the Laws of Missouri prohibit the person from holding these two offices. Also from a perusal of the duties of a Justice of the Peace and committeeman, we cannot see that the same are in any way inconsistent, incompatible or repugnant to each other. In fact, the duties of each are in entirely separate and distinct fields.

Honorable Charles E. Murrell, Jr. -3- June 10, 1938

CONCLUSION

We conclude, therefore, that one person may legally file and hold the offices of Justice of the Peace and Township Committeeman at the same time.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

JFA:LB

MUNICIPAL CORPORATIONS:) City owning electric light plant may sell
ELECTRICITY:) surplus electrical energy to persons outside
corporate limits, under certain conditions.

June 30, 1938.



Honorable W. L. Mulvania
City Attorney
City of Rock Port
Rock Port, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of June 15th, in which you request the opinion of this Department on the question set out in your letter, which is as follows:

"As the attorney for the City of Rock Port I would appreciate very much having the opinion of your Department upon a municipal question involving our city.

"The City of Rock Port has practically completed the construction of a municipal light plant and distribution system. The City already has its municipal water plant, the pump being located about two and one-half miles from the city limits. In the construction of the light plant and distribution system it is of course necessary to run a line out to the water plant outside the city limits. This line runs along the highway and passes along the premises of two or three persons. At least one of these persons would like to have the privilege of getting lights from this line by hooking on to it, buying his own transformer, if necessary. The question involved is whether the City would have the legal authority to render electric service to this prospective customer who does not live within the city.

"I have read the case of Taylor et al. v. Dimmitt, Mayor, et al. found in 78 S. W. (2d) 841, which lays down the general principle that a municipality does not have the statutory authority to construct, maintain, and operate an electric transmission line for the purpose of furnishing service to consumers outside its corporate boundaries. There is a distinction to a certain extent in the facts of that case and the one that is before us. In our case we must maintain this line for our own municipal purpose and so it would not be necessary for the city to do anything further in the way of extending its facilities beyond the corporate limits in order to accommodate this customer. But there are certain statements in the opinion that might indicate that the rule would be applicable even in a case like ours."

Briefly, your question is, whether the City of Rock Port, which has completed a municipal light plant and distribution system, and having erected electric light lines to its municipal water plant which is outside the city limits, may sell surplus electrical energy to person adjacent to said power lines, and living outside the corporate limits of said city.

Section 7642, R. S. Mo. 1929 (Mo. St. Ann. Sec. 7642, p. 6031) provides as follows:

"Any city in this state, which owns and operates any electric light or power plant, may, and is hereby authorized and empowered to supply electric current from its light or power plant to other municipal corporations for their use and the use of their inhabitants, and also to persons and private corporations for use beyond the corporate limits of such city, and to enter into contracts

therefor for such time and upon such terms and under such rules and regulations as may be agreed upon by the contracting parties."

The Legislature by this Act, which was enacted by the Legislature in 1911 (Laws of Missouri, 1911, p. 351) extended the authority of a city owning and operating an electric light plant to permit such city to supply electric current from its electric light plant to other municipalities and also persons and private corporations beyond the corporate limits of such city.

We note what you say in your letter of request with reference to the case of Taylor v. Dimmitt, 78 S. W. (2d) 841, 98 A. L. R. 995, as perhaps being applicable to the question stated in your letter. The court in this case, in construing Sections 7642, 7643 and 7644, decided that the City of Shelbina which owned a municipal light plant was without "statutory authority to construct, maintain and operate an electric transmission line for the purpose of furnishing service to consumers outside its corporate boundaries." The decision in the above case is not decisive of the question asked in your letter of request.

The well established rule is that a municipal corporation has only such powers as are clearly and unmistakably granted to it by its charter or by other acts of the Legislature, and consequently can exercise no powers not expressly granted to it, except those which are necessarily implied or incident to the powers expressly granted and those which are indispensable to the declared objects and purposes of the corporation. 19 R. C. L. 768, 49 A. L. R. p. 1239. Gainesville v. Dunlap (1917) 147 Ga. 344, 94 S. E. 247; Steitenroth v. Jackson (1911) 99 Miss. 354, 54 So. 955; Kearny v. Bayonne (1919) 90 N. J. Equ. 499, P. U. R. 1919E, 696, 107 Atl. 169; Western New York Water Co. v. Buffalo (1925) 213 App. Div. 458, 210 N. Y. Supp. 611; Richards v. Portland (1927) Or., 255 Pac. 326; Haupt's Appeal (1889) 125 Pa. 211, 3 L. R. A. 536, 17 Atl. 436; Childs v. Columbia (1910) 87 S. C. 566, 34 L. R. A. (N. S.) 542, 70 S. E. 296; Paris v. Sturgeon (1908) 50 Tex. Civ. App. 519, 110 S. W. 459; Farwell v. Seattle (1926) 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130.

By Section 7642, supra, cities owning and operating electric light or power plants were authorized to sell to persons and private corporations for use beyond the corporate

limits of such city and to enter into contracts upon such terms and conditions as may be agreed upon by the contracting parties for the selling of surplus electrical energy by them. This statute changed the rule with reference to cities selling surplus electricity to consumers outside its corporate limits.

It was held in the case of *Speas v. Kansas City*, 44 S. W. (2d) 108, 1. c. 113, that Kansas City "is operating its waterworks primarily for the purpose of supplying water for its own needs and the needs of its inhabitants, and is incidentally selling surplus water to nonresidents, without impairing the usefulness of its waterworks for said primary purpose, such exercise of its charter power to supply water to nonresidents is not inconsistent with its charter power to acquire and to operate waterworks for public purposes only, nor with the constitutional provision that taxes may be used for public purposes only." Many cases from other jurisdictions are cited in the opinion sustaining the above statement of the law.

On the question submitted in your letter the City of Rock Port has built a power line to its municipal pumping station outside the city limits, and as we understand it, a customer living near to this power line desires to have supplied to him from this line surplus electrical energy and the City desires to accede to his request if it may legally do so. Since the City has constructed this line primarily for the purpose of supplying electricity to its pumping station lying outside its corporate limits and same was not constructed for the purpose of delivering electricity to customers outside its city limits, we can see no objection to selling such electricity to customers along its power line.

It is therefore our opinion that under the state of facts as set forth in your letter that the city, so long as it maintains its power line constructed as aforesaid to its pumping station, may sell to customers along said line the surplus electrical energy of the city, but under the authority

June 30, 1938

of the Taylor v. Dimmitt Case, supra, it would have no authority to construct and maintain any part of a transmission line built primarily for the purpose of furnishing service to consumers outside its corporate boundaries.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

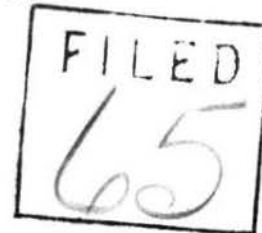
(Acting) J. E. TAYLOR
Attorney-General

CRH:EG

ELECTIONS: Candidate for Representative in Congress may
PRIMARY: withdraw even though his name has been certified
out to the several County Clerks.
Pederson permitted to withdraw as candidate
for Congress.

July 8, 1938.

Hon. Charles E. Murrell, Jr.,
Prosecuting Attorney,
Adair County,
Kirksville, Missouri.



Dear Sir:

This is to acknowledge receipt of your letter of July 6th in which you request the opinion of this department on the question therein submitted. Your letter is as follows:

"Enclosed find a copy of the notice received by the County Clerk of Adair County, Missouri, from Fred Pederson who is a candidate for Representative from the First Congressional District of Missouri, which district includes Adair County, Missouri, to the effect that he is withdrawing from the ballot. The County Clerk of Adair County, Missouri, wishes to know if this notice is sufficient. I have attempted to investigate the matter but can not find anything on it and, therefore, I am unable to give the opinion myself. The Clerk would also like to know if it is proper for him to remove the candidate's name from the official notice and ballot upon this notice? I would appreciate a reply from you at your earliest convenience."

Attached to your letter of request is the following affidavit, which we assume has been filed with the several County Clerks in the counties in the First Congressional District of Missouri:

July 8, 1938

"NOTICE TO CLERK OF THE COUNTY COURT
NOT TO INCLUDE NAME OF CANDIDATE IN PUBLICA-
TION OR ON OFFICIAL BALLOT.

To the Clerk of the County Court of
Adair County, Missouri:

Notice is hereby given you that the undersigned, a resident and qualified elector of the County of Grundy and State of Missouri, with post office address at Trenton, Missouri, having announced myself a candidate for the office of Representative in Congress from the First Congressional District of Missouri on the Democratic Ticket, to be voted for at the primary election to be held on the first Tuesday in August, 1938, did thereafter by declaration in writing signed and executed with the formality prescribed for the execution of an instrument affecting real estate to entitle it to record, renounce my said declaration and revoke the same and the authority therein given to have my name printed upon the official ballot at such primary election and did by said instrument in writing declare that I have withdrawn my name as such candidate and do not desire the same be placed upon the ballot at such primary election; and you are notified that I will not accept the nomination and my name should not be included in the publication to be made by you or upon the official ballot and you are further notified that a similar notice is being given the Clerk of the County Court of each of the counties in the First Congressional District of Missouri.

Fred Pederson."

Sworn to before a Notary Public on June 28, 1938.

July 8, 1938

Under the provisions of Section 10260, R. S. Mo. 1929, it is provided that all declaration papers shall be filed as follows:

"1. For state officers, representatives in congress, courts of appeals and circuit judges, and those members of the senate and assembly whose districts comprise more than one county, in the office of the secretary of state."

Section 10261 provides:

"At least fifty-five days before any primary preceding a general election, the secretary of state shall transmit to each county clerk a certified list containing the name and postoffice address of each person who shall have filed declaration papers in his office, and entitled to be voted for at such primary, together with a designation of the office for which he is a candidate, and the party or principle he represents."

It is our information that the Secretary of State performed his duties under this section and certified to the several County Clerks in the counties comprising the First Congressional District the name of Fred Pederson as a candidate for Congress in that district, the said Pederson having theretofore duly filed his declaration papers with the Secretary of State more than sixty days before the primary election to be held August 2, 1938. After the name of Pederson had been certified by the Secretary of State aforesaid, the affidavits above were filed with the several County Clerks in the counties comprising the above Congressional District.

The question to be determined by your letter of request and other requests received involving the same question is whether or not the various County Clerks in the First Congressional District are authorized and empowered to withdraw the name of Fred Pederson as such candidate and not include his name in the publication to be made and not to include his name on the official ballot to be printed and used in the August primary.

Section 10251, R. S. Mo. 1929, Article 4, Chapter 61, provides that

"the secretary of state shall not certify the name of a candidate whose certificate of nomination shall have been filed in his office, who shall have notified him in writing, signed and executed with the formalities prescribed for the execution of an instrument affecting real estate to entitle it to record, that he will not accept the nomination contained in the certificate of nomination. The clerk of the county court shall not include in the publication to be made according to section 10249 the name of any candidate whose certificate of nomination shall have been filed in his office who shall have notified him in like manner that he will not accept the nomination. The names of such candidates shall not be included in the names of the candidates to be printed in the ballots as herein-after provided."

The sworn statement of Pederson has followed the provisions of this section of the statute in preparing his withdrawal.

A similar situation to the instant case arose in California in the case of Bordwell v. Williams, 159 Pac. 889, L. R. A., 1917A, p. 996, where a candidate had filed nomination papers for the office of United States Senator in the requisite form, and in addition thereto, as required by statute, the candidate had filed with the Secretary of State his affidavit stating, in addition to the other matters required, that, if nominated, he would accept such nomination and not withdraw, and that he would qualify as such officer if nominated and elected. The Secretary of State thereupon certified the name of the candidate to the County Clerks in the several counties, directing said officers to print on the primary ballot the name of the candidate as a candidate for the Republican nomination for the office of United States Senator. This case is well reasoned and clearly applicable to the case in hand, and we quote from the headnotes:

"A candidate whose name has been duly certified for a place on the ballot at a primary election, and who has signed the statutory affidavit that, if nominated, he would accept such nomination and not withdraw, is not precluded from withdrawing his name before the primary election, although the statute provides that the names of all persons for whom nomination papers have been filed, as certified by the secretary of state, shall be printed on the ballots."

Under Section 10257, R. S. Mo. 1929, a candidate in filing his declaration of candidacy states:

"I further declare that if nominated and elected to such office, I will qualify,"

and it is noted that in the declaration filed by the candidate in the California case he makes the additional statement that he will not withdraw, and yet in that case the Supreme Court of California held that the candidate had a right to withdraw his name and decline to be a candidate.

In the case of State ex rel. Neu v. Waechter, et al., 332 Mo. 574, 58 S. W. (2d) 971, 1. c. 974, in construing Section 10441, Article 13, Chapter 61, R. S. Mo. 1929, relative to primary elections in cities of four hundred thousand, said the following:

"The board contends he could not withdraw in view of the last two provisions of section 10441 which are that 'all declaration papers shall be filed with the board of election commissioners of such city, and such declaration papers shall not be withdrawn'; and that 'the names of candidates who so declare shall be printed on the official primary ballot.' It will be observed the statute merely says such declaration papers shall not be withdrawn; it does not say the declarant cannot abandon his candidacy. It then goes on to provide the names of candidates

who so declare shall be printed on the official primary ballot.

"In our opinion, a construction of this statute which would make it mean that a candidacy once declared by the filing of papers can never be recalled, and that the name of the candidate must be printed on the ballot, is so violent and unreasonable that it ought not to be adopted if any other construction is possible. It would mean the names of deceased declarants, those who had moved out of the city or state and admittedly become ineligible, or those who would refuse to continue in the race if nominated, nevertheless must be voted upon by the people. And in cases where a deceased or ineligible declarant received the highest number of votes it would nullify the whole primary election. 20 C. J. sec. 267, p. 207; Sheridan v. St. Louis, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Cas. 480. * * *

"Section 10251, R. S. 1929 (Mo. St. Ann. sec. 10251), expressly provides the secretary of state and county clerks shall not certify and publish, respectively, the names of declarants who shall notify them in writing, etc., that they will not accept nomination to the offices for which they have been certified. In other words, the general primary law by the section last cited in terms authorizes the withdrawal of primary candidacies."

July 8, 1938

Since Mr. Pederson declares under oath that he does not desire to have his name placed upon the ballot at such primary election and that he would not accept the nomination, and clearly renounces his candidacy for Congress in that district, we are of the opinion that his wishes in this matter should be acceded to by the several County Clerks with whom said affidavit has been filed. We can see no valid reason why a person who is not in fact a candidate for nomination should have his name placed upon the ballot against his will, although he may have previously filed as a candidate for office. It is a right which he clearly has and it cannot be taken away from him except by some positive statute. It would be a vain and useless thing for the voters to nominate a person who has declared that he will not accept the nomination by a solemn instrument of writing.

CONCLUSION:

It is therefore our opinion that the several County Clerks with whom the foregoing affidavit has been filed are authorized and empowered to withdraw Pederson's name as a candidate for Congress in the First Congressional District and not publish his name in the primary notice as required by Section 10262, R. S. Mo. 1929, and not print his name in the official primary ballot for the August, 1938, primary.

Respectfully submitted,

COVELL R. HEWITT,
Assistant Attorney General.

APPROVED:

ROY MCKITTRICK,
Attorney General.

CRH:HR

CRIMINAL LAW:
PRELIMINARY EXAMINATION:

If defendant is discharged by justice
at the preliminary examination
prosecuting attorney may file complaint
before any other justice in the county.

July 22, 1938

7-23



Mr. Arthur C. Mueller,
Prosecuting Attorney,
Gasconade County,
Hermann, Missouri.

Dear Sir:

This is in reply to yours of July 20th requesting
an official opinion from this department based upon the
following letter:

"Will you kindly give me your opinion
on the following question:

A man is charged with a felony and at
the preliminary hearing the Justice
dismissed the charge. Can the same
charge be filed before some other
Justice in the County and again pro-
ceeded on?

For your further information, I had
the above experience, I also am of
the opinion that the defendant is
guilty and that the State proved all
the facts necessary to bind the de-
fendant over to the circuit court
and firmly believe that various
Justices would have bound the defend-
ant over on the testimony submitted.

Kindly let me have this opinion at the
earliest possible date."

Your request goes to the question of whether or not the filing of a second complaint against a defendant who has been discharged by a justice at a preliminary examination is double jeopardy. Under the provisions of Section 23 of Article II of the Constitution the person may be placed in jeopardy only one time for the commission of an offense. Volume 8 R. C. L. page 137, section 117, we find that the rule is stated as follows:

"* * * The discharge of a defendant by a magistrate on a preliminary examination is not such an adjudication in his favor as will bar a subsequent prosecution for the offense."

A defendant's right of preliminary examination is set out in Section 3503, page 203, Laws of Missouri, 1931, which is as follows:

"No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. * * * * *

In the case of State ex rel. McCutchan v. Cooley, 12 S.W. (2d) 466, l.c. 468, the court said:

"While it is not expressly provided in section 3848 that an information cannot be filed until the magistrate has found 'that a felony has been committed and that there is probable cause to believe the prisoner guilty thereof,' such is the clear intent of the statute. Otherwise the according of an examination

before a magistrate is a useless preliminary step and affords no protection to the accused. The lawmakers are guilty of no such absurdity. The examination by a magistrate before an information can be filed by the prosecuting attorney takes the place of an examination by a grand jury before the return of an indictment and prevents an abuse of power by the prosecuting attorney. On a discharge of the accused a complaint may be filed before another magistrate, or the charge may be investigated by a grand jury."

In the same opinion the court, in discussing the case of State v. Pritchett, 219 Mo. 696 quoted from that case as follows: (l.c. 468)

"Although the justice might, after a preliminary examination, discharge the prisoner, such action would in no way operate as a bar to an indictment, or to an information by the prosecuting attorney for the same offense, and whatever the justice might do in the case is from a legal standpoint merely preliminary."

And the court in further discussing the opinion of the Pritchett case said:

"This statement was unnecessary to a decision of the case. If the learned judge intended to rule that on the discharge of an accused by a magistrate the prosecuting attorney was thereby authorized to file an information for the same offense, we do not agree with him. Such a ruling is contrary to all the authorities, and should not be followed. If he intended

Mr. Arthur C. Mueller

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July 22, 1938

to rule that a discharge is not a bar
to the filing of a complaint with another
magistrate, he is in harmony with all
the authorities and should be followed."

While it was not necessary to rule upon this point in the said case of State v. Cooley, supra, yet the court has by no uncertain terms stated its views in this matter and we are following those views in arriving at our conclusions in this opinion.

CONCLUSION

This office is, therefore, of the opinion that if a man is charged with a felony and at the preliminary examination the justice of the peace dismisses the charge and refuses to bind the defendant over to the circuit court, then the prosecuting attorney may file a complaint setting up the same charge before any other justice of the peace in the county before whom another preliminary examination may be had.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWB:DA

GAME AND FISH: Provision for election by counties on question of closed season for shooting quail not repealed by Amendment No. 4, Laws of Missouri, 1937, page 614.

August 12, 1938



Honorable Arthur C. Mueller
Prosecuting Attorney
Hermann, Missouri

Dear Sir:

This is in reply to yours of August 9th wherein you request an opinion based upon the following statement:

"A petition for a closed season on quail was filed in this county under Section 8246 R. S. Mo. '29. Will you kindly advise this office if the County Court is compelled to place this question on the ballot in November as provided in the above section or does Amendment No. 4, Laws '37, page 614, take precedence over the said section."

Your request involves the question of when does a constitutional amendment repeal a special statute dealing with the same subject matter.

In the case of State ex rel. Harrison v. Frazier, 98 Mo. 429, the court said:

"The terms of a special law are not ordinarily regarded as repealed by a later law of a general nature on the same subject. To thus effect a repeal such an intent must be clearly manifested in the latter. The constitutional declaration regarding the power and duty of the general assembly, in respect of the

registration of voters, is, by its terms, evidently designed to have a prospective operation only. It does not purport to repeal any existing law such as is here under discussion. Nor do we think any such purpose can be fairly inferred from its language, especially when we consider that, unless such an intent is evident beyond reasonable question, we should assume as a rule of construction that only a prospective operation of the constitution was contemplated."

The rule is further discussed in the case of *State ex rel. Goldman v. Hiller*, 278 S. W. 708, 709, wherein the court said:

"If a previous law conflicts with a new constitutional provision, the law withers and decays and stands for naught, as fully as if it had been specifically repealed. This is the simplest rule of horn book law. So that if the enactment of 1921 conflicts with the constitutional provision of 1924, it stands for naught."

So if Section 8246, R. S. Mo. 1929, is in conflict with Amendment No. 4, Laws of Missouri, 1937, page 614, it stands for naught the same as if it had been specifically repealed. But, as stated in *State ex rel. Harrison v. Frazier*, supra, there must be a conflict in the provisions of the statute, which conflict must be beyond a reasonable question, before the existing law will be repealed by implication. If said Section 8246 or the provisions thereof relating to an election on the question of a closed season for killing quail in the county, are repealed by said Amendment No. 4, they are repealed by implication, and, as said supra, repeals by implication are not favored.

In *State v. Hostetter*, 79 S. W. (2d) 463, 468, the court said:

"Repeals by implication are not favored (Cooley's Constitutional Limitations (8 Ed.) p. 316; Black on

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Interpretation of Laws (2 Ed.) sec. 107, p. 351; 12 C. J., P. 710, note 54; Endlich on Interpretation of Statutes, sec. 210, p. 280). At page 281 in the authority last cited it is said: 'A rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject.' The same authority at page 731, holds that the same presumption against unnecessary change of law exists in the construction of a constitutional provision."

Vol. 12 C. J., page 725, Sec. 97, provides as follows:

"While a new constitution is, by its very nature, intended to supersede a prior constitution, it is not intended to supersede the entire body of statutory law. To the extent, therefore, that existing statutes are not expressly or impliedly repealed by the constitution, they remain in full force and effect. * * *

Section 8246, R. S. Mo. 1929, provides as follows:

"The right given by this article to take or kill game or birds, or to have in possession, unless otherwise specified is

limited to food purposes, and to one turkey, ten quail or bobwhite, and fifteen additional game birds of each and every other family for each person in any one calendar day, and no person shall take, kill or have in his possession at any one time more than one turkey, fifteen quail or bobwhite, and twenty-five additional legal game birds of each and every other family; and no person shall kill during any calendar year more than one turkey: Provided, that it shall be unlawful to kill turkey at any time within the confines of any state park. No birds, game or fish protected by this article shall be held in possession by any person for more than five days after the close of the season for killing the same: Provided, that upon the filing of a petition signed by one hundred or more householders of any county and presented to the county court at any regular or special term thereof more than thirty days before any general election to be had and held in said county, it shall be the duty of the county court to order the question as to whether or not there should be a closed season upon quail for the next two years in their said county submitted to the qualified voters, to be voted on by them at the next election. Upon the receiving of such petition it shall be the duty of the county court to make the order as herein recited, and the county clerk shall see that there is printed upon all the ballots to be voted at the next election the following:

For a closed season upon quail

Yes.

No.

Erase the word you do not wish to vote.

The returns of said election upon said subject shall be opened, canvassed and certified, as the returns for general elections.

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If the majority of the votes cast upon such subject be in favor of the closed season upon quail, then it shall be unlawful to take, capture or kill any quail or bobwhite within such county for the period of two years thereafter following the announcement of the result of said election, and the county court shall spread the result of such election upon its records and give notice thereof by publication in some newspaper printed and published in such county, and such law shall become operative and effective from the time such publication is made. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor."

The Constitutional Amendment No. 4, page 614, Laws of Missouri, 1937, provides in part as follows:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party."

While the power is granted to the Conservation Commission by this Amendment to control, manage, restore, conserve, and regulate the bird, fish and game resources, yet we do not think, beyond a reasonable question, that the voters intended to repeal by implication that part of said Section 8246, supra, which authorizes the voters to vote upon the question of a closed season for killing quail in their respective counties. This part of said section is for the purpose of conserving the quail of that particular county, and even though the Commission has authority and does make a regulation to conserve quail, such

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regulation would be in harmony with the vote of the people who have voted on the question of a closed season on the killing of quail.

In the case of *Barker v. St. Louis County*, 104 S. W. (2d) 371, 377, the court in discussing when a statute was repealed by a later act or a constitutional amendment, said:

"There is no better settled law in our state than the rule that courts will not hold a statute to be unconstitutional unless it contravenes the organic law in such a manner as to leave no doubt of its unconstitutionality.' *Bledsoe v. Stallard*, 250 Mo. 154, loc. cit. 165, 157 S. W. 77, 80. On the other hand, if there is no doubt that a statute or part thereof is in conflict with the Constitution, then it is the duty of any court, whose duty it is to decide, to declare the conflict and declare void the statute or part thereof in conflict with the Constitution."

The last paragraph of Amendment No. 4, supra, is as follows:

"The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

That part of said Section 8246 which provides for the counties to vote a closed season on killing quail would be classed as legislation in aid of the provisions of the Amendment and would be in conformity with the last clause of said Amendment referred to above, and we do not think it contravenes said provision, or at least we think there is some doubt as to whether or not it does, and applying the rule announced in the *Barker v. St. County* case above, such statute is not repealed if there is some doubt as to whether or not it contravenes

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the provisions of the Constitutional Amendment. That being the case, that part of said Section 8246, supra, providing for the election on the question of a closed season for killing quail is not repealed by implication by the provisions of said Constitutional Amendment No. 4.

CONCLUSION

From the foregoing, it is the opinion of this department that when a petition which complies with the provisions of Section 8246, R. S. Mo. 1929, is presented to the County Court, then it is the duty of such County Court to order the question of whether or not there should be a closed season upon quail for the next two years in their county submitted to the voters, to be voted on by them at the next election as provided in said Section 8246, supra. We are further of the opinion that this provision of this section is in aid of the provisions of Amendment No. 4, Laws of Missouri, 1937, page 614, and that it is not repealed by implication by the provisions of said Amendment.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

CRIMINAL COSTS: State Highway Patrol Officer not liable for costs in a misdemeanor where the defendant is acquitted by a jury, without judgment of malicious prosecution, or is not liable for costs for arrest and conviction on a vagrancy charge, or acquittal in an arrest in a felony case before a jury.

August 22, 1938

Arthur C. Mueller
Prosecuting Attorney
Gasconade County
Hermann, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of August 9, 1938, requesting an opinion from this department, which reads as follows:

"Will you kindly give this office your opinion on the following questions, to-wit:

"Is a member of the Missouri State Highway Patrol personally liable for costs, when he signs a complaint for a misdemeanor committed in his presence and the defendant is later acquitted by jury?

"Is a member of the Missouri State Highway Patrol personally liable for costs if he arrest a person on a vagrancy charge and the defendant enters a plea of guilty?

"Is a member of the Missouri State Highway Patrol personally liable for costs if he signs complaint in felony cases and is he competent witness to material facts in the case? Also would the Patrolman be personally liable for costs if defendant was acquitted by jury in circuit court."

Section 3444, R. S. Mo. 1929, reads as follows:

"When the proceedings are prosecuted before any justice of the peace, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the justice on his docket as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the prosecuting attorney be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint."

This section applies to proceedings before justices of the peace in misdemeanor cases. Under this section, it is mandatory to adjudge the costs against the prosecuting witness upon discharge of the defendant on a complaint filed by the injured party for (1) disturbance of the peace, (2) libel or slander, or (3) trespass against the person or property of another, not amounting to a felony, except for petit larceny. Under this section, in every other case of acquittal, if the court or jury find that the complaint was maliciously brought or without probable cause, the court or jury may assess the costs against the complaining witness,

but in no case shall the prosecuting attorney be liable for the costs. In all other cases, under this section, the county must pay the costs except where a complaint is filed and the prosecuting attorney refuses to file an information, and in that event the costs should be assessed against the complaining witness.

Section 3827, R. S. Mo. 1929, reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Under Section 3827, if the defendant is sentenced to the county jail, or to pay a fine, or both, and is unable to pay the costs, then the county must pay the costs.

Section 3828, R. S. Mo. 1929, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Under this section, the state must pay the costs in case of an acquittal in capital cases and in cases where the sole punishment is imprisonment in the state penitentiary, but in other cases of acquittal the costs shall be paid by the county. Under this section, in an acquittal of a graded felony the liability for the costs is assessed against the county.

August 22, 1938

Section 3826, R. S. Mo. 1929, reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. * * *"

Section 3829, R. S. Mo. 1929, reads as follows:

"Every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be adjudged to pay all costs if the defendant is acquitted although he may not be entitled to any part of the same."

This section applies only to personal offenses and not public offenses. It was so held in *State v. Wood*, 128 Mo. App. 642.

As set out in your request concerning an arrest for vagrancy, vagrancy should be considered as a public offense and not a personal offense.

In the case of *City of Greenville v. Farmer*, 195 Mo. App. 209, 1. c. 211, the court said:

"It is the well settled law of this State and the country at large that the right to tax costs is purely made by statute; no such right existed at common law; and unless there is a statute authorizing the taxing of costs against the plaintiff, the order of the circuit court is erroneous. It is held

in the case of State ex rel. Clarke v. Wilder, 197 Mo. 27, 94 S. W. 499, that no costs can be taxed in any court except such as the statute in terms allows. In Ring v. Chas. Vogel Paint & Glass Co., 46 Mo. App. 1. c. 377, the following language is used: ' . . . It may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation.'

CONCLUSION

In view of the above authorities, it is the opinion of this department that if a state highway patrol officer signs a complaint for a misdemeanor committed in his presence and the defendant is acquitted by a jury, the state highway patrol officer is not liable for the costs unless it was one of the three offenses set out in Section 3444, supra, which makes it mandatory to adjudge the costs against the prosecutor, or unless the jury or justice of the peace, in accordance with Section 3444, supra, shall state in his or their verdict that the prosecution was malicious or without probable cause. In that case the justice should enter a judgment against the prosecutor or party at whose instance the information was filed, but in no case shall the prosecuting attorney be liable for the costs. In all other cases of acquittal or discharge, the county is liable under Section 3444, supra.

It is further the opinion of this department that if a member of the state highway patrol makes an arrest for vagrancy under Section 4333, R. S. Mo. 1929, and the defendant pleads guilty, the county is liable for the costs under Section 3827, supra, for the reason that vagrancy is only a misdemeanor. Of course, it goes without saying that in case the defendant is able to pay the costs, they

August 22, 1938

should not be paid by the county in case of conviction, but if not paid by the defendant, the county must pay the costs except costs incurred on the part of the defendant.

It is further the opinion of this department that a member of the state highway patrol is not personally liable for the costs in a case where he signs a complaint in a felony case in which he is a material witness and the defendant is acquitted by a jury in the circuit court. Under Section 3828, supra, if the defendant is acquitted on a capital case or on a felony case, where the sole punishment is imprisonment in the penitentiary, the costs shall be paid by the state, and in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county, except when the prosecutor shall be adjudged to pay them or it be otherwise provided by law.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

OFFICERS: Any officer-elect may assume the duties of
office on Sunday, January 1, 1939, if he has
ELECTIONS: taken the oath of office prior thereto.

December 23, 1938

17-77

Honorable Maurice L. Mushlin
2nd Associate Prosecuting Attorney
Municipal Courts Building
St. Louis, Missouri



Dear Sir:

We have received your letter of December 16, 1938, which reads in part as follows:

"Sometime ago when Judge James P. Finnegan met General McKittrick he inquired as to whether it was permissible under the law for an official whose term of office began on January 1st to take office on that day when that day was a Sunday.

"Since there are a number of offices, including ours, in which the terms begin on January 1st, 1939, and as January 1st, 1939 falls on a Sunday, I would at the request of Judge Finnegan formally request an opinion from your office on this matter.

"I would point out Section 1863 of the Revised Statutes of Missouri, which prohibit a Court from holding session or transacting any business other than to receive a verdict or to discharge a jury.

"I believe that this is the only relevant statute, and that therefore an official could not take on January 1st, 1939.

Dec. 23, 1938

"Judge Finnegan would likewise like to know if it would be permissible to take office or be sworn in on December 31st, New Year's Eve."

We are enclosing a copy of an opinion dated December 22, 1938, and addressed to the Honorable Carl F. Wymore, Prosecuting Attorney of Cole County, Missouri, which holds that the county court cannot convene on Sunday, January 1, 1939, for the purpose of administering oaths of office to newly elected officers whose terms are to commence as of that date. That opinion is based principally on Section 1863, R. S. Mo. 1929, which makes it unlawful for any court to transact any business on Sunday except for certain limited and designated purposes. The opinion also holds that there is nothing to prevent the oath of office from being administered on a date prior to Sunday, January 1, 1939, or on a date subsequent thereto; that Article XIV, Section 6, of the Constitution of Missouri merely requires that the oath of office shall be subscribed to before any officer enters upon his duties.

Consequently, if any of the officials who are by law to assume office on January 1, 1939, have taken the oath of office prescribed by the Constitution on a date prior thereto, such officer would then be the lawful incumbent on January 1, 1939.

CONCLUSION

Any officer who is by law to assume the duties of his office on Sunday, January 1, 1939, shall be entitled to assume the duties thereof on January 1st provided he has taken and subscribed to the oath of office provided for by the Constitution of Missouri on a date prior thereto.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA:HR

ASSESSORS: It is the duty of the County Assessor to compile a land list or real estate book for assessment purposes, and the County cannot necessarily be required to pay the Assessor therefor.

Supplemental opinion to #59 - 8-24-37

February 4, 1938

2-11

Mr. Martin L. Neaf,
Assessor, St. Louis County,
Clayton, Missouri.



Dear Sir:

In compliance with your request that this department reconsider its opinion rendered on August 24, 1937, to Mr. John H. McNatt, Prosecuting Attorney of St. Louis County, the following is the conclusion that has been reached based upon and confined to the questions asked in Mr. McNatt's letter of inquiry, together with the records of the county court submitted therewith:

I.

Mr. McNatt's letter is as follows:

"We should like to know whether under R. S. Mo. 1929, sec. 9787, our County Assessor can be required to compile and keep a land list for a full and accurate assessment of all property in this county without being paid therefor out of the County treasury. The County Court has ordered Assessor Neaf to do this work, expecting him to pay for it out of his fees rather than, as the statute requires, out of the County treasury. We should also like to know whether the County Court's order requiring Assessor Neaf to do this work is mandatory.

"Thanking you very much for your courtesy in this matter, I remain."

II.

The pertinent records of the county court show as follows:

(a) The matter of the Assessor of St. Louis County making a land list or real estate book first came before the court on May 9, 1881, whereby it was ordered that the assessor should make up his land list book in alphabetical order.

(b) The next pertinent record is that of March 9, 1906, whereby a method or system of tax assessment to be used by the assessor of the county was approved and adopted, which method included as a part thereof the making of the land list book.

(c) The above order of 1906 pertaining to the method of tax assessment, including a land list book, was readopted by the court from time to time up to and including the last and final order made at the May Term, 1937, of the court; and in this last order the court finds that the fees of the assessor are adequate to pay sufficient personnel to carry out such method without the county paying for such personnel, and the assessor is ordered to proceed to make such assessment of the county under the method adopted.

III.

The present general laws or statutes pertaining to assessments and assessors' duties, among which are Sections 9780 and 9782, have been in force a long number of years, and the county assessor has always been required by such laws or statutes to make a land list or real estate book.

In 1883 the Legislature enacted what is now Section 9787, R. S. Mo. 1929, it being the section alluded to in Mr. McNatt's letter of inquiry, and this section provides, in substance, among other things, that all counties in the state which had at the time of the enactment of this statute in 1883, a system of plats and abstracts to facilitate the assessment of property, then in such case the provision

respecting the making of the land list is superseded. However, in the instant case the county court records do not show, either at the time of the enactment of the statute now in force or since, whether or not St. Louis County had and used plats and abstracts as a method for assessment of the county property.

Another provision of Section 9787, now discussed, is that any county having a population exceeding forty thousand in number (St. Louis County being one of such counties) may by court order adopt any method of assessment it deems fit. Hence, by reason thereof, the county court could eliminate the land list, if one was being used, and substitute some other means or record in its place. However, the county court in this instance has not seen fit to eliminate the land list book, but, on the contrary, has retained it in its method and system of tax assessment ever since 1881, or before, up to the present time, as shown by its last order and record aforesaid. Hence, it would appear that, either under the provisions of the general statutes aforesaid, Sections 9780-9782, or by reason of the county court's last and present order, apparently acting under Section 9787, it is the duty of the assessor to make up and use a land list book as part of, and to facilitate, his assessment of the property in the county.

IV.

Relative to the question of whether the assessor can require the county court to pay him additional, or any, compensation, or to pay necessary personnel which the assessor might employ for the work of making up this land list, it can be answered as follows:

Sections 9780 and 9806 provide the compensation of assessors in counties having a population such as St. Louis County has, to-wit, 25¢ for each assessment list and 3¢ additional for each entry in the land list or real estate book. Hence, unless the provisions of Section 9787 (alluded to in the letter of inquiry) change the fee or compensation basis under the facts in this case, the aforesaid Sections 9780 and 9806 prevail.

V.

A question has been presented in this matter as to whether or not the concluding words or clause, namely, "and may provide the means for paying therefor out of the county treasury," found in Section 9787, which words or clause relate to the adoption by the court of some particular method of assessment and the work necessary to carry it out, can be construed as to make it mandatory, in place of discretionary, on the court to pay the assessor in this case for compiling and using the land list in question as a part of the county's assessment method, having ordered him to do so. In dealing with this question it is first necessary to consider a further portion of Section 9787, to-wit:

"Provided, that in counties having a population of over forty thousand the county court may in addition to the foregoing provisions for securing a full and accurate assessment of all property therein liable to taxation, or in lieu thereof, by order entered of record, adopt for the whole or any designated part of such county any other suitable and efficient means or method to the same end, whether by procuring maps, plats, or abstracts of titles of the lands in such county or designated part thereof or otherwise."

In view of the foregoing language of this part of the section just quoted, it must be shown or else assumed, in order to make said section applicable, that the county court by its last and recent order aforesaid adopted a method of assessment "in addition to the foregoing provisions for securing a full and accurate assessment," or, one that was "in lieu" of such foregoing provisions. Did the county court by said last order, in adopting the method it did, do either one or the other? We believe not because:

(a) The existing method of assessment in St. Louis County whereby a land list or real estate book and personal property book are used is not a method in addition to the foregoing provisions of Section 9787, inasmuch as there is no showing one way or the other that the county was using a plat

and abstract method at the time the statute in question was enacted. Nor is it in addition to the method prescribed in the general statutes, Sections 9780-9782.

(b) Neither is said existing method in lieu of either of the methods provided for by the "foregoing provisions" of Section 9787 or Sections 9780-9782.

In point of fact, it seems to us, gathered from the county court's records submitted, that the present existing method of assessment in St. Louis County is the same method used by the county for a considerable period of time before the enactment of Section 9787 and used ever since to the present time. Further, and in point of fact, the last order of the court expressly states that the method of assessment called for in the order is the same that has been in force for the last five years or more. Hence, we seriously doubt, under the facts as shown, that Section 9787 has any applicability in this case.

VI.

However, assuming for argument, that the county's present method of assessment is a real and substantial change from the preceding method and that it can therefore be said that the present method is in lieu of such former method, can the county, having required the assessor by its said order to proceed under such change in method, be compelled to provide the means for paying therefor out of the county treasury, under the theory of a mandatory construction of the statute, said Section 9787? The further question asserts itself here as to whether a change in method of assessment is, or would be, such as to do away with, in whole or in part, the basis on which the assessor is compensated for his work under Section 9806 as amended and Section 9780, that is to say, if the new method of assessment did away with the taking of assessment lists or compiling the land list book, or both, then the assessor would have to rely on the county court, acting under said Section 9787, to supply him compensation, in whole or in part, for what he would lose under the general statutory provisions for fees by reason of such change in method. Hence, if the assessor should be deprived of the

whole, or a very substantial part, of his fees under the general statutes, then it would apparently work an injustice for the county court, if acting under the provisions of Section 9787, not to supply compensation to the extent necessary. Our courts have frequently ruled in cases affecting the rights of public officials that a statute should be construed as mandatory even though discretionary terms are used, and also where there is an abuse of discretionary power, if manifest injustice would result if not so construed. As illustrative of this principle, our Supreme Court in the case of State ex rel. v. Public Schools, 134 Mo. 296, said, (l. c. 305):

"While it is generally true that mandamus will not lie to control the discretion of an inferior tribunal in whom a discretion is vested in the performance or non-performance of certain duties devolved upon it by law, it is well settled that if the discretionary power is exercised with manifest injustice the courts are not precluded from commanding its due exercise. Such an abuse of discretion is controllable by mandamus."

However, we cannot say, under the facts as submitted to us in this case, that the assessor will be deprived of any of his regular fees or compensation and that the county court is working a manifest injustice by reason of its last court order. Further, even though it be assumed that the county court could be required under said section 9787 to pay the assessor compensation out of the county treasury for the work ordered, it is apparent that there is no limitation upon the amount the court could fix. In other words, it would be entirely discretionary with the court to fix an amount wholly inadequate as compensation. In this connection our Supreme Court in the case of Sanderson v. Pike County, 195 Mo. 1. c. 605, said:

"It will thus be seen that the Legislature has vested in the county court the power to fix the compensation of the treasurer for his general services and for his services in disbursing the school moneys of the county. With this discretion neither

this court nor the circuit court has any right to interfere. The county court is a court of record, and its acts and proceedings can only be known by its record. A contract with such court cannot be established by parol evidence. (Maupin v. Franklin Co., 67 Mo. 327; Dennison v. County of St. Louis, 33 Mo. 168.) No record of the county court was produced on the trial of this cause fixing the treasurer's compensation under either of the foregoing sections of the statute. It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it. (State ex rel. v. Adams, 172 Mo. 1-7; Jackson County v. Stone, 168 Mo. 577; State ex rel. v. Walbridge, 153 Mo. 194; State ex rel. v. Brown, 146 Mo. 401; State ex rel. v. Wofford, 116 Mo. 220; Givens v. Daviess Co., 107 Mo. 603; Williams v. Chariton Co., 85 Mo. 645; Gammon v. Lafayette Co., 76 Mo. 675.)"

The county court in its last order finds that the fees of the office of the Assessor of St. Louis County are adequate to pay salaries of sufficient personnel to carry out the present method of assessment without payment therefor out of the county treasury.

We do not believe it to be the province of this office to dispute this finding, even though hardship by reason of the court's said order might result in this case. The Supreme Court has passed upon this principle in State ex rel. Buder v. Hackmann, 265 S. W. 1. c. 535, where the court said:

"The argument of hardship, and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute."

VII.

Summarizing, and in conclusion, we say as follows:

1. That it is the duty of the assessor under Sections 9780 and 9782 (which we believe to be the applicable law in this case) to make up or compile annually a land list or real estate book for current assessment purposes. Or, if Section 9787 could be held applicable in this case (which would be contrary to our view) so that the court could act under the authority given it to require the assessor to compile such land list as a part of the assessment method adopted, then, the court having so acted, its order would make it the duty of the assessor to proceed and compile said book.
2. That it appearing in the showing made by the county court records that there has been no material or real change in the method of tax assessment by the county, then as a consequence the provision of Section 9787 respecting the fixing of the assessor's compensation is not applicable to this case.
3. That even though the aforesaid provision of Section 9787 could be held applicable to this case, and it could be construed as mandatory upon the county court to fix compensation for the assessor, yet the amount to be fixed would rest entirely with the court, and which amount so fixed might prove to be wholly inadequate as compensation to the assessor.
4. That the last order or judgment of the county court, which was not appealed from and hence has become final, finding in substance that the fees of the office of the assessor are adequate to carry out the work of the assessment method in vogue for the last five years or more preceding this order or judgment, is binding on the assessor.

5. That in making up or compiling a land list in alphabetical order as part of the method of assessment, the assessor may by order of court be allowed not to exceed 3¢ for each and every tract assessed and entered in the land list in addition to the other fees allowed him by law and to retain same not to exceed the constitutional limit.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

JWB:HR

TAXATION: Under Jones-Munger law an occupant or any interested party, as well as the owner, may redeem from tax sale.

February 16, 1938

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Honorable Onie D. Newlon,
Prosecuting Attorney,
Ralls County,
New London, Missouri.



Dear Sir:

We acknowledge receipt of your letter, which is as follows:

"IN RE: Section 9956a of Session
Acts of 1933 at page 437.

"I would like to have your interpretation of the following portion of the above act which reads as follows, 'The owner or occupant of any land or lot sold for taxes, or any other person having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner:'.

"A tract of land in my County containing about 15.75 acres of land title to which was and is in a bank that has ceased to exist since 1929, has since 1929 and for about five years prior thereto been used and occupied by a man owning the adjoining farm. In November, 1937, this 15.75 acre tract was sold by the Collector for taxes, and a man living about five miles away purchased the farm and a certificate was issued to him. Upon learning of the sale, the man who owns the adjoining land and who has been in possession of the same since the year 1924 tendered the taxes and penalties to the Collector, and the Collector refused the tender holding that this man had no right to redeem. I advised the

2/16/38

Collector that it was my opinion and belief that this man did have the right to redeem as the language of the statute uses the word 'occupant' and also the words 'or any other person having an interest therein', and certainly the man offering to redeem was an occupant or a man having at least a possessory interest.

"Would you be so kind as to advise as to your interpretation of this matter."

Replying thereto, we refer particularly to that part of your letter stating that "the man who owns the adjoining land and who has been in possession of the same since the year 1924 tendered the taxes and penalties to the Collector, and the Collector refused the tender, holding that this man had no right to redeem." It would seem from this that the Collector is acting more in the capacity of a court in determining rights in land than in the primary duty cast upon the Collector, to-wit, to collect the taxes for the state, county and other political subdivisions.

The main function of the Collector's office is to collect taxes. This is true of all classes of taxes, whether they be the current or delinquent taxes. The Jones-Munger Law passed by the Legislature in 1933 (Laws of Missouri, 1933, pp. 425, et seq.) clearly so indicates and sets forth the duty of the Collector with reference to the collection of the delinquent taxes, the primary thought interwoven all through the act being to provide for a quick and inexpensive method of collecting the delinquent taxes.

Section 9949 places upon the Collector the duty of collecting the taxes "contained in such 'back tax book.'"

Section 9952a carries out the above idea in providing that delinquent taxes "may be paid to the county collector at any time before the property is sold therefor."

Likewise, Section 9952b states that the notice shall specify that "so much of said lands and lots as may be necessary to discharge the taxes * * * will be sold * * *."

So, also, Section 9952d provides that when several tracts belonging to the same person are to be sold at the same time, "a part of one of said tracts or lots shall be offered,

first for the payment of the whole sum due from such owner on all such delinquent lands or lots, * * *."

Section 9954 requires the Collector to indorse on the certificate of sale to the purchaser his written guaranty warranting that the taxes due upon the tract, lot or lots, * * * are named in such certificate. And if it should at any time appear that such county collector had, before the time of making such guaranty, received, either in person or by deputy, the taxes * * *, the holder of such certificate is entitled to his action upon such written guaranty," or may sue the collector on the collector's bond.

Section 9954a further emphasizes that the primary object of the Jones-Munger Law is not the transfer of ownership, but is to collect the taxes. It provides that any rent collected by a purchaser at such sale "shall operate as a payment upon the amount due the holder of such certificate of purchase, and such amount or amounts, * * * shall be endorsed as a credit upon said certificate, and which said sums shall be taken into consideration in the redemption of such land, as provided for in this act."

The same thought is further emphasized by numerous other sections of the act. See Sections 9954d, 9955a, 9955b, 9955c, 9956a, 9956b, and 9957.

When the property has been sold for taxes, the purchaser at the sale only gets a certificate of purchase. It does not authorize him to go upon the land any more than if he had not bought the certificate of purchase. His rights do not extend to the point where he can exercise any dominion over the land until one year after the sale.

Section 9956a provides the method of redeeming lands when sold for delinquent taxes. It provides:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate

of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, * * *. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser"

notice of such deposit for redemption, and further provides that such notice shall stop payment to the purchaser of any further interest or penalty.

The only rights the purchaser has prior to one year after the date of the sale are that he shall be made whole for the amount of money he paid the collector at said sale plus the interest specified in the certificate of purchase. The object of the law is to sell lands for taxes only as a last method left for collecting the taxes.

The Jones-Munger Law was not enacted for the primary purpose of determining title to land, nor for the purpose of settling conflicting claims of different parties to a given tract of land on which there are delinquent taxes. A person redeeming land, whether he be the owner or occupant or some other interested person, does not thereby acquire any title to the land, but the redemption merely places the land in the same position as it would have been if it had never been sold for the payment of delinquent taxes.

The statute defining who are parties entitled to redeem is plain. It says that the owner, occupant or other interested person may redeem the land. If no one but the owner of the land could redeem it, then no meaning at all can be given to the further designated parties as the statute provides. They would be empty words. The Legislature necessarily meant that anyone of the three classes was authorized to redeem the land.

Your question more particularly deals with whether an occupant of land, who is in possession of it, is entitled to make tender to the Collector, and whether it is the duty of the Collector to accept that tender.

In *West End Brewing Co. v. Osborne*, 238 N. Y. S. 345, 347, 227 App. Div. 340, the court said that the erection by the owner of advertising signs on land sold for taxes and the use of the sign to advertise the owner's products, although the name of the owner did not appear on the sign, constituted actual occupancy of the land within the tax law of that state requiring notice to redeem from a tax sale to be served on occupants of land, where the use of the land was the appropriate one according to the locality.

In *City of Indianola v. Faison*, 132 So. 550, 552, 159 Miss. 520, the court said that an occupant was one who occupies and takes possession; one who has the actual use or possession, or is in possession, of a thing, and that generally the words "possession and occupation" are used synonymously with reference to land, leases and like incidents.

In *Robinson v. Ramsey*, 176 S. W. 282, the Springfield Court of Appeals, in 1915, approvingly quoted from the case of *Bartlett v. Draper*, 23 Mo. 407, 409, as follows:

"Any act done by himself (the plaintiff) on the premises indicating an intention to hold the possession thereof to himself will be sufficient to give him the actual possession."

It is not difficult to conceive that a person in possession of land is an interested party, even if the statute did not provide that an occupant could redeem the land. A person in possession of land may, by the continuance of that possession, have not only a possessory right, but if he retains that possession adversely to all others for the statutory period, he, by such retention, acquires the title itself to the land. But between the time he first takes possession of the land and ten years thereafter that he has adversely held the land, he has a possessory right, and that right is to hold the possession of that land until another with a superior right to the possession has asserted that right in court and procured a judgment of the court entitling the "other" to such possession, and the man in possession is both an occupant and one interested in the land, within the provisions of Section 9956a. Doubtless the Legislature had in mind that a person occupying or in possession of land had an interest which he could protect by redeeming if he saw fit to exercise the right of redemption which the Legislature by said Section 9956a provided.

A person not in possession of land is not authorized under the law to, of his own main strength, enter upon the land and oust the person who is in possession. In the Robinson case, supra, the defendant sought to take possession of land by his own efforts, and the court, speaking of such actions, said the following, page 283:

"If defendant owned an interest in this land, the law requires him to establish his right in an action brought for that purpose. He cannot assert his right by any short cut, such as taking possession of the land in the manner here shown. The law does not permit one to redress his grievance with his own hand."

In State ex rel. Barrett v. Boeckeler Lumber Co., 301 Mo. 445, 532, speaking of whether a statute means what it says when it is plain, the Supreme Court of this state en banc said:

"Nor is it within our province to give the statute any other meaning than its language imports. Our duty to apply the statute as it is written is as plain as the language of that statute, and in that language there is no ambiguity."

To like effect, see State ex rel. Publishing Co. v. Hackmann, 314 Mo. 33, decided by the Supreme Court en banc in 1926, where the court said:

"The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction."

So this statute, Section 9956a, is plain and free from ambiguity, and the Legislature meant what it has plainly expressed, to-wit, that an occupant or one interested in the land is entitled to redeem the same when it has been sold for the collection of delinquent taxes under the Jones-Munger Law.

CONCLUSION

In view of the fact that the primary duty of the Collector is to collect the taxes and not to settle land titles in other ways or among other people than insofar as the collection of the taxes is concerned, and in view of the further fact that the Legislature has not seen fit to vest the Collector with wider powers in the exercise of a judicial discretion, and in view of the further fact that the person redeeming land from a tax sale does not thereby acquire a greater title than he would have had if the land had not been sold for taxes, and in view of the further fact that the statute has plainly stated that anyone of the three classes of people, to-wit, the owner, the occupant, or other interested persons, may redeem the land from such tax sale, and has provided how the same shall be done, that is, by tendering the amount to make whole the purchaser of the tax certificate plus interest, plus costs, it is our opinion that when one in possession of land that has been sold for taxes tenders to the Collector the amount of money sufficient to reimburse the purchaser at the tax sale in full for the amount of money he has bid at the tax sale, plus the interest specified in the tax certificate, plus the costs incident to the sale, he is entitled to redeem the land, and it becomes the duty of the Collector to accept said tender and thereby to collect the taxes on behalf of the state and other political subdivisions thereof. To do otherwise might render the Collector liable on his bond.

Yours very truly,

S. V. MEDLING,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

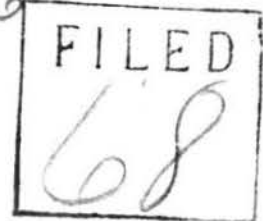
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ROADS AND BRIDGES:
TAXATION:
SPECIAL ROAD DISTRICTS:
COUNTY COURTS:
COUNTY HIGHWAY COMMISSION:

TAXES LEVIED AND COLLECTED ON
PROPERTIES IN SPECIAL ROAD DISTRICTS,
FOR THE ROAD AND BRIDGE FUND SHALL
BE TURNED OVER TO SUCH SPECIAL ROAD
DISTRICT AND COUNTY COURT MAY USE
SUCH TAXES THAT IT RECEIVES ON ACCOUNT
OF THE ROAD AND BRIDGE
FUND TAX FOR IMPROVEMENT
OF ROADS OF THE COUNTY
HIGHWAY SYSTEM.

January 5, 1938

Honorable Edwin C. Orr,
Prosecuting Attorney,
Boone County,
Columbia, Missouri.



Dear Sir:

This office acknowledges receipt of your request for an official opinion on the question of whether or not by the provisions of Section 7867 R.S. Mo. 1929, all of the taxes levied and collected for the road and bridge fund of the county by authority of Section 7890, R.S. Mo. 1929, stands appropriated to the use of the County Court where levied, to be used at the discretion of such Court for the construction and maintenance of roads and bridges located within the confines of the County Highway System as well as all other roads in the county.

Your inquiry particularly refers to such portion of the 'Road and Bridge Fund' that are levied and collected upon properties located in Special Road Districts. By virtue of the provisions of Sections 8042, 7890 and 7891 R.S. Mo. 1929, and by the rulings of the Courts on the question, these taxes have gone to the Special Road Districts in the County in which the properties were located.

The Courts in a long line of decisions have construed the provisions of Sections 7890, 7891 and 8042 R.S. Mo. 1929, so that the Special Road Districts would get all of the taxes which are levied and collected for the 'Road and Bridge Fund', by virtue of the provisions of said Sections 7890 and 7891, upon the properties in such districts. The last time the question was before the appellate court was in 1933, in the case of Hawkins v. Cox, 66 S.W. (2d) 539; 334 Mo. 640, and in this case the Court followed the foregoing rule as to where these taxes should go.

If by the provisions of Section 7867, R.S. Mo. 1929, the Legislature intended to include the taxes collected by the provisions of Section 7890, which had theretofore gone to the Special Road Districts containing the properties upon which such taxes were levied and collected, then it will be necessary for said Section 7867 to receive such a construction that it

would repeal by implication those provisions of Sections 7890, 7891 and 8024 which have heretofore given these taxes to the Special Road Districts which contained the properties upon which they were levied.

In construing these statutes, they should be considered together, because they deal with the same subject matter.

Section 7867 R.S. Mo. 1929, is as follows:

"All taxes derived from the levy authorized by Section 7890 R.S. Mo. 1929, are hereby appropriated to the use of the county court in each county where levied, to be used at the discretion of the said court for the construction and maintenance of roads and bridges located within the confines of the county highway system herein provided for, as well as all other roads and bridges in such county."

Section 7890 R.S. Mo. 1929, is as follows:

"The county courts in the several counties of the State having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the "county road and bridge fund".

Section 7891 R.S. Mo. 1929, is as follows:

"In addition the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization in their discretion may levy and collect a special tax not to exceed twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purpose whatever, and the same shall be known and designated as 'the special

road and bridge fund' of the county: Provided, however, that all that part of portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: Provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

Section 8042, R.S. Mo. 1929, is as follows:

"In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by virtue of

any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district, or districts, or where money shall be collected for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also one-half of the amount collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district, or districts."

The intent of the Legislature to repeal the provisions of the foregoing sections should very clearly appear and the courts will not hold to repeals by implication if they can find any reasonable ground to hold to the contrary, or if there is any other reasonable construction that can be placed on the statute under consideration, then the implied repeal will not stand. 25 R.C.L. 917, 918.

We also find the rule to be that one act cannot be allowed to defeat another, if by fair and reasonable construction, the two can stand together. 25 R.C.L. 919.

With the foregoing rules of construction in mind, if by a fair and reasonable construction of the foregoing

statutes we can find that all of them can stand, then said Section 7867 should not be so construed that it will repeal by implication the provisions of section 7890, 7891 and 8042 R.S. Mo. 1929 which have heretofore given to the special road districts the taxes levied and collected by the provisions of said sections upon properties in such special road districts.

And by the foregoing rules, Section 7867 should not receive such a construction as to leave said Sections 8042, 7890 and 7891 meaningless, in so far as they apply to the taxes collected for the road and bridge fund which belonged to special road districts before the enactment of the County Highway Commission Act in 1927.

In the case of State ex rel. Columbia National Bank of Kansas City v. Davis, et al., 284 S.W. 464, the court held that a statute should be construed so as to render another statute meaningless, only where the Legislature clearly expressed such intention. In the same case the Court held that statutes seemingly in conflict should be harmonized and force and effect given to each, so far as reasonably possible, as it will not be presumed that the Legislature in enacting a statute intended to repeal an earlier one, unless done in express terms, or to leave on the statute books two contradictory statutes.

Under the foregoing rules of construction, we should harmonize these statutes and not give them such a construction as will repeal any of them by implication.

Said Section 7867 is a part of the Act known as the County Highway Commission Act passed in 1927 by the Missouri Legislature, and is now found in Revised Statutes of Missouri, Article 2, Chapter 42, containing Sections 7856 to 7867 inclusive. By this act it appears that the Legislature was attempting to set up a county highway system of highways, a county highway commission, somewhat similar in powers and duties to the State Highway Commission and was attempting to provide the County Highway Commission with funds from taxes to acquire and maintain the roads under its jurisdiction.

The Act by Section 7861 provides that when any of the roads of the County Highway System pass through or into a Special Road District, it shall be the duty of the treasurer of such special road district to pay over to the highway commission, such proportion of the total road revenue arising therein as the mileage of said county highway within said special road district shall bear to the total number of road mileage therein. From this Section it seems that it would not be necessary to construe Section 7867 so that it will include the taxes belonging to the special road districts

raised by Section 7890, for said Section 7861 gives to the highway commission its proportionate part of the taxes raised by both Sections 7890 and 7891. The County Court has no jurisdiction over the highways of the county highway system, after they are laid off by the commission, and if the system laid out extends over any existing highways of the county, over which the county court has jurisdiction, then it is the duty of the county court to convey such highways to the county highway commission, who shall thereafter have control and supervision over same.

Section 7864 R.S. Mo. 1929 of the county highway commission act authorizes the county court to make additional contributions to the County Highway Commission and as this commission is a new agency and distinct from the county court, the county court must have statutory authority to appropriate any of the tax collections to its upkeep. It is the opinion of this department that the legislature, deeming such authority necessary, placed said Section 7867 in the Act, and by this section the County Court is authorized to expend and appropriate the tax moneys to the up-keep of the roads of the county highway system.

We do not think that the Legislature intended to change the provisions of Sections 7890, 7891 and 8042, in so far as they provide that the moneys collected on properties within the territory of such road districts shall belong to the special road district, except that it provided that if any of the roads of the county highway system pass through such special road district, then the county highway commission shall be entitled to its proportionate part of the road taxes paid in such special road district or to its officers, and provided that the commissioners of the special road district should pay such moneys over to the county highway commission. It also appears that the Legislature, by Section 7867, was attempting to give to the county court authority to appropriate any of the taxes except those belonging to special road districts, which it had been collecting under Section 7890 R.S. Mo. 1929 to the county highway commission for the construction and maintenance of said roads.

January 5, 1938

CONCLUSION

It is therefore the opinion of this department that Section 7867 R.S. Mo. 1929, does not change or alter the provisions of Sections 7890, 7891 and 8042 R.S. Mo. 1929, in so far as they relate to the taxes which the Special Road Districts have heretofore been getting, for the taxes collected upon the properties in such special road districts, except that the Highway Commission Act requires such special road districts to pay to the county highway commission taxes collected on properties in such district, in proportion to the mileage of the county highway system within such special road district.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

CARTOON CONTEST: Lottery.

March 14, 1938



Hon. Edwin C. Orr
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

We have your request of March 2, 1938, for an opinion which in part is as follows:

"I have checked up on the matter in which the Herald-Statesman cartoon contest is conducted, and find the following facts.

1. The participant in the contest must be a subscriber to the paper.
2. The prizes are a Hudson car and a couple of radios.
3. There will be ten cartoons presented, one each week for ten weeks.
4. These cartoons are published as appears from the inclosed sheet. There are no names under the cartoon. Each player is to select such a name as he thinks most appropriate for the cartoon, then the judges in the end of the contest will decide which set of ten names is the best."

From the statement in your letter it appears that a prize is being offered and that a consideration is being paid or given by the contestants. The issue then turns upon the question of chance.

There are no rules or yardstick by which the names for cartoons must be selected by the judges. Leaving the selection of such names or titles in the uncontrolled discretion of judges is "chance" within the meaning of the lottery law.

There need be no actual drawing. In *People vs. Hecht*, 3 Pac. (2nd) 399, 1. c. 402, the court said:

"But it may be said that there is no element of chance because there is no drawing; that the management itself selects the beneficiary; but this factor does not purge the transaction of all element of chance. To the purchaser it is uncertain, as to him it is chance."

Commenting upon this phase of lotteries, we find the following statement in 45 *Harvard Law Review*, page 1212:

"It is somewhat surprising to find a fairly large number of decisions involving the award of prizes in the uncontrolled discretion of a judge. All of them agree that the contest is a lottery."

I call your attention to the use of the word "best" in paragraph four of your request for an opinion. This is a general term, many times depending upon the individual opinion of the judge or judges. There is no standard or rule by which the best or most appropriate title is to be selected or judged from a definite standpoint. In *Brooklyn Daily Eagle vs. Voorhies*, 181 Fed. 579, 1. c. 582, the Court said:

"It must be held that to offer a prize for the 'best' essay might be a lottery, if the persons are not induced to compete with some definite statement of what the word 'best' means."

Even the English "pure chance" cases condemn this unlimited range given to contest judges. In *Coles vs. Odham Press Ltd.* 1 K.B. (1936) 416, 1. c. 426, the Chief Justice said:

March 14, 1938

"There is no clue at all to the qualifications of the editor, or to the frame of mind in which he will act, or has already acted at the material time. There is no clue to the criterion, if any, by reference to which the standard has been fixed. The solution which is to be adjudged to be correct is not to be picked out of the efforts of the competitors in competition with each other. It is to be the solution that is found, on examination, to coincide most nearly with a set of words chosen beforehand by somebody not known, by a method, if any, not stated, that person being perfectly at liberty to act in an arbitrary, capricious, or even mischievous spirit. In other words, the competitors are invited to pay a certain number of pence to have the opportunity of taking blind shots at a hidden target."

We are unable to distinguish the present cartoon contest from that condemned as a lottery in *State vs. Globe Democrat Publishing Company*, 110 S. W. (2) 705.

CONCLUSION

It is therefore the opinion of this office that the contest now sponsored by the *Herald-Statesman* is a lottery prohibited by the criminal code of this state.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

ELECTION EXPENSES:
MUNICIPAL CORPORATIONS:

Lawful obligations of a municipality
payable from general funds unless law
specifically provides otherwise.

August 8, 1938.

Miss Ruth O'Malley, Sec.
Missouri Library Commission
Jefferson City, Missouri



Dear Miss O'Malley:

This department is in receipt of your letter and
enclosures under date of July 16, 1938. Your letter reads
as follows:

"I am enclosing herewith corres-
pondence from Mr. George Kindorf,
president of the Maplewood Public
Library, together with an opinion
of the city attorney.

"May I have your opinion on the
point of law as to whether or not
The City Council of Maplewood may
draw on the library fund to defray
the cost of the special election of
May 3rd, 1938?"

The letter from Mr. George Kindorf, President of
the Maplewood Public Library, under date of July 14, 1938,
reads as follows:

"It is regretted that we should have
to call upon you again, and we trust
that you will understand that we are
taking the liberty because we value
your counsel.

"On May 3rd, 1938, a special election
was called in response to a referendum
petition to vote upon the proposition
to increase the taxes for library from
two mills to five mills.

August 8, 1938

"The members of the Library Board co-operated with the City officials to the point of securing election clerks and judges to serve gratis and assisted in securing polling places, booths, flags, etc., gratis also. This is mentioned to indicate that we desired to keep the cost of this election at a minimum.

"Some five or six weeks ago the City Council appropriated \$150.00 from the Library Fund to defray the cost of the election, and a few weeks later drew a check for \$17.85 against the Library Fund to pay for printing ballots. No warrants were submitted by the Library Board authorizing the expenditure of Library Funds thus.

"Disapproval of their actions was directed to their attention by our Treasurer on June 8th and by the writer on two dates subsequent thereto.

"On July 11th, the City Attorney rendered an opinion, copy of which is attached hereto. As laymen, we fail to find in that opinion a legal reason why we should execute warrants to support the two disbursements referred to. We have never to this day been informed for what the \$150.00 was used.

"For your information, the revenue based upon the newly authorized rate will not be available until about October of this year.

"If you will be good enough to favor us with your views on this important matter, or if it is not too much trouble, secure for us an opinion from the Attorney General's office, your kindness will be highly appreciated."

The city of Maplewood, Missouri, held a special election on May 3, 1938, for the purpose of increasing "the taxes for library from two mills to five mills." We desire to point out that a library tax increasing the levy to exceed the constitutional limit is illegal. *Brooks vs. Schultz*, 178 Mo. 222; 77 S. W. (2d) 861. The question as to the amount of the levy is not raised and consequently we are not passing on same.

From the enclosed opinion of the city attorney, we assume that the library directors are governed by Section 13452, R. S. Mo. 1929, which provides that "they shall have the exclusive control of the expenditure of all moneys collected to the credit of the library fund," as follows:

"Said directors shall, immediately after appointment, meet and organize by the election of one of their number president, and by the election of such other officers as they may deem necessary. They shall make and adopt such by-laws, rules and regulations for their own guidance, and for the government of the library and reading room, as may be expedient, not inconsistent with this article. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the library fund, and of the construction of any library building, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for that purpose: Provided, that all moneys received for such library shall be deposited in the treasury of said city or village to the credit of the library fund, and shall be kept separate and apart from other moneys of such city or village, and drawn upon by the proper officers of said city or village, upon the properly authenticated vouchers of the library board. Said board shall have power to purchase or lease grounds, to occupy, lease or erect an appropriate

building or buildings for the use of the said library; shall have power to appoint a suitable librarian and necessary assistants, and fix their compensation, and shall also have power to remove such appointees; and shall in general carry out the spirit and intent of this article in establishing and maintaining a public library and reading room."

An examination of the above statute reveals no direction or authorization of the Legislature to pay expenses of the special election out of the library fund. That the Legislature has the power and disposition of public moneys in the custody of a municipality is found in the statement in McQuillin on Municipal Corporations, Volume I, (2d Edition) Paragraph 255, pages 650-651, as follows:

"From the accepted doctrine that a municipal corporation has, and can have, no vested rights in the powers conferred upon it by the state for public or governmental purposes, it follows that the legislature has plenary power to make appropriate provisions agreeably to the public welfare touching funds and revenue held by the municipality for general public purposes. The doctrine everywhere prevails, sustained by early and late cases, that public moneys in the custody of municipalities are subject to state control and disposition for governmental purposes, within the limitations of the constitution. Neither the charter nor any legislative act concerning the subject can operate as a restriction in this respect. The authority of the legislature of a state to direct a municipality to make any payment of its funds rests upon the fact that such funds are public moneys acquired under the authority of the state for public purposes. The

legislature has the same power of disposition over the public moneys in the custody of the municipality that it has over those in the state treasury."

In the case of State ex rel. vs. Jost, 265 Mo. 51; 175 S. W. 591, l.c. 594, the court said:

"These municipal corporations are subordinate to the sovereign power of the state, and whilst they do, in a sense, hold the purse strings, they so do by the consent of the state. Without the authority of the sovereign, they would not even have a purse, much less the strings of one. The power which gave them the purse can limit the use of it. The power which placed upon that purse the strings can loosen the strings."

The Legislature in this instance did not specify the fund to be drawn on for the payment of the special election. The question is presented whether under the circumstances same should be drawn from the library fund or general revenue fund of the city.

McQuillin on Municipal Corporations, (2d Edition), Vol. VI, Section 2628, page 611, in discussing what claims are valid against municipalities, states as follows:

"Valid obligations include ** election expenses, incurred in behalf of the municipal corporation, in local elections held for its benefit, or those imposed by law; ** "

There can be no question but that the election expenses were incurred on behalf of the municipal corporation, since the library is clearly for a municipal purpose.

Miss Ruth O'Malley

-6-

August 8, 1938

The court, in the case of Tampa vs. Prince, 63 Fla. 387; 58 So. 542, l.c. 543, makes the following statement:

"As the city is expressly authorized to raise by taxation funds 'necessary to maintain a public library in such city,' the maintenance of such a library is a municipal purpose not excluded by organic law; and any proper action taken by the city to effectuate the designated municipal purpose within the prescribed limits is authorized."

McQuillin on Municipal Corporations, Vol. V, (2d Edition) Section 2337, page 972, states as follows:

"All lawful obligations of a municipality are payable from its general funds unless the law specifically provides otherwise."

The Legislature not having specified that the library fund be used for the payment of election expenses incurred in determining the question of increasing the library tax, we are of the opinion that the city council of Maplewood may not draw on its library fund to defray the costs of the special election of May 3, 1938.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

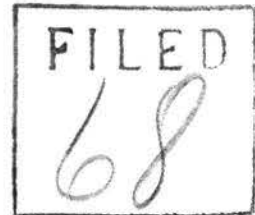
J. E. TAYLOR
(Acting) Attorney General

POLL TAXES:

Poll taxes in towns and villages not
repealed by Laws of 1937, page 440.

November 10, 1938

11-17



Mr. R. B. Oliver, III
Prosecuting Attorney
Cape Girardeau County
402 H.-H. Building
Cape Girardeau, Missouri

Dear Sir:

This will acknowledge receipt of your letter of
October 31, 1938, requesting an opinion as follows:

"Section 13 of the Code of the Town
of Whitewater provides for the levy-
ing and collecting of poll taxes.

"I have been asked for an opinion as
to whether or not the repeal of the
state poll tax law invalidates Section
13 of the Code of the Town of White-
water. In other words, the question
is whether or not the Town of White-
water may still collect a poll tax."

At the 1937 Session of the Legislature, Laws of
1937, page 440, an act was passed repealing certain
statutes pertaining to the levy and collection of poll
taxes. This repealing act is as follows:

"That Sections 7879, 7880, 7881, 7882,
7883, 7884, 7885, 7886, 7887 and 7888
of Article Three (3), Chapter Forty-
two (42) of the Revised Statutes of
the State of Missouri for the year 1929
and Sections 8157, 8158, 8159 and 8160
of Article Fifteen (15), Chapter Forty-two

(42) of the Revised Statutes of the State of Missouri for the year 1929 be and the same are hereby repealed."

An examination of these acts discloses that they pertain only to the levy and collection of poll taxes by counties not under township organization and those under township organization.

Though you do not so state in your letter, I gather that Whitewater is a town organized under the provisions of chapter 38, Article IX of the Revised Statutes of Missouri pertaining to towns and villages. Section 7110 R. S. Mo. 1929, is a part of the chapter and article previously mentioned and reads as follows:

"The board of trustees shall also, from time to time, provide, by ordinance, for the levy and collection of * * * * * poll taxes * * * * . All able-bodied male persons, between the age of twenty-one and fifty years, who may have resided within the corporate limits of such village thirty days next preceding the levy of any poll tax for any given year, shall be liable to work on the streets and alleys of such village not to exceed three days, or to pay such sum in lieu thereof as may be provided by ordinance, not in any case, however, to exceed the sum of three dollars; and upon failure to pay such poll tax, either in cash or by labor, when notified so to do, according to law and the ordinance of such village, it shall be the duty of the town marshal, when ordered so to do by the board of trustees of such village, to bring suit before some justice of the peace, if there be any in such village, and if not, then before some justice of the peace nearest such village, and proceedings shall be had thereon the same as in other civil cases; and no property shall be exempt from seizure and sale upon any

Mr. R.B. Oliver, III

-3-

November 10, 1938

execution issued upon any judgment
rendered for such poll tax."

This section provides a complete scheme for the levy and collection of poll taxes in towns and villages and is in no way dependent for its efficacy upon the statutes repealed by the Legislature at the 1937 Session.

CONCLUSION

Therefore, it is the opinion of this department that the repealing act passed by the 1937 Session of the Legislature, Laws of 1937, page 440, in no way affects or invalidates the poll taxes which towns and villages are authorized to levy and collect under Section 7110, R. S. Missouri, 1929.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:DA

ELECTIONS:

**JUSTICES OF THE
PEACE:**

Justices of the Peace can only be elected at "off-year" election. Error on ballot must be objected to before election.

December 12, 1938

12-14



Honorable R. B. Oliver, III
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

We have received your letter of November 23, 1938, which reads in part as follows:

"We have an unusual situation existing here in Cape Girardeau County which is as follows:

"Byrd Township in this County is entitled to three Justices of the Peace. For a number of years there have only been two active Justices in Byrd Township. The statute relating to Justices of the Peace requires that they be elected beginning with the year 1882 and every four years thereafter. This makes the election of Justices of the Peace to be held on what is known as the off-year election.

"In the off-year election of 1934, one Justice was elected and the second Justice held over until the general election in 1936 when he ran for Justice of the Peace at the general election. In my opinion, he was running to be elected in order to fill the unexpired term for which he had held over.

"The County Court after the general election issued a commission to this Justice for four years which, in my opinion, was an

error on the part of the County Court. At this year's election there were two Democrats and two Republicans who ran for the office of Justice of the Peace.

"On the printed ballot, instead of the words '3 to be elected,' the County Court through error wrote '2 to be elected.' The Justice who was elected in 1936 did not file for this year's election, he being under the impression that it was not necessary for him to run in that he held a four-year commission from the County Court which would expire in 1940. One of the Democratic candidates withdrew before the election leaving three names on the ballot. Of course, each one of the three received a number of votes at the election. The County Court is now in a quandry as to who they should declare as Justices of the Peace, the question being, whether the Justice who held a commission from the County Court from 1936 to 1940 is a qualified Justice of the Peace, or whether he should have run at the election this year.

"If this Justice is entitled to continue to act as Justice of the Peace until 1940, then do the two men receiving the highest number of votes at this year's election go in as Justices of the Peace? In the event the Justice who holds the Commission until 1940 is declared no longer to be a Justice of the Peace, do the three men who ran in this year's election take office as Justices of the Peace in view of the fact that the ballot had printed '2 to be elected' instead of '3 to be elected.'"

In this same connection we have received another letter from Edwin L. Kies, Clerk of the County Court of Cape Girardeau County, relating to the same situation. This letter reads in part as follows:

"On Sept. 1st. 1931, John G. Putz was appointed by the County Court to fill the unexpired term of F. C. Bertrand, resigned, to expire with the General Election to be held in November, 1934. At the General Election in November, 1934, two Justices of the Peace were elected in Byrd Township, one of which failed to qualify, and as this township is entitled to three Justices of the Peace, John G. Putz held under his old commission, together with E. L. Proffer the newly-elected Justice. Then in the General Election of 1936 John G. Putz was elected by the voters and commissioned for a term of four years, which would make his expiration fall in 1940. Now at the November Election of 1938, E. L. Proffer, (Republican) whose commission expired in 1938, together with Clyde Baugh, (Republican) and C. M. McWilliams (Democrat), were candidates for Justice of the Peace of Byrd Township, and at said election Clyde Baugh and C. M. McWilliams received the highest number of votes, but the question has arisen whether or not all three Justices of the Peace were to be elected, or if John G. Putz, commissioned in 1936 for four years, would hold until 1940.

"None of the above Justices of the Peace elected in November, 1938, have qualified, by reason of the fact that Mr. Proffer thinks he was elected at such election and Mr. Putz claiming an office until 1940."

Section 2138, R. S. Mo. 1929, provides as follows:

"Justices of the peace, as herein provided for, shall be elected at the general election to be held in eighteen hundred and eighty-two, and shall hold their offices for four years, or until their successors are elected, commissioned and qualified; but every justice of the peace now in office shall continue to act as such until the expiration of his commission, and until his successor is elected and qualified."

The meaning of this section is that justices of the peace are to be elected at what is commonly called the "off-year" elections. In other words, such elections occurred in the years 1930, 1934, 1938, etc.

The Supreme Court of Missouri construed Section 2138 in the case of State ex rel. Walker, Attorney General v. Powles, 136 Mo. 376. In that case the evidence showed that on the 9th day of August, 1889, Powles was appointed by the County Court of Howell County "a justice of the peace within and for said township of Howell to serve until the next general election." On November 14, 1892, in pursuance of an election held on November 8, 1892, Powles was appointed and commissioned a justice of the peace for the term of two years from said 14th day of November, 1892, "and until his successor in said office shall be duly appointed and qualified." At the general election held on November 6, 1894, three justices of the peace, not including Powles, were elected. Since Powles would not relinquish his office, proceedings in quo warranto were instituted. The only title set up by Powles to the office was such that he acquired by virtue of the appointment made by the County Court of Howell County on August 9, 1889. The court said, l. c. 381:

"The term of the office to which he was appointed extended only to the general election in 1890, and by the terms of his commission, and under the law, could extend no longer than to the qualification of his successor elected at such election and duly commissioned in pursuance thereof. As has been seen, the term of office of justices of the peace in this state is four years. They are elected quadrennially at the general election for county officers and have been so elected ever since 1882. The first general election for county officers and justices of the peace occurring after the appointment of the respondent, by the county court, was in November, 1890, at which a successor to the respondent might have been elected, upon whose qualification the term of the respondent would

have ceased. But it seems that no successor was chosen at that election, and as the respondent, under his appointment by the county court, was authorized to hold and exercise the functions of said office not only until the next general election of county officers, but until his 'successor was elected, commissioned and qualified,' he thereafter continued lawfully the incumbent of said office and authorized to exercise the functions thereof until a successor for him should be chosen at the next general election for county officers, and justices of the peace in November, 1894. State ex rel. v. Ranson, 73 Mo. 78.

"His successor was chosen at that election as hereinbefore stated, on the sixth, was duly commissioned on the eighth, of November, 1894, and thereafter respondent ceased to be a justice of the peace de jure within and for Howell township, Howell county, Missouri (State ex rel. v. Spitz, 127 Mo. 248), and since that time has been an intruder in, and usurper of the office aforesaid. As there was no law in force authorizing an election of justices of the peace in 1892, the respondent acquired no title to the office by virtue of that election, and the commission issued to him by the county court in pursuance thereof; nor does he make any claim by virtue of such appointment, and it goes without saying that his so-called appointment of justice of the peace of the city of West Plains on the seventh of May, 1896, affords no defense to this action. Judgment of ouster will therefore be entered against the respondent and writ issued accordingly."

It is apparent then that the election of John G. Putz as justice of the peace at the general election in 1936 was a nullity.

It appears, however, that Putz was properly appointed to the office of justice of the peace by the county court on September 1, 1931. At the "off-year" election in 1934, when justices of the peace were properly to be elected, it appears that a successor to Putz, if one was then elected, did not qualify and was not commissioned. Putz, under those circumstances, properly held over until his successor was "elected and qualified." Consequently, under the facts which we have received and as we understand the same, Putz was therefore a duly qualified and acting justice of the peace under his 1931 appointment at least until the time of the November election in 1938.

Under the terms of Section 2138, the year 1938 was a proper year to elect justices of the peace. Therefore, if the office occupied by Putz was filled in the 1938 election by a person other than himself, such elected person is the only one entitled to be commissioned for the office. It appears that Byrd Township is entitled to elect three justices of the peace and that there were at least three names of candidates on the ballot in the 1938 election; that at least three candidates received votes. Consequently, the three candidates receiving the highest number of votes for justice of the peace were properly elected and should be commissioned by the county court unless the error appearing on the ballot to the effect that only two were to be elected instead of three was such an error as to nullify the election of one or all three of the candidates.

Section 10306, R. S. Mo. 1929, provides as follows:

"Whenever it shall appear by affidavit that an error or omission has occurred in the publication of the names or description of candidates nominated for office, or in the printing of the ballots, the circuit court of any county, or the judge thereof in vacation, or if the circuit judge is then absent from the county, a judge of the county court, may, upon application by any elector, by order, require the clerk of the county court to correct such error, or to show cause why such error should not be corrected."

The effect and meaning of Section 10306 was discussed in the case of Bowers v. Smith, 111 Mo. 45, in which an election contest was involved. In that case the plaintiff claimed that no election had actually been held because the official ballots printed by the county clerk contained (among others) the names of the nominees of the Union-Labor party and that that political party had not polled three per cent of the entire vote at the last previous general election as required by law. In discussing the question as to the effect of an error on the ballot and when the same could be attacked, the court said, l. c. 54:

"It is declared to be the duty of the county clerk to provide the ballots, and that all others than those printed by him according to the provisions of this law 'shall not be cast or counted in any election.' The plain meaning and purpose of this expression can be seen from the context in the section in which it occurs and that which next follows. Revised Statutes, 1889, secs. 4772-3. The design is to preclude the voter and his party friends from supplying his own ballot (as was the former practice), and to compel him to use only that furnished by the state, through the county clerk. The latter is directed to print no other names on the voting papers than those of the candidates nominated according to the provisions of that law. The title of the original act (Session Acts, 1889, p. 105) and its opening lines show that uniformity in the printing and appearance of the ballots is one of the main objects aimed at. The prohibitions above noted are inserted to further that object; but they give no countenance to the notion, advanced by the plaintiff, that their purpose or effect is to nullify the result of every election at which the county clerk may make some error in publishing or printing the names on the only ballots that can be used.

* * * * *

"The suffrage is regarded with jealous solicitude by a free people, and should be so viewed by those intrusted with the mighty power of guarding and vindicating their sovereign rights. Such a construction of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other. *Wells v. Stanforth* (1885), 16 Q. B. Div. 245.

"Or, as a very able judge once tersely said: 'All statutes tending to limit the citizen in his exercise of this right (of suffrage) should be liberally construed in his favor.' *Owens v. State ex rel.* (1885), 64 Tex. 509.

"It is proper, and often necessary, to consider the effect and consequences of a proposed interpretation of a law to ascertain what is probably its true intent. *State v. Hope* (1889), 100 Mo. 361; 8 L. R. A. 608. The consequences which would inevitably follow the acceptance of the reading proposed by the plaintiff are so far-reaching and disastrous that they constitute a vigorous argument against adopting it.

"More than that, section 4778 clearly discloses a legislative design to provide for the correction of just such errors as we are considering, at the instance of any elector (including every one interested) before the election. The process is so summary that the inference is irresistible that the errors it is designed to reach should be rectified by prompt action then, so as not to subject voters to the risk of losing their votes by reason of those errors.

"Sec. 4778. Whenever it shall appear by affidavit that an error or omission has occurred in the publication of the names or description of candidates nominated for office, or in the printing of the ballots, the circuit

court of any county, or the judge thereof in vacation, or if the circuit judge is then absent from the county, a judge of the county court, may, upon application by any elector, by order, require the clerk of the county court to correct such error, or to show cause why such error should not be corrected.'

"In connection with this section, it should be remembered that, 'at least seven days before an election,' the county clerk is required to cause the list of nominations, 'arranged in the order and form in which they will be printed upon the ballot,' to be published in the newspapers as provided in sections 4768-9. Thus every one in interest is apprised of the names of all candidates, as determined by the clerk, at least one week before election day, to the end that steps may be taken, if desired (as indicated by the language quoted), to supply any omissions or to correct other errors in that list as published. If full effect be given to that section, the injustice and unfairness which otherwise would result in the practical working of the statute will be avoided.

"This 'ballot reform law' was intended to improve the methods for giving expression to the popular will in the choice of public officers. It should be construed so as to promote, not destroy, the great objects in view in its passage."

Again, in the case of Nance v. Kearbey, 251 Mo. 374, 1. c. 381, the court said:

"It might be determined by considering whether (absent a pre-election challenge, as here) in an election contest an official ballot, published, printed and voted, as was

this, can be challenged (absent fraud in the election and absent any fatal irregularity in election officers in handling the ballots)--challenged and those who voted it disfranchised, merely because of alleged imperfections or errors in judgment of the county clerk in printing the ballot, including its caption.

* * * * *

"Election laws must be liberally construed in aid of the right of suffrage. (State ex rel. v. Hough, 193 Mo. l. c. 651; Hale v. Stimson, 198 Mo. 134.) The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors. (Stackpole v. Hallahan, 16 Mont. 40.) The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious, because of a disregard of mandatory statutory safeguards.

"The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. (Gass v. Evans, 244 Mo. l. c. 353; Hehl v. Guion, 155 Mo. 76.) 'Such a construction' (says this court, speaking through Barclay, J., in Bowers v. Smith, 111 Mo. l. c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other. (Wells v. Stanforth (1885), 16 Q. B. Div. 245.)' Again (pp. 61-2): 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. (Ledbetter v. Hall (1876), 62 Mo. 422.) In the absence of such

declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return: otherwise it is considered immaterial.'

"(b) The Australian ballot law in force in this State for a generation, for the first time took away from a political party and electors the right to print, circulate, handle and vote their own ballot, and gave the preclusive right and made it the preclusive duty of the county clerk to print an official one. This official ballot passes through strictly official channels to election officers, thence to the hands of the voter for an instant only when in the act of exercising the right to vote, from thence it goes back to the election officers to be numbered, deposited, counted or rejected. From thence onward such cast ballot remains in official custody inviolate and secret except it be produced for purposes prescribed by the law. The voter from beginning to end had nothing to do with it except he could erase a name and substitute another in the voting booth, that is, he has left him a natural right to scratch (out or in). We should expect, therefore, in such a statutory scheme, ex necessitate rei, a pre-election plan for correcting official errors of judgment causing imperfections or irregularities in ballots so officially promulgated. So long as political parties or electors prepared their own ballots, the fault or blame for irregularities rested with them. But when the government took over that function, such fault and blame rested with officials. It is obvious that any election law permitting officials, either by design or inadvertence, to print irregular official ballots and foist them on voters and

thereby disfranchise them by wholesale without their own fault, nolens volens, would be a harsh and indefensible statute. It would make of the law a gigantic trap to catch the unwary voter by the heel. The remedy provided by such statute would be worse than the disease it was intended to cure in the body politic. Nay, the unclean spirit, ostensibly cast out, walking through dry places, seeking rest and finding none, would return with seven other spirits more wicked than himself and finding rooms all swept and garnished would enter in and dwell there, so that the last state of the law would be worse than the first. (Luke xi: 24-26.) 'It must be borne in mind' says Blake, V. C., in *Grant v. McCallum*, 12 Can. L. J. (N. S.) 1. c. 114, 'that if the court lightly interferes with elections on account of errors of the officers employed in their conduct, a very large power may thus be placed in the hands of these men. That which arises from carelessness to-day may be from a corrupt motive tomorrow, and thus the officer is enabled, by some trivial act or omission, to serve some sinister purpose, and to have an election avoided, and at the same time to run but little chance of the fraudulent intent being proved against him.'

"The dangers pointed to by the vice chancellor are held by this court of stiff significance. (*Hehl. v. Guion*, 155 Mo. 76; *Gass v. Evans*, 244 Mo. 1. c. 354.)

"The Australian ballot law, a reform act, was not built on such disturbing and indefensible lines. Contra, it provided plans and contemplated proceedings to correct irregularities in ballots before election in order that a timely remedy might be applied before the event, that is, before it was too late."

After reciting the statute relative to the pre-election right to challenge the correctness of the ballot, which statute is now Section 10306, the court in the above case said further, l. c. 387:

"The right to contest an election is a statutory right. So, the condition created by the preclusive power in the county clerk to publish a list of candidates and print an official ballot is purely a statutory condition. Now, the general rule is that remedies expressly provided by statute to enforce rights created alone by statute are preclusive. Hence, when the Bowers-Smith case decided that those statutory remedies must be followed and if not followed the objections, if any, to the ticket were waived, it but proceeded on the broad analogies of the law as well as on those rules of interpretation applicable to election laws as such.

"The question whether the pre-election right to challenge irregularities in nominations, as well as in the officially promulgated ballot, is preclusive, has been ruled in several jurisdictions agreeably to the views herein before announced. For example: In *Allen v. Glynn*, 17 Colo. 338, the holding was to the effect that where public officers are entrusted with the preparation of ballots and ample provision is made for the corrections of errors before election, the general rule is that it is too late after they have been voted to interpose objections to the ballots for mere irregularities in the printing thereof."

In the instant matter it does not appear that any pre-election challenge was ever made in connection with any error in the 1938 ballot in Byrd Township. After the election, as will be noted by the above cases, any objection to any error made by the county clerk in preparing the ballot comes too late. The error made by the county clerk did not nor could it have changed the fact that there were three justices of the

Dec. 12, 1938

peace to be elected. Undoubtedly the three candidates for such offices receiving the highest number of votes in the 1938 election were elected. The particular error made in assembling and printing the ballot could not have the effect of disfranchising the voters. The election laws must be liberally construed in aid of the right of suffrage.

CONCLUSION

It follows, therefore, that Justice of the Peace Putz held his office, under his 1931 appointment by the county court, until his successor had been elected and qualified. Since no one was elected and qualified to such office at the 1934 election, Putz held over until a successor could be elected and qualified at the 1938 election. The 1934 election of Putz was a nullity and gave him no right whatsoever to the office for any period of time. The error on the 1938 ballot informing the voters that two justices of the peace were to be elected instead of three did not void the election and the three candidates receiving the highest number of votes at such election were duly elected and should be commissioned by the county court.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA:HR

CONTRACTS: Manner of signing Cooperative Agreements with federal government by Missouri State School for the Deaf.

December 28, 1938

Mr. Frank C. Oldham, Chief Clerk
U. S. Department of Agriculture
Soil Conservation Service
Fulton, Missouri



Dear Sir:

We wish to acknowledge your request for an opinion under date of December 17, 1938 as follows:

"The United States Government, U. S. Department of Agriculture, Soil Conservation Service, in cooperation with landowners in Callaway County, through this project office, has occasion at times to enter into a Cooperative Agreement to the mutual advantage of the State of Missouri and the United States Government. In fact we did enter into a Cooperation Agreement on November 9, 1936 with the Missouri School for the Deaf; legal description of said property being Section 2, Township 47N, Range 9W, Callaway County, Missouri; comprising an acreage of two hundred fifty-four (254) acres in said location.

"At that time this program was more or less new and Cooperative Agreements were being signed without any careful checking of ownership or authenticity of signing party. The particular Agreement mentioned was signed: "Missouri School for Deaf, by E. L. Dunlop, Steward." It now becomes necessary that an amendment be written, by mutual

consent, to this original Agreement. I, therefore, desire an opinion from you covering the following points:

1. In whom is power vested to sign Cooperative Agreements of a contractual nature on land owned by the State of Missouri, and/or in the name of the Missouri School for Deaf, being operated by them for state purposes?

2. Just how should such Agreements be signed and by whom, acting under proper authority?

3. Should such Agreements be signed and sealed with the State of Missouri seal? If so, through what office or department should they be routed for inspection, approval, and signature?

"It is presumed that the School for the Deaf acts under a Board of Trustees and that possibly they are empowered to sign contractual obligations such as the Agreements in question; and that possibly their power may be delegated to the Steward. If this is the case we should have a copy of such authority, properly signed by someone acting for the state.

"For further clarification on these points, a sample copy of the Cooperative Agreement form, and the Amendment form as used at the present time by the Soil Conservation Service, is attached.

"Your prompt opinion and reply will be appreciated.

I.

We have examined the Agreement attached to your letter

and note that it is cooperative in spirit. The United States of America, through the Soil Conservation Service of the Department of Agriculture agrees to make essential surveys for developing a suitable plan of Soil and Water Conservation and to formulate plans for such operation. The Board of Managers for the School of the Deaf agrees to cooperate by following the plan. It is self-evident that the Board, by such an arrangement, is not conveying or leasing land, but is entering into an arrangement whereby the land will be materially benefited.

Section 9705, R. S. Mo. 1929, places the care and control of the land owned by the School on the Board of Managers:

"The board of managers of each school shall have the care and control of all the property, real and personal, owned by such school, and the title to all real estate or personal property now owned by such school, or by the state for its use, or that may hereafter be purchased by or donated to such school shall be vested in such board of managers of the respective schools, for the use and benefit of the said school. The board of managers of either school shall not sell or in any manner dispose of any real estate belonging to the school without an act of the general assembly authorizing such sale or disposal of such real estate. The boards of managers shall provide their respective schools with an official seal. (Laws 1921, p. 645, Sec. 18)"

The property sought to be incorporated in the Agreement, being under the care and control of the Board of Managers of the School of the Deaf, we are of the opinion that they are empowered to sign the attached Cooperative Agreement in the name of the Board of Managers of the School of the Deaf.

II.

The Board of Managers consists of five members appointed by the Governor with the advice and consent of the Senate (Section 9689, R. S. Mo. 1929).

Section 9707, R. S. Mo. 1929, sets out the duties of the President of the Board:

"The president of each board of managers shall preside over meetings, and shall see that all matters of business pertaining to the school are faithfully and accurately recorded by the secretary. He shall sign all requisitions on the state auditor or other officer for the payment of money to said school, and all warrants or orders on the treasurer of the school for the payment of any money belonging or appropriated to such school: Provided, that he shall sign no requisition on the state, and no warrant or order for the payment of money for the use of the school, until such requisition shall have been ordered by the board, or the account for which such warrant or order is given shall have been allowed by the board. Three members shall constitute a quorum for the transaction of business of the board. (Laws 1921, p. 645, Sec. 20)"

Inasmuch as the President of the Board of Managers presides over the meetings of the Board, we are of the opinion that upon approval of the Cooperative Agreement by the Board, the President of said Board of Managers of the Missouri School for the Deaf, may sign such Agreement in the name of the Board.

III.

We are of the opinion that such Agreement need not be signed and sealed with the seal of the State of Missouri.

Mr. Frank C. Oldham

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December 28, 1938

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:RT

HEALTH:
HOTELS:
INSPECTION OF ROOMS:
NUMBER OF ROOMS:
HOW DETERMINED:

Inspectors of State Board of Health are authorized to inspect all rooms of hotel to determine whether or not the provisions of article 7, chapter 93 R.S. Mo. 1929 are being complied with.
Number of rooms for living purposes as ascertained by number assignable to guests.

January 14, 1938

Mr. Harry F. Parker, M.D.,
State Health Commissioner,
Jefferson City, Missouri.



Dear Sir:

Your request dated January 11, 1938 for an official opinion from this department was referred to the writer, which request is as follows:

"I am interested in having an interpretation of the statutes regarding the inspectors in the Food and Drug Department who also have the inspection of hotels.

1. Will you give me an opinion on what constitutes hotels and whether or not apartments should pay a state license too?

2. In making inspection of hotels has the inspectors authority to inspect each and every room separately in order to determine not only the number of rooms but the sanitary conditions, ventilation, et cetera? Can a hotel or inn keeper refuse an inspection of individual rooms of said hotel?

3. The statutes make reference to the number of rooms, or guests as occupants of a hotel, I wish an interpretation on this part of the statutes."

I

Answering the first section of the request as to what constitutes a hotel and whether or not apartments should pay a state license tax too, I find:

In the case of the City of Independence v. Richardson,

232 Pacific 1044, we find that a hotel is defined as follows:

"A hotel is a business institution which is held out to the public as a house where all travelers and strangers or other transient persons having means of payment, and of proper demeanor and fair repute, who choose to patronize it, must be received and accommodated to its capacity, without previous agreement for accommodation or agreement as to the duration of their stay." (Words & Phrases Third series, page 18)

In "Words and Phrases, Third series" the apartment house and hotel are distinguished as follows:--

"As used in restriction against erection of 'hotel', 'apartment house' is not a 'hotel', but a building used as a dwelling for several families living separate; a 'hotel' being a building held out to the public as a place where all transients will be entertained as guests for compensation." Satterthwait v. Gibbs, 135 At. 862.

Section 13091 R.S. Mo. 1929 defines what building shall be construed as hotels under the term of said section which section is as follows:

"That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in ten or more rooms are furnished for the accommodation of such guests, whether with or without meals, shall for the purpose of this article be deemed a hotel, and upon proper application the food and drug commissioner shall issue to such above described business a license to conduct a hotel: Provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the food and drug commissioner."

In the case of Metzler v. Hotel Company, 135 Mo. App. 410, 416, a hotel is defined as:

"A place where transient guests are admitted to lodge, as well as one where they are fed and lodged."

The apartment house in the ordinary term, is a building, the apartments of which are let to tenants for use and occupancy for living quarters for a certain period upon a special contract, and which is not advertised or held out for occupancy to the general public, but only to those tenants that the owner of the building may choose. It differs from the apartment hotel in that it is not advertised or held out to the general public.

If the building contains apartments and or individual rooms and is kept, used, maintained, advertised or held out to the public to be a place where sleeping and or dwelling accommodations are furnished for pay to transient or permanent guests, and if it contains ten or more rooms, which are furnished for the accommodation of such guests, whether with or without meals, it is a hotel within the meaning of the above statutory definition of "hotel", and subject to the statutory regulations of the Health Department.

CONCLUSION

Taking the foregoing statutory definition of the word "hotel" into consideration, it is the opinion of this department that any building in Missouri which contains ten or more rooms for sleeping and or dwelling quarters, which are furnished for the accommodation of transient or permanent guests, and which is kept, used, maintained, advertised and held out to the public for dwelling, lodging and or feeding purposes is a hotel and is subject to the rules and regulations of the State Board of Health.

II

As to Section 2 of your inquiry we find that:

Section 13084 R.S. Mo. 1929 provides as follows:

"It is hereby made the duty of the food and drug commissioner to inspect or cause to be inspected, at least once annually and as often thereafter as he may deem necessary, every hotel in the state, and for that purpose he shall have the right of entry and access thereto at any reasonable time. Whenever, upon such inspection, it shall be found that such business and property so inspected is not being conducted, or is not equipped in the manner and condition required by the provisions of this article, it shall thereupon be the duty of the food and drug commissioner to notify the owner, proprietor or agent in charge of such business, or the owner or agent of the building so occupied, of such changes or alterations as may be necessary to effect a complete compliance with the provisions of this article. It shall thereupon be the duty of such owner, proprietor or agent in charge of such business, or such owner or agent of the building so occupied to make such alterations or changes as may be necessary to put such building and premises in a condition that will fully comply with the provisions of this article; all permanent repairs and alterations to the building and premises to be made by the owner thereof: Provided, however, that thirty days' time after receipt of such notice shall be allowed for conforming to the requirements of this article. If at the expiration of the required notice such owner or agent of the building so occupied refuse or fail to comply with said sections mentioned in such notice, then it shall be the duty of the food and drug commissioner to close said hotel until such requirements are complied with."

Section 13085 R.S. Mo. 1929 makes it the duty of the commissioner of health and his deputies to see that all of the provisions of Article 7, chapter 93 are complied with

which article contains Section 13083 to Section 13114 both inclusive of the Revised Statutes of Missouri 1929.

Section 13093 R.S. Mo. 1929 requires the hotel operator to obtain a license, the amount charged for which depending upon the number of rooms in the hotel.

By accepting the license to operate the hotel and exercising the privileges under the restrictions and limitations of said Article 7 of chapter 93 which require the hotels to be inspected for the purpose of determining whether or not the provisions of said article are being complied with, the hotel operator waives his constitutional right of search and seizure.

In the case of State v. Bennett, 288 S.W. 50, the court held:

"Defendant, by accepting hunter's license under Rev. St. 1919, 5598, and exercising the privilege under the restrictions and limitations of statute in sections 5581, 5596, and 5645, the latter requiring him to submit to inspection and counting of quail in his possession by game warden, waived constitutional rights invoked so far as applicable to facts."

In the case of the one who accepts the license to operate a hotel and submit to the inspection law is analogous to the case where the person accepts a hunting license and submits himself to search to determine that the fish and game laws are being complied with.

By Section 13096 R.S. Mo. 1929 it is necessary for the commissioner and his deputies to inspect the hotel to determine whether its provisions are complied with.

Section 13100 R.S. Mo. 1929 provides as follows:

"Every hotel in this state shall be properly plumbed, lighted and ventilated, and shall be conducted in department with strict regard to health, comfort and safety of the guests: Provided, that such proper lighting shall be construed to apply to both daylight and illumination, and that such proper plumbing shall be construed to mean that all plumb-

ing and drainage shall be constructed and plumbed according to approved sanitary principles, and that such proper ventilation shall be construed to mean at least one door and one window in each sleeping room. No room shall be used for a sleeping room which does not open to the outside of the building or upon light wells, air shafts or courts, and there must be at least one window with opening so arranged as to provide easy access to the outside of the building, light wells or courts."

Section 13105 R.S. Mo. 1929 provides as follows:

"All hotels hereafter shall provide each bed, bunk, cot or other sleeping place for the use of guests with pillow slips and under and top sheets. Each sheet shall be ninety-nine inches long and of sufficient width to completely cover the mattress and springs: Provided, that a sheet shall not be used which measures less than ninety-five inches after being laundered. Said sheets and pillow slips shall be made of white cotton or linen, and all such sheets and pillow slips after being used by one guest must be washed and ironed before they are used by another guest, a clean set being furnished each succeeding guest."

Section 13106 R.S. Mo. 1929 provides as follows:

"All bedding, including mattresses, quilts, blankets, pillows, sheets and comforts, used in any hotel in this state must be thoroughly aired, disinfected and kept clean: Provided, that no bedding, including mattresses, quilts, blankets, pillows, sheets or comforts, shall be used which is worn out or is unfit for further use: Provided further, that after six months from the passage of this law no mattress on any bed, bunk or cot in a hotel shall be used which is made of moss, seagrass,

January 14, 1938

excelsior, husks or shoddy. Any room in any hotel infested with vermin or bedbugs shall be fumigated, disinfected and renovated until such vermin or bedbugs are exterminated. All carpets and equipment used in hotels, as well as the walls and ceilings, must be kept in a clean and sanitary condition."

Section 13007 R.S. Mo. 1929 provides as follows:

"***** Any person who shall obstruct the commissioner, or any of his assistants, by refusing to allow him entrance to any place which he desires to enter in the discharge of his official duty, or refuse to deliver to him a sample of any article of food or drug made, sold, offered or exposed for sale by such person when the same is requested and when the value thereof is tendered, shall be guilty of a misdemeanor, punishable by a fine of not exceeding fifty dollars for the first offense and not exceeding five hundred dollars, nor less than fifty dollars for each subsequent offense."

CONCLUSION

Following the foregoing authorities it is the opinion of this department that the commissioner and his deputies are authorized to inspect each and every room of a hotel separately to determine whether or not the provisions of Article 7, chapter 93 R.S. Mo. 1929 are being complied with.

It is further the opinion of this department that if the hotel or inn keeper refuse to permit such inspections that he is guilty of a misdemeanor and may be complained against and prosecuted in accordance with the provisions of Section 13007 R.S. Mo. 1929.

III

As to the third section of your request I find that section 13093 R.S. Mo. 1929 provides as follows:

"The fee for licenses to conduct a hotel in this state shall be three

(\$3.00) dollars, except hotels containing fifteen rooms and less than twenty for the accommodation of guests, the license fee shall be five (\$5.00) dollars, and hotels containing twenty rooms and less than thirty for the accommodation of guests the license fee shall be ten (\$10.00) dollars, and hotels containing thirty rooms and less than forty for the accommodation of guests the license fee shall be fifteen (\$15.00) dollars, and hotels containing forty rooms and less than fifty for the accommodation of guests the license fee shall be twenty (\$20.00) dollars, and hotels containing fifty rooms and less than seventy-five for the accommodation of guests the license fee shall be twenty-five (\$25.00) dollars, and hotels containing seventy-five rooms and less than one hundred for the accommodation of guests the license fee shall be thirty (\$30.00) dollars, and hotels containing one hundred rooms and less than two hundred for the accommodation of guests the license fee shall be thirty-five (\$35.00) dollars, and hotels containing two hundred rooms and less than three hundred for the accommodation of guests the license fee shall be forty (\$40.00) dollars, and hotels containing three hundred rooms, and less than four hundred for the accommodation of guests the license fee shall be forty-five (\$45.00) dollars, and hotels containing four hundred rooms and more for the accommodation of guests the license fee shall be fifty (\$50.00) dollars; which shall be paid to the food and drug commissioner before said license is issued, and said license shall be kept in the office of said place in a conspicuous manner, properly framed. Said license may be revoked by the commissioner at any time when the law or regulations are not being complied with."

Section 13094 R.S. Mo. 1929 provides as follows:

"In all hotels within the meaning of this article the parlor, dining room, kitchen and office shall be construed to mean a guest room."

By these two sections the amount to be charged for the license is based upon the number of rooms the hotel contains for the accommodation of guests. The rooms for accommodation of guests refer to rooms the guests occupy for sleeping and or living quarters, that is the rooms which are assigned to them when they register at the hotel, and they also include the dining room, kitchen, parlor and office.

CONCLUSION

It is therefore the opinion of this department that the number of rooms for the basis of the amount of the license for the hotel is determined by the number of rooms such hotel has assignable to guests for their accommodation, including the parlor, dining room, kitchen and office.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

INSPECTION OF BEVERAGES: Right to inspect and collect fee therefor.

June 28, 1938.

630
FILED
69

Honorable Harry F. Parker,
State Health Commissioner,
Jefferson City, Missouri.

Dear Sir:

We are in receipt of your request for an opinion, which is as follows:

"Section 13116, 13120a and 13124 (Revised Statutes 1929) set forth the duties of the State Food and Drug Commissioner relative to the inspection and collection of inspection fees on all beverages sold in this state.

"The City of Excelsior Springs has recently completed, with the aid of the Federal Government (P.W.A.) a project which among other activities, bottles and sells mineral water and other beverages. This activity, known as the Mineral Water System, according to my understanding is operated by the city under a special board.

"I am requesting an opinion from your office as to whether or not it is my duty, as State Food and Drug Commissioner, to collect the inspection fee for all beverages sold in Missouri by this municipally owned bottling plant either natural water or prepared beverages in accordance with the Beverage Inspection Law, Section 13115 to 13139 inclusive. In other words does your interpretation

June 28, 1938

of the law exclude the prescribed inspection tax on a bottling plant due to it being municipally owned."

In response to your request above, we note that Section 13116, R. S. Mo. 1929, makes it the duty of the Food and Drug Commissioner to inspect, or cause to be inspected, samples of all non-intoxicating liquors, or beverages, or so-called "soft drinks", of every kind manufactured or sold in this state, and said section defines such beverages as including mineral waters. Said section, as pertinent here, reads as follows:

"The food and drug commissioner of this state shall cause to be inspected by chemical analysis samples of all non-intoxicating liquors or beverages or so-called 'soft drinks' of every kind manufactured or sold in this state, which shall be understood to include * * * mineral waters and all other waters used and sold for beverage purposes, * * *."

Section 13120 allows the Commissioner a fee of three-fifths of a cent for each gallon of such beverage that is inspected.

However, Section 13124 does not permit the collection of the fee for such beverages as are manufactured, prepared or bottled in this state and exported outside the state for sale.

If, as you state, the City of Excelsior Springs bottles and sells in this state the beverage, or beverages, in question for profit, then the fact that the bottling plant is municipally owned would not exempt it from inspection or the payment of the required inspection fee, because the statutory enactments referred to herein are manifestly attributable to the rights of the state in the exercise of its police power to safeguard the public health. The Supreme Court has spoken concerning the police power of the state in the case of State ex inf. Attorney-General v. Curtis, 319 Mo. 1. c. 326, as follows:

"Proper disposition of sewage is essential to public health, and the passage of laws making such possible is obviously a proper exercise of the police power. (Morrison v. Morey, 146 Mo. l. c. 562; Dillon on Mun. Corp., pars. 93-96; Cooley on Taxation (4 Ed.) 202.) This power resides in the people of the State. (Sec. 2, Art. II, Constitution of Missouri; State v. Layton, 160 Mo. l. c. 489.) It may be exercised through municipalities and other agencies (28 Cyc. 693), but can never be surrendered or bargained away."

Hence, if the State were to recognize, or abide by, any claimed exemption from the inspection and payment of fees in question on the part of Excelsior Springs, such recognition on the part of the State in such case would be tantamount to a surrender or bargaining away of its police power.

Again, in the case of Cocoa Cola Bottling Co. v. Mosby, 289 Mo. l. c. 469, the court, speaking concerning the statutes on inspection of beverages, said as follows:

"The fact that these and other preparations, especially those intended for food or drink, are so extensively made and so generally used, is the moving cause of legislation of the character here under review. In short, it is but another illustration of the exercise of the police power, inherent in the State as a sovereignty, needing no organic grant for its existence and demanding legislative aid only to give it form and provide a procedure for its operation."

Consequently, your right of inspection and exaction of a fee therefor would be justified on the ground of a proper exercise of the police power of the State, if for no other reason.

However, your right of inspection and collection of fees can be justified on another ground. Where a municipality engages in an activity for profit, such as the sale of mineral waters and other beverages, it is operating in a proprietary capacity and not a governmental one respecting such activity. Consequently, if a municipality operates in a proprietary capacity, it is subject to the same general laws as a private corporation.

In the case of *Asher v. City of Independence*, 177 Mo. App. 1. c. 7, the court said:

"We agree with defendant that in the operation of a public utility for profit, the city was not acting in its governmental capacity, but was subject to the same rules and duties as would have governed and devolved upon a private corporation engaged in such business."

In the case of *Riley v. Independence*, 258 Mo. 1. c. 681, the court said:

"Cities undertaking to run the lighting business must assume the same responsibilities as private persons and private corporations running like plants."

Hence, if a city engages in an activity for profit, whether it be a light plant, bottling plant, or any other business, it is subject to such rules and regulations of law as any private corporation engaged in the same activity would be.

June 28, 1938

CONCLUSION

It is the opinion of this office that you have the right to inspect samples of mineral waters, and collect a fee therefor (and as well the other beverages mentioned if such fall within the category defined in Section 13116) bottled for sale and sold in this State by the city's municipally owned plant.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR

PHYSICIANS AND SURGEONS:

The practice of Physio-Therapy; Swedish Massage, Hydro-Therapy, Electro-Therapy and Naturopathy is a practice of medicine and surgery and within the provisions of the law requiring a license therefor.

July 29, 1938

Filed: #69

Dr. Harry F. Parker, Secretary
State Board of Health of Missouri,
Jefferson City, Missouri

FILED

69

Dear Sir:

This is in reply to yours of July 22nd for an official opinion from this department which is as follows:

"We have had a number of inquiries relative to the laws regulating the practice of Physio-Therapy; Swedish Massage, Hydro-Therapy and Electro-Therapy and Naturopathy in the State of Missouri.

"Since we have no law regulating the practice of these branches, we are at a loss to know what to tell them. Will you kindly give me an opinion as to whether or not they would come under the Medical Practice Act of the State of Missouri. If not, will these people be permitted to practice in this state until we have a law regulating such practice."

In our research on your inquiry we find in Gould's Medical Dictionary that the practices of Physio-Therapy to be:

"The use of the forces of nature in the treatment of disease, for example,

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heat, light, electricity, exercise,
air, water."

The Swedish Massage is a treatment by certain systematic exercises intended to exercise and develop the human body and affect function, nutrition, etc.

The practice of Hydro-Therapy is the treatment of disease by means of water; that the practice of Electro-Therapy is the science and act of the application of electricity for therapeutic purposes; that the practice of Naturopathy as defined in the case of Milsap v. Alderson, 63 Cal. App. 518, 219 Pac. 469, is the treatment of the sick and afflicted by means of light, air, water, clay, heat, rest, diet, herbs, electricity, massage, etc.

Section 9111, R. S. Mo. 1929 provides as follows:

"It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in the state of Missouri, except as herein-after provided."

Section 9112, R. S. Mo. 1929 provides as follows:

"The state board of health shall have general supervision over the registration of all practitioners of medicine, surgery and midwifery in this state."

That part of Section 9111, supra, which provides that:

"It shall be unlawful for any person not now a registered physician within the meaning of the law * * * or to profess to cure and attempt to treat the sick and others afflicted with

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bodily or mental infirmities" * * *

is a very broad term and was apparently intended by the lawmakers to cover any and all forms of treatments by anyone who professed to cure or attempted to cure the sick.

In the case of *Kansas City v. Baird*, 92 Mo. App. 204, l.c. 208, the court, in discussing the statute relating to medicine and surgery which statute is now Section 9111, supra, said:

" * * * The words 'medicine and surgery' and 'practicing medicine and surgery,' being in a penal statute, must be taken to have a meaning in their ordinary sense. Medicine, in its ordinary sense, as applied to human ailments, means something which is administered, either internally or externally, in the treatment of disease, or the relief of sickness. It may be applied externally and it need not necessarily be a substance which may be seen and handled. It may consist of electricity conveyed by instruments or the human hand. And he whose profession it is to prescribe and administer this, after diagnosing the complaint, is a physician as commonly and ordinarily understood. Thus the statute will include what is known as 'a medical clairvoyant' who visits sick patients, examines their condition, determines the nature of the disease and prescribes the remedies deemed most appropriate. *Bilber v. Simpson*, 59 Maine 181; *Wilson v. Harrington*, 72 Wis. 591. And so one is practicing surgery who professes and practices bone-setting in dislocations and fractures, reducing sprains, swellings and contraction of

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the sinews by friction and fomentation.
Hewitt v. Charier, 16 Pick. 353."

In the case of State v. Davis, 194 Mo. 485, 1.c. 497, in discussing what may be termed the practice of medicine under the Missouri statute, the court said:

"The practice of medicine as contemplated by the provisions of the statute covering that subject, may consist only of the examination of a patient, diagnosing the cause of the trouble complained of, or by one professing to be a physician seeing the patient at stated intervals, and the indication and prescribing of remedies to be applied, and the acceptance of pay for such services. * * *"

Section 23, page 1076, Volume 48 Corpus Juris, lays down the rule of what constitutes a practice of medicine as it applies to massages:

"A masseur without a license or certificate to practice medicine does not violate the statutes requiring such a license or certificate where he confines himself to the particular sphere of labor of a masseur and merely massages other persons without reference to any pains or diseases which such persons may profess to have; but the rule is otherwise where he undertakes to treat diseases for pay, and in doing so uses means not customarily used by a masseur in his particular sphere of labor."

In the case of State v. Smith, 233 Mo. 242, 260, the Supreme Court of Missouri defined the practice of medicine as follows:

" * * * The practice of medicine is not confined to the administration of drugs;

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nor is surgery limited to the knife.
When a physician advises his patient
to travel for his health, he is
practicing medicine. * * * "

In the same case at l.c. 257 the court, in discussing the intention of the lawmakers when this legislation was enacted, said:

"It is obvious that the Legislature, by this amendment, intended to include those who practice neither medicine nor surgery in any of its departments, but who profess to cure, and who treat or attempt to treat, the sick by means other than medicine or surgery. Evidently the Legislature, in order to guard the overcredulous against injury that might result from yielding to the solicitations and professions of men who ignorantly undertake to diagnose and treat human ailments, deemed it proper, in the exercise of its police power, to require all persons, who undertake to so treat the sick, to show that they possess the qualifications which the lawmakers prescribe as essential."

If such persons hold themselves out as being able to cure the patient of the illness they are practicing medicine and surgery within the meaning of the act. Volume 48 Corpus Juris, page 1077, section 24, provides as follows:

"In many states there are statutes which, although varying considerably in phraseology, are to the same general effect that a person shall be regarded as practicing medicine, within the meaning of a provision requiring a license or certificate, where he holds himself out as a physician, or publicly professes to treat, cure, or heal, either generally or by certain designated means, such as by advertisement or other public announcement, opening an office for the practice of medicine, or

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using, in connection with his name, the title 'Doctor,' 'Dr.,' or 'M.D.,' or any other word or abbreviation indicating that he is engaged in treating human ailments or diseases; and a person performing acts within such statutes is of course amenable thereto. The statutes apply to advertising or professing to treat, cure, or heal without drugs, medicines, or surgery and, except in some jurisdictions, to the use of the word 'doctor' or 'physician' in connection with some qualifying word, as 'osteopathic,' 'magnetic,' or 'drugless.' While actual treatment or practice is not necessary to bring a case within the statutes under consideration, a public profession of an ability to heal will not subject a person to the penalties of the law, unless it is made with a view of undertaking to cure the afflicted. In the absence of a statute on this subject, a statute merely prohibiting the practice of medicine by any person not qualified and licensed will not prohibit the assumption of the title 'Doctor' by any person whatever his profession."

And in Volume 21, R. C. L., page 373, section 20 states the rule as follows:

" * * * One who advertises himself as a doctor or healer and is in fact engaged in curing by means of suggestive therapeutics or by magnetic methods is engaged in the practice of medicine within the meaning of a statute which prohibits the same without the possession of a license."

A person who advertised himself as a 'suggestionist' and treated the sick was held to be practicing medicine

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in violation of the statute in the case of State v. Evertz, 202 S.W. 616, 617, wherein the court said:

"Neither is there any merit in the contention that the court below should have sustained appellant's demurrer to the evidence. It was shown by abundant evidence: That defendant held himself out as being authorized to treat the sick, or those afflicted with bodily or mental infirmities. That he maintained an office, near the entrance to which was a large sign in the following language, viz.: 'Evertz School of Suggestion. Oscar Evertz, S.D. Suggestionist. Treatment. Instruction.' That he circulated advertising matter concerning his method of treatment which is said to have been that of 'auto-suggestion,' and that he offered to treat the witness, Leonor Howes, in consideration of the sum of \$45 to be paid him in advance. And it is conceded that he was not a licensed physician. It cannot be doubted that a violation of the statute was shown."

In the case of State v. Stoddard, 86 A. L. R. at page 617 upon what constitutes a practice of medicine the rule is as follows:

"A treatment of human beings by another person for the purpose of relieving an ailment, with a public profession on the alleged doctor's part of the ability to cure and heal, amounts to the practice of medicine."

From the definitions of the various forms of practice mentioned in your letter, it appears that those who are practicing such callings may not be practicing medicine or surgery in any manner but that they are treating or attempting to treat the sick by means other than medicine

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or surgery which would bring them within the provisions of the Missouri law and as stated in the case of State v. Smith, supra, such acts do come within the provisions of the Missouri law.

CONCLUSION

From the foregoing authorities this department is of the opinion that any person who advertises or holds himself out as a practitioner of Physio-Therapy, Swedish Massage, Hydro-Therapy and Electro-Therapy and Naturopathy who examines his patients and/or prescribes such treatment to those who come to him and give such treatment making a charge therefor is practicing medicine and surgery within the meaning of the Missouri law relating to the practice of medicine and surgery and such parties are required to and should have a license therefor from the State Board of Health.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

FUNERAL DIRECTORS: Municipal license requirements
to operate.

November 12, 1938



Honorable Harry F. Parker, M.D.
State Health Commissioner
Jefferson City, Missouri

Dear Doctor Parker:

This will acknowledge receipt of your letter requesting an opinion from this Department on the following matter:

"Attached please find a copy of a proposed ordinance for licensing St.Louis funeral directors, sent us by the City of St.Louis.

"Before I approve it, I would appreciate an opinion as to its legality. I am greatly concerned about any proposed legislation which would be unfair to undertakers located outside of the City of St.Louis but doing business there.

"I would like to have your comment on that phase along with your opinion, as affected by the proposed ordinance."

Answering your request we will deal first with the legality of the proposed ordinance in its affect upon funeral directors, residents of St.Louis, and, secondly, the affect of such ordinance on non-resident funeral directors.

I.

We will enumerate the several questions that arise concerning the validity of such ordinance, as follows:

(1) The authority of the city to enact this ordinance must be based on Article I, Sec. 1, or Article XX, or both, of the City Charter to license, regulate and tax occupations, among which "undertakers" are specified, or such authority must be based upon the general police power of the city under its charter.

If the ordinance is one in the exercise of the City's license or taxing power, we note that it is one pertaining to "funeral directors" and not "undertakers", at least by name. We are unable to find either legal or dictionary definition of "funeral director", whereas the term "undertaker", has both legal definition or construction and dictionary definition. Although the ordinance construes the term "funeral director" to be substantially the same as the term "undertaker", as defined, nevertheless there is no acknowledged recognition by either court or dictionary construction that the terms are synonymous. Hence, the charter aforesaid limiting the City's right to license and tax the occupation of "undertaker", Section 7287 R.S. Missouri 1929, is pertinent, which Section is as follows:

"No municipal corporation in this state shall have the power to impose a license tax upon any business, avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

Consequently, the charter provision first mentioned not providing for the licensing of "funeral directors", at least by such term, a serious question arises as to whether or not the ordinance covers a vocation or occupation for which a license is required.

(2) Can the ordinance be attributed to the police power of the City? The exercise by a city of its police power is confined solely to regulating the conduct of a business, vocation or calling, from and during the time that such business, vocation or calling begins and continues to function. Incidentally, the City can levy a tax sufficient only to pay the cost of municipal police, fire and kindred protection, and also protection against unfair dealing if the business is of a public calling. As we read the ordinance in question we are unable to find any provisions for regulation of the business concerned from and after the time the applicant has procured the required license enabling the applicant to begin business. In fact, it would appear that it was intended to be a tax or revenue measure by reason of the graduated license tax provided for, inasmuch as a City in affording police, fire, etc., protection does not discriminate in such protection between the large and small business, but renders the same protection to both regardless of the amount of license or property tax paid by one or the other. Furthermore, it can be seen by reading the provisions of the ordinance itself, that it is confined to stated requirements for a license and stated grounds for revocation of such license and not a regulation of the business.

Hence, we believe the validity of the ordinance must be determined as a tax or revenue ordinance and not as a police regulation, and consequently we repeat that the ordinance in its present form apparently does not provide for the licensing of a business or vocation that is specifically named as one which the city can license and tax.

(3) Another questionable feature of the ordinance arises as to whether or not there is an unwarranted delegation of power to the proposed Board of Funeral Directors. Section 5 of the ordinance provides for a form of application and what it shall state to be executed by the person seeking a license to be presented to the license collector and by him referred to the Board, and upon the approval by the Board the collector will issue or renew such license.

Section 6 provides for an examination of the applicant according to rules and regulations that are to be prescribed by the Board.

Section 7 sets up certain requirements for the applicant to meet relative to character and as to mental and physical equipment in order to obtain a license.

Recurring to Section 6, it is apparent therein that the municipal legislative body neither provided for nor indicated any rule or guide for the board to follow as to what kind or character or subjects of examination would be reasonably necessary for an applicant to qualify, but on the other hand such feature is left entirely in the discretion of the Board as to what should be required.

While Section 7 sets up requirements to be met by the applicant, yet it cannot be readily determined from the ordinance itself, whether or not the requirements are to be developed through the examination provided for in Section 6, or through some other source. However, it is manifest that the requirement of the physical setup of the funeral home has no relation to an examination of the skill, knowledge or mental ability of the applicant. Consequently, in view of what we have said there does not appear to be a sufficient, if any, connecting up between these three sections mentioned so as to determine whether the "approval by the Board" of an applicant has or has not some limitation of the discretion of the Board as to who it will approve, that is to say, there is nothing in Section 6 to show what subjects the applicant is required to undergo examination on, and what shall be deemed a satisfactory showing on the part of the applicant, but on the contrary such matter is lodged within the unlimited discretion of the Board to prescribe whatever rules and regulations they choose and to change same at will. Furthermore, even though the applicant meets the requirements called for in Section 7, and should pass satisfactorily whatever kind of examination is set up under Section 6, there is no provision in Section 5 that the applicant thereupon as a matter of right, upon paying the license fee and filing bond, is entitled to a license, but to the contrary, the applicant is still subject to the "approval by the Board" to be given or withheld as the Board sees fit.

In this connection we call attention to the requirements for a state license in the case of physicians, attorneys, dentists, nurses, optometrists, osteopaths and embalmers. The legislature in creating the several respective Boards to determine the qualifications of applicants in these several callings specifically defined and limited the respective boards to what should be the qualification of applicants, and what subjects the applicants should be examined on, and in some cases set the minimum passing grade on the examination. In each and every case it is provided that all applicants who meet the prescribed requirements and pass the prescribed subjects of examination shall, as a matter of right, be entitled to a license. In other words the legislature has not delegated to the various boards mentioned the authority to set up its own requirements of applicants for a license, nor does the legislature leave it to the sole discretion of a board to determine whether or not it will grant a license even though its own requirements are satisfactorily met. The pertinent legal principle involved here is set forth by the Supreme Court in *Lux vs. Insurance Company*, 15 S.W. (2d) 343, 1. c. 345, wherein the Court said:

"The general rule is that any ordinance which attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance, is an unwarranted attempt to delegate legislative functions to such officer, and for that reason is unconstitutional."

In view of the foregoing it appears to us that the ordinance in its present form is subject to attack as an unwarranted delegation of power to the Board of Funeral Directors.

(4a) In the requirements called for in Section 7, the applicant must possess, among other requirements, skill and knowledge in "sanitation, preservation of the dead, and disinfecting the bodies of deceased persons." We are not sufficiently advised as to whether or not the above quoted

terms mean the services performed by an embalmer, and if so, whether or not from a practical standpoint the vocation of funeral directors necessarily comprehends and includes that of embalmers. As mentioned above the vocation of embalming is specifically provided for by statute, Section 13535 et seq. R.S. Missouri 1929, and an embalmer is not required to be a funeral director. Furthermore, the charter of the City aforesaid, does not authorize the city to require a license of embalmers, nor impose a license tax on such vocation.

Hence, it is our view that a funeral director, as such, cannot be required to possess the qualifications of an embalmer, nor stand an examination on such subject as any part of an examination as to qualifications as a funeral director. An apt case on this point is *State vs. Whyte* (Wis.) 23 A.L.R. 67, 1. c. 70, wherein the Court said:

"Since embalming is not compulsory, since it is not universally practised, why require every undertaker to have an embalmer's license before he can bury the dead? The qualifications required for obtaining an embalmer's license would add nothing to his fitness for burying an unembalmed body. It would add nothing to public health, safety, convenience, comfort, or morals. A police regulation restricting to the extent of prohibition an ancient, honorable, and necessary calling must justify its validity on the ground that it is essential to the public health, safety, convenience, comfort, or morals. This statute has no such sanction. It was beyond the power of the legislature to make it a valid enactment. *State vs. Redmon*, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N.W. 137, 15 Ann. Cas. 408. As was aptly stated by the Supreme Court of Massachusetts in *Wyeth v. Board of Health*, 200 Mass. 479, 23 L.R.A. (N.S.) 147, 128 Am. St. Rep. 439, 86 N.E. 927,

decided in 1909: 'Except in those cases where embalming is desired for a special reason, we know of nothing connected with the duties of an undertaker that calls for the work of a licensed embalmer. When such work is desired, a proper person can be procured to perform it. In cases generally, it is not an essential part of the duties of an undertaker, and it has no relation to the public health.'

(b) Another of the requirements of Section 7 is that the applicant must possess a funeral establishment at a specific location, devoted exclusively to the care and preparation for burial of dead human bodies, and the establishment in question to be of the kind described in the ordinance.

We are inclined to believe that such requirements cause that part of the ordinance to fall within the legal classification of ordinances held to be unreasonable and hence void.

It is common knowledge that all funerals are not conducted from funeral homes or establishments, but are conducted from the residence of the deceased. So far as we know there is no law to prevent a funeral director or undertaker, who so desires, to confine his business or vocation to funerals conducted from the residence of the deceased. Consequently, in such case the funeral establishment called for in the ordinance would be unnecessary and hence classed as an unreasonable requirement under such circumstances.

Apparently the ordinance calls for a funeral establishment physically disconnected from any other building. Again we know of no law which would prevent an applicant from using a residence building jointly as a place of business and also for his home; nor would an applicant be legally prevented from operating his business in a building occupied by other business tenants. Furthermore, we question that an applicant can be required to have an establishment consisting of the three rooms specified--and especially the room and supplies designated for embalming, inasmuch as an

ordinance cannot compel a funeral director to become an embalmer if the two vocations are separable. In view of the fact that doctors, lawyers, dentists and osteopaths are privileged to and in instances do, have their offices or place of business as a part of and in conjunction with their residence; and in fact it is seldom that those who follow such vocations have a separate establishment or place of business separate and apart from all others, we believe as a consequence that it would seem unreasonable to single out and mandatorily require funeral directors to have a separate establishment or one having a specified number of rooms each to be devoted to a specified purpose without some recognized sound reason for so doing. At this time we are not advised of any such reason.

It is a well established rule of law in this state that unreasonable provisions in an ordinance are of no force and effect. As an illustration of the principle involved here, we refer to the case of City of Lancaster vs. Reed, 207 S.W. 868, wherein the court said:

"Municipal corporations are prima facie the sole judges of the necessities of their ordinances, and the courts will not ordinarily review the reasonableness of such ordinances when they are passed in compliance with authority given by the state. City of Windsor vs. Bast, 199 S.W. 722; City of Hannibal vs. Mo. & Kans. Telephone Co., 31 Mo. App. 23; City of St. Louis vs. Green, 70 Mo. 562. However, courts should declare an ordinance void if upon inspection it appears to be unreasonable. City of Windsor vs. Bast, supra; City of St. Louis vs. St. Louis Theater Co., 202 Mo. 690, 100 S.W. 627. The ordinance seeks to make it a complete offense for one person to associate with another of opposite sex upon the public streets or sidewalks of the city if either person is one of ill repute, without requiring that there be any commission of any offense against the law, or any attempt to commit such an offense.

"We have no hesitancy, in view of the many decisions of our Supreme Court on the point, in declaring the ordinance unreasonable and void as infringing upon the rights of personal liberty."

(c) Section 10 of the ordinance creates grounds for suspension or revocation of a license, among which grounds, as set forth in subsection (h), is the prohibited connection in any manner by the licensee with a so-called burial society or association. We seriously question that this provision could withstand a legal test for invalidity. We said at the outset that the ordinance viewed as a whole should be ascribed to the licensing or taxing power of the city rather than to its police power. However, it may be that Section 10 is intended as an indirect method of police power regulation by means of license revocation. Nevertheless, an ordinance although enacted under the police power, must be reasonable in its terms the same as a license ordinance.

The operation of a burial association is given legal sanction in this state by statute and hence if such association operates in conformity to law and deals fairly and honestly with its members, an ordinance provision by which the license of a funeral director could be revoked if he had any interest in such character of burial association would be both arbitrary and unreasonable. The police power can be exercised only when it is reasonably clear that regulation is needed, in a given case, to protect the public. Manifestly the public interest could not be injuriously affected by reason of the funeral director being connected with a burial association if such is conducted according to law. However, if the funeral director associates himself with any association wherein there is any element of fraud, or practice of certain of the inhibitions set forth in said Section 10, in the conduct of the business of such association, a different case might present itself, but the ordinance makes no distinction between the good and the bad.

Furthermore, an additional question arises concerning this prohibited connection of a funeral director with a burial association, in this, can such prohibition stand in the face of Federal Constitutional guarantee of freedom of contract?

In view of the fact that both features of subsection (h) of the ordinance now under discussion has been passed on by the Supreme Court of Rhode Island relative to a legislative act of that state, which act contained substantially identical provisions as does the ordinance in question relative to a funeral director or undertaker's connection with burial associations, we here cite the case of Prata Undertaking Company vs. State Board of Embalming, 182 Atl. 808, 104 A.L.R. 1. c. 398, 399, wherein the Court said on the question relative to any connection with a burial association as follows:

"Other issues are raised by the appellants under section 13, as amended by section 2 of the act in question. This section designates the persons who are not entitled to a certificate of registration under chapter 1886 of Public Laws 1932. The first clauses of the section set out that among such persons are those who participate 'in any scheme or plan in the nature of a burial association or a burial certificate plan wherein the rights of the public are not properly protected, or wherein there is any element of fraud.'

"The manifest object of the provision concerning fraud is to afford protection to the general public in relation to such plans or schemes. Fraud has frequently been passed upon and considered by courts and the term has a recognized meaning in the law. This proviso, therefore, appears to us to be clearly valid, in that it is reasonable and relates to the general welfare of the public. Whether or not any particular scheme or plan of the above nature is fraudulent will have to be determined upon the facts in any given case."

On the question concerning freedom of contract the Court said, l. c. 399, 400:

"If one participating in any scheme or plan in the nature of a burial association or a burial certificate plan is to be entitled to a certificate of registration, without which he cannot lawfully conduct the undertaking business, it would appear that this part of the section precludes him from contracting with a person in regard to the details of the latter's own funeral. The practical effect of this part of section 13, likewise, would be to prevent an individual from so contracting with a funeral director or undertaker who was participating in any such plan or scheme.* * * *

"A statute, or any part thereof, cannot be given effect if, under the guise of the police power in the public interest, but actually to bring about some object outside of the proper scope of that power, it arbitrarily or oppressively interferes with a person or property in relation to recognized guaranteed rights. No good reason has been called to our attention, and none accurs to us, which makes it necessary in the interest of the general public that an individual, if he desires, should not be free to make a contract concerning the details of his own funeral with an undertaker who is conducting a burial association scheme or burial certificate plan, or that such undertaker should not be able in like manner to enter into a binding contract with a person concerning the latter's funeral, without placing himself in the class of those not

entitled to a certificate, and therefore not able to do business. The clause in question seems to go beyond the general purpose of the act in its relation to the public welfare. After careful consideration, and realizing fully the seriousness of our duty in passing upon the validity of an act of the Legislature, we are of the opinion that the part of section 13 now under consideration constitutes an unreasonable and oppressive restriction upon the liberty of contract secured by section 1 of the Fourteenth Amendment to the United States Constitution, and that this part of the act in question is clearly and palpably in excess of legislative power, and, therefore, that it is in violation of the provisions of said Fourteenth Amendment, and unconstitutional."

Hence, based upon this cited case which is peculiarly in point, the aforesaid subsection (h) of the ordinance in its present form is invalid.

II.

Taking up your second question, namely, the affect of the ordinance on non-resident funeral directors, it necessarily follows that if the whole, or any part of the ordinance is invalid as to resident funeral directors, it is likewise invalid to the same extent as to non-resident funeral directors.

However, for the purpose of this part of the discussion, we will presuppose the entire ordinance to be valid, and inasmuch as we are not furnished with any facts as to the character and extent of operations of the non-residents within the city we are forced to hypothesise facts in order to reach a conclusion.

(a) If the operations of a non-resident within the city are infrequent or casual only, and with no place of business maintained in the city, or if the operations of the non-

resident are confined solely to transporting a dead person from inside the city to a point outside the city for the necessary or customary burial preparation and interment at such point outside the city, or if such operations are confined to transporting a deceased person from a point outside the city to a cemetery in the city for the purpose of interment in such city cemetery where the customary burial preparations, and burial ceremonies, if any, are conducted at a point outside such city, we believe such hypothesized cases are covered in principle by the ruling of the Supreme Court to the end that such non-residents would not be affected by the ordinance. In the case of City of St. Charles vs. Nolle, 51 Mo. 1. c. 125, a city ordinance required a license and tax on all wagons hauling for hire inside the city and into and out of the city. The defendant hauled for hire lumber in his wagon from a point out of the city into the city. The Court said:

"So much of the ordinance under consideration, as attempted to impose a tax upon wagons hauling into and out of the city, we think was void as not being authorized by the charter, and in my opinion the legislature could give no authority to pass such an ordinance."

This case was reviewed at a later day by the St. Louis Court of Appeals in City of St. Clair vs. George, 33 S.W. (2d) 1021, wherein the Court said:

"Some question has been made as to the proper interpretation of the Nolle Case, but we do not see how the plain language employed can be misunderstood. The court clearly holds that the city of St. Charles had no power to impose a license tax upon the wagons of an outside resident, engaged in the business of hauling into and out

of the city, and that the Legislature could confer upon the city no such power. The court manifestly places its holding on the ground that an outside resident so engaged in the business of hauling, was in legal contemplation engaged in such business outside, and not within, the city."

In the City of St. Clair case the defendant, a resident of St. Louis, hauled merchandise from the City of St. Louis to a Kroeger Store in St. Clair, and from such Kroeger Store in St. Clair to the City of St. Louis. Defendant was fined under a city of St. Clair ordinance requiring a license for carrying on a hauling and transfer business in the City of St. Clair. The Court in disposing of the case in defendant's favor, said:

"We conclude that defendant in the present case was not carrying on the business of transporting merchandise within the limits of the city of St. Clair, and was not subject to the imposition of a license tax by said city."

(b) On the other hand, if the non-resident regularly operates in the City and holds himself out there as doing business within the city, and performs within the city the same or substantially the same acts in the preparation for and the burial of deceased persons as are performed by the city funeral directors, (and especially so if the non-resident maintains a place of business within the city), we believe what is said by Judge Gray in his concurring opinion in the case of Carterville vs. Blystone, 160 Mo. App. 1. c. 205, is pertinent, and from which we quote as follows:

"If the testimony in this case disclosed nothing more than the facts that the transfer company had an office in Joplin, and that its teams and equipment were kept there also, and that occasionally it was employed to haul goods which required

its teams to enter upon the streets of Carterville, I do not believe it could be required by Carterville to pay a license tax on the vehicle thus using the streets. But the record in this case discloses that the city of Joplin is but a few miles distant from the city of Carterville, and that said cities, together with the city of Webb City, which lies between Joplin and Carterville, comprise one trade area and district from which the company obtained its transfer business, and in which it held itself out to the public as being engaged in such transfer business, and ready to serve all who required its services. Under these circumstances it appears to me that the transfer company was engaged in the transfer business in Carterville, and, therefore, that city has the right to require the company to pay a license tax on its vehicles used in conducting its business in the city."

We are aware of the fact that the operations in this state of a large number of the so-called burial associations are not in the public interests as conducted, and that the provisions of said subsection (h) of the ordinance are well intended and are, or would be salutary in such cases, yet it would be of no avail to pass such provisions as valid if in fact they are invalid in their present form.

CONCLUSIONS

It is our opinion that the ordinance in question in its present form is of questionable validity, if not in fact invalid in the following particulars:

- (1) It undertakes to require a license of a vocation not required to be licensed by charter.

(2) It contains an unwarranted delegation of legislative power to the Board of funeral directors in approving applicants for a license.

(3) It contains unreasonable provisions as to requirements of an applicant in order to obtain a license, and also as to revocation of license in the respect hereinbefore mentioned in paragraph 4 of this opinion.

(4) Non-resident funeral directors would be affected according to the character and extent of their operation within the City as discussed in point 2 of the opinion.

Respectfully submitted,

J. W. BUFFINGTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JWB:MM

CHICORY * May not be used in coffee as it constitutes an adulteration of food

December 28, 1938

12-29



Mr. Harry F. Parker
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your request of recent date, relating to whether or not "chicory" may be used in coffee. Appending to your request, is an original letter directed to H. H. Harnsberger of your department from B. H. St. John, Chemist, enclosing a letter from the Ronnoco Coffee Co. and circular relating to "chicory", which letter reads in part:

"I am enclosing in duplicate a letter from the Ronnoco Coffee Company of this city which is in part self explanatory. These people wish to sell prepared chicory to be added to coffee when prepared. This addition adds a flavor to the prepared beverage which many people, myself included consider a definite improvement in the beverage. Chefs generally object to making a statement that they are offering for coffee, coffee with chicory, for two reasons, first that this would be far from easy to do in the restaurant itself, and second that such a statement might be misconstrued by some among their patrons.

I am inclined in this discussion to take the attitude that cookery is in itself an art and that in this the chef is entitled to a certain leeway in preparing palatable products, and that in this case the addition of chicory is in fact not adulteration but the addition of a flavoring constituent to affect the taste and palatability of the product."

At the outset, your attention is directed to Section 13017, R. S. Mo. 1929 reading in part as follows:

" * * * * The term "food," as used in this article, shall include all articles used for food, drink, confectionery or condiment by man or animal, whether simple, mixed or compound."

Ordinarily, words in a statute are to be construed in their common acceptation, in view of arriving at the intent of the legislature. Cummins vs. K. C. Public Service Company, 66SW (2) 920. In view of this principle of law, it is believed that when the legislature used the term "food" so as to include drink, that "coffee" would be considered as being a drink. It is a well known fact that coffee is used as a drink with or without food.

is
Since drink/included within the term "food" and drink may be construed as being coffee, in view of our above observation, can it be said that coffee may be adulterated within the meaning of Section 13019 R. S. Mo. 1929? We think so. Section 13019 reads in part as follows:

"Food shall be deemed to be adulterated; * *
if any substance or substances have been substituted wholly or in part for the article *
* * * *"

The above part of the statute is clear and needs no interpretation, therefore, we don't consider whether or not "chicory" is included within the word substance. Suffice it to say, the sample package submitted is of a powdered substance to be used with coffee for certain purposes.

A diligent search has disclosed but one case wherein "chicory" has ever met the judicial view. In the case of U. S. vs. Rosenstein, 60 Fed. 74, the U. S. Circuit Court of Appeals, Second Circuit, considered whether or not "Seelig's Coffee" a substance containing about 68 per cent in weight, and 44 per cent in value, of chicory and used as a substitute and adulterant of, coffee was dutiable as a substitute or as being chicory root. The court held that the compound was

dufiable as a substitute and not as chicory root because the article had a distinctive place of its own and not merely as "chicory". The facts in this case disclose that:

" * * * * The merchandise is a well-known article, composed of chicory or chicory root, (which are commercially convertible terms,) beet root, olive oil, and syrup. It is manufactured in Germany by grinding these ingredients together, and, when imported, is in the form of rolls or cylindrical sticks, each of which is inclosed in a wrapper, upon which the following directions are printed: 'Use one part of this preparation to two or three parts of coffee. Pour boiling water over the mixture. Let it draw five minutes, and strain.' Chicory is about 68 per cent, of the weight, and about 44 per cent of the value, of the compound article. It, like at least two other similar compounds made by other manufacturers, is used to some extent to flavor coffee, and more largely, both in Germany and in this country, to mix with coffee, or as a substitute for coffee, for purposes of economy. It is sold for about six cents per pound. Chicory is also used by dealers, as an adulterant, to mix with ground coffee, and by consumers to mix with, or as a substitute for, coffee * * * *"

Gould's Medical Dictionary defines "chicory" as:

"a composite plant of Europe and Asia, naturalized, and growing in the United States. Its ground root is used to adulterate coffee."

Websters New International Dictionary defines "chicory" as being:

"a common European perennial plant, cultivated for its root and as a salad plant; also, its root, roasted for mixing with coffee."

From these definitions, it is evident that "chicory" is used principally as an adulterant to mix with coffee for the purposes of economy and as a substitute therefor. This conclusion is fortified by a reference to the printed matter contained on the sample package reading:

"Because 'chicory' strengthens coffee, you will obtain more cups per pound. Use a little less coffee to brew the strength to which you are accustomed."

Then again, the company recognizes that "chicory" is an adulterant, when the printed matter reads further:

"Properly blended, Chicory is no adulterant"

Note the allusion to "chicory" being an adulterant by the use of the phrase and comma at the beginning of the sentence.

To further illustrate that "chicory" is an adulterant or substitute for coffee, attention is directed to the circular heretofore referred to, wherein it is said:

"For the additional cost of just a fraction more than 1 cent you can obtain from 8 to 15 extra cups of better coffee from each pound."

Without attempting to further detail matters appearing on the advertisement and sample package, which but further supports our conclusion, it is sufficient that "chicory" is a substance which is used wholly or in part for coffee. When so used in coffee, such use violates Section 13019 Supra.

It is to be further observed, that if any person or corporation in this state shall manufacture or produce, offer or expose for sale, or shall have within their possession with the intent to sell any food which is adulterated shall be guilty of a misdemeanor under the provisions of Section 13029 R. S. Mo. 1929.

December 28, 1938

CONCLUSION

In view of the above, it is our opinion that "chicory" may not be used in coffee, because so to do, is to adulterate a drink which is included within the term "food".

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

(Acting) Attorney General

RCS:WW

PROSECUTING ATTORNEY:

In a county containing a population of 11,764, the county court cannot grant an extra fee to the prosecuting attorney for an opinion rendered to the county court and the Federal Government.

January 28, 1938

Mr. W. S. Pelts,
Prosecuting Attorney,
Greenfield, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of January 25, 1938 asking for an official opinion, which letter reads as follows:

"I would like an opinion of your office as to whether or not the county court of Dade County, when it had its project to build a courthouse here in Dade County, which the people had voted bonds to the amount of \$75,000.00 and the United States Government contributed something over \$30,000.00, could appoint an attorney who was the prosecuting attorney at the time to furnish a statement with his certificate, reporting that the project was nearing completion and the contract between the county, the United States Government and the construction company had been carried out properly, that there were no suits pending the circuit court and no prospective suits or claims pending in connection with the courthouse project.

It was necessary for the court to appoint an attorney to furnish this information in order to secure from the Government its share of this project. The court on July 18, 1935, in regular session, appointed me, prosecuting attorney at the time, as agent and attorney for the courthouse.

I made this investigation and two reports with my certificate attached and upon receipt of those reports the United States



1/28/38

Government turned to the county court its share of this project, which will be evidenced by the copy of the record enclosed.

They paid me One Hundred (100) Dollars for this work, which was a very modest and meager fee, and assured me when they appointed me as attorney for the courthouse that this came out of the courthouse fund and had nothing to do with the funds of Dade County. When in fact, without me noticing where the money came from, they paid me One Hundred (100) Dollars out of the general revenue fund of the county. They are now attempting to have me pay back this money because I was prosecuting attorney of Dade County at the time."

Section 11364 R.S. Mo. 1929 provides as follows:

"The county courts of all counties in this state containing one hundred thousand inhabitants or more, according to the last decennial census of the United States, and of all such counties as may hereafter contain one hundred thousand inhabitants or more, may, in their discretion, appoint and commission as other officers are commissioned by the county court a county counselor, who shall be a person learned in the law, at least twenty-five years of age, and who shall hold his office for two years, and until his successor is appointed, commissioned and qualified: Provided, that in all counties containing less than one hundred thousand inhabitants the office of county counselor is hereby abolished."

According to the last census, which was 1930, Dade County only had a population of eleven thousand seven hundred and sixty four (11,764) and according to section 11364, as set out above, could not have a county counselor.

Section 11318 R.S. Mo. 1929, in reference to the duties of a prosecuting attorney, provides as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace when the state is made a party thereto:*****."

Section 11314 Session Laws of 1933, page 178 provides that the prosecuting attorney of Dade County according to the population, should receive twelve hundred dollars (\$1200.00) a year as salary. According to Section 11318, as above set out, it is the duty of the prosecuting attorney to represent the county court in all matters and should not receive extra pay.

Section 48, article 4 of the Constitution of the State of Missouri especially prohibits the enactment of the legislature which would grant extra compensation. This section reads as follows:

"The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service had been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

This section is discussed in the case of State ex rel. Bradshaw, Warehouse Commissioner v. Hackmann, State Auditor, 208 S.W. 445.

Mr. W. S. Pelts

-4-

1/28/38

According to the above authorities set out, the county court did not have authority to pay you one hundred dollars (\$100.00) out of the county fund as extra compensation in addition to your regular salary.

CONCLUSION

It is, therefore, the opinion of this office that the county court can, by proper procedure, recover the one hundred dollars (\$100.00) paid to you unlawfully.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

ELECTIONS: In Jackson County, outside of Kansas City, Board of Election Commissioners should publish notice of election.

June 16, 1938.

Honorable John B. Pew,
County Counselor,
624 Rialto Building,
Kansas City, Missouri.



Dear Sir:

This will acknowledge receipt of your letter of May 25th referring to an opinion from this office under date of April 30th concerning the question as to whether the County Clerk of Jackson County or the Jackson County Board of Election Commissioners should make preparation for the coming August, 1938, primary election by publishing the proper newspaper notices, together with a further question as to ballots, not pertinent here; and your query now is, will a notice of the primary mentioned containing the names of the candidates and offices sought and time and place of election, by the county clerk, be a sufficient and legal notice?

In our former opinion we quoted in part the following two sections of the 1929 statutes respecting powers of the election board, as follows:

"Section 10525. The board of election commissioners created hereunder and hereby shall have full and complete power to conduct any and all elections in such county and to receive and certify the returns thereon. * * *"

"Section 10536. * * * Said election commission shall make all necessary rules and regulations not inconsistent with this article in reference to the registration of voters and conduct of elections and shall have charge of and make provisions

June 16, 1938.

for elections, general, special, local, municipal, state and county or any part thereof at any time to certify the returns thereof to the proper officers issuing certificates of election: * * *

It would appear by reason of the broad general powers given the election board under the above sections in making provisions for and conducting an election, that the carrying out of the details of such election, among which details notice as to time and place and names of candidates and offices sought would naturally seem to be one of such details, would require the board to publish the notice and not the county clerk.

However, we note that Section 10512, after providing for the first or initial registration after such section went into force, makes the following provision:

"A general registration shall be made by the board of registry in every year thereafter in which a presidential election occurs and just prior thereto * * *." (Emphasis ours.)

Section 10524 provides for intermediate registration and notice thereof, but has nothing to do with elections.

Hence, it can be seen that the board conducts a general registration only every fourth year by reason of the provisions of Section 10512, supra.

Turning to Section 10531, which specifically relates, by its title, to "Notice of time and registration and election" to be given by the board, it provides as follows:

"It shall be the duty of said board of election commissioners to publish notice in at least two weekly newspapers, of general circulation and of opposite politics, if possible, published in the county, for four weeks prior to each general registration and election, giving the time and place of such registration and election."

It is patent that under the last above section the board is required to give notice, at least so far as registration is concerned, only prior to each general registration, that is to say, every fourth or presidential year, because a general registration is defined by Section 10512, supra. A very confusing and as well serious question is presented by the above wording in Section 10531 relative to notice, to-wit, "general registration and election," as to whether the word "general" qualifies the word "election" the same as it does the word "registration," and hence confines the giving of such notice to presidential elections or general elections as distinguished from primary elections, or whether the word "election" stands alone and means every state-wide election, including a state-wide primary election. We are frank to confess that we have no guide either from companion statutes or court decisions to aid us to any confident conclusion as to what the Legislature intended in the above respect.

However, there may be some basis for concluding that the election meant was the one next following the general registration, or, in other words, the presidential or general election following next after such general registration. But notwithstanding the confusion as to what election or elections the notice should apply, the statute in question is at least specific as to what the notice is required to state, namely, the time and place. The statute does not by its terms, at least, require the notice to state the names of the candidates for office and what office each candidate seeks.

Hence, it appears that the only provision providing for notice or publication of the names of candidates and the office each seeks in a state-wide primary is contained in Section 10262, which makes it the duty of the county clerk to publish such and as well the time and place of the election.

Recurring to the first above mentioned sections, namely, 10525 and 10536, which appear to give to the election board broad and general powers to make provisions for and conduct all manner of elections, we would be of a fixed impression that the Legislature was intending to place the whole category of details of any and all elections, including notice of time, place, candidates and office sought, in the hands of the board, if it were not for the fact that such

June 16, 1938

Legislature specifically dealt with the question of notices on the part of the board by Section 10531, supra. But having dealt with the subject of notices, as the Legislature did, and leaving manifest doubt as to whether the notice should be published at any other time than at a presidential election, and further limiting the contents of such notice to time and place of whatever election was meant, results in serious doubt as to whether such general power given the board was intended to, and in fact and law does, supersede or supplant the duty of the county clerk to publish for each and every election the names of candidates and offices sought and time and place of such election.

In your letter you say, "It is conceded that the Board should publish notice for the general election in November." You will note by Section 10249 that the county clerk is required, seven days before election, to publish the nominations to office. Even if it is construed that the word "election" as hereinabove alluded to in Section 10531 means or includes the coming November, or so called off year, general election, then should the board adhere to the notice prescribed by the statute which provides for stating only the time and place of election and not the names of the nominees for office and the offices to be filled? Due to the confusion and doubt created by the provisions of the various and several statutes hereinabove mentioned and set forth, anyone's conclusion or guess is about as good as another; and until the Legislature sees fit to straighten the matter out, no fixed or definite conclusion can be arrived at with much, if any, confidence.

Hence, our conclusion is that in the interest of precaution the county clerk should publish the notice for the coming primary election in conformity with the provisions of Section 10262, and for the coming November election in conformity with Section 10249; and that the election board should likewise publish such notices both as to time of publication and contents for each such election; and that the Legislature should be called upon at its coming session to clarify the matter so as to obviate any necessity for such duplication of notices in the case of future elections.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

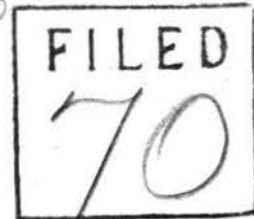
JWB:HR

NEPOTISM:

Judge of Probate Court receiving personal service from relative within fourth degree does not violate Sec. 13 Art. XIV where such relative is not appointed to an official position.

June 24, 1938

Hon. Lee C. Phillips
Judge of Probate Court
New Madrid County
New Madrid, Missouri



Dear Judge Phillips:

We acknowledge your letter of June 18 in which you inquire as follows:

"I would like to have your opinion and legal advice on the matter of appointing a clerk in the Probate Court.

"Would it be legal to appoint as clerk a relative of the Probate Judge who would serve without pay in this capacity.

"Thanking you for your advice in this matter, I am."

Sec. 13 of Art. XIV of the Constitution of the State of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint

June 24, 1938

any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the above section of the Constitution any public official who names or appoints any person within the fourth degree either by consanguinity or affinity to render services to the State makes himself liable to forfeiture of office. This office has taken the position, however, that the proper construction to be placed upon such constitutional provision is that such relative must be appointed to hold an official position existing under the laws or Constitution of this State. We can see a distinction between a person rendering service to the State in an official capacity and the rendering of service to an individual official because of the relationship. The test as we understand it is whether or not the person is appointed to fill an official position and as such to render service to the State. Where a public official has in his office a member of his family who does not occupy an official position, nor as such render service to the State, but whose services are rendered personally to the official involved without expense to the State, and only to the officer by reason of the family relationship, we do not believe that such situation comes within the meaning of the Nepotism Law.

You did not give us many facts in your inquiry and we are assuming that the relative you have in mind comes within the fourth degree. We also assume from your letter that the relative you wish to have assist you is not to be employed as, nor is he to be considered as a statutory clerk in any sense. We are assuming that such relative will merely be assisting you personally; that he will not take an oath of office or perform either in his own name or in the name of a principal any of the duties of a statutory clerk. If this is the case, then

June 24, 1938

we do not believe that the Nepotism Law will be violated by the arrangement you have in mind.

On the other hand, if the relative is within the fourth degree of relationship and you plan to have such relative perform the duties of a statutory clerk, such an arrangement would be in violation of the constitutional provision whether you paid such clerk a salary or not.

CONCLUSION

It is therefore the opinion of this department that if the services to be performed by a relative of yours are merely personal to you and that such relative will not hold any official position existing under the laws or Constitution of this State, that the Constitution will not be violated.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA/w

INTOXICATING LIQUOR: Unlawful to supply habitual drunkard
with intoxicating liquor.

August 26, 1938



Honorable W. S. Pelts
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

We have your request of August 24, 1938, for
an opinion upon the following statement of facts:

"A man was charged with and plead
guilty to the offense of being in-
toxicated and disturbing the peace
of the community and was sentenced
to serve six months in the county
jail. While serving this sentence
a man gave him a pint of whiskey.

"Did the man who gave him the whiskey
while he was confined violate the law?
If so, under what section?"

Section 9 of the Liquor Control Act (Laws of
Missouri, Extra Session, 1933-1934, page 81) prohibits
any person from selling or supplying intoxicating liquor
to an habitual drunkard or to any person who is under or
apparently under the influence of intoxicating liquor.

The term "habitual drunkard" has been defined in
Glenn vs. Glenn, 87 Mo. App. 377, as a person who habitually
drinks strong drinks immoderately, one whose habit is to get
drunk.

It may be that Section 9 of the Liquor Control Act
has been violated if you can establish that the person to
whom the liquor was supplied was an habitual drunkard.

August 26, 1938

Section 8447, R. S. Mo. 1929 makes it a misdemeanor to furnish intoxicating liquor to any person confined in the State Penitentiary or in a prison or reformatory or industrial home, or that may be under sentence to such institution, and be employed by the state at any kind of labor either within or without the walls or enclosure of any prison, reformatory, or industrial home, or state farm.

The above statute applies among other things to any person confined in the State Penitentiary. Section 3914, R. S. Mo. 1929 carries a penalty for any person who shall escape while confined in the Penitentiary. In State vs. Betterton, 295 S. W. 545, 317 Mo. 307, an effort was made to construe this confinement in the Penitentiary so as to include a convict detained on a prison farm. It was held that the term "confined" meant being kept inside the penitentiary walls. In view of the fact that this section is part of Article 5, Chapter 44 relating to penal institution, it cannot be extended to apply to county jails.

It is, therefore, the opinion of this office that the provisions of the Liquor Control Act and Section 8447, R. S. Mo. 1929, do not prohibit the giving of liquor to prisoners in the county jail.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE

ASSESSORS: Township assessors entitled to be paid for taking list containing only real estate in view of Laws of 1937, p. 570.

December 22, 1938

Mr. H.I. Phelps
Township Assessor
Salisbury, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 19, 1938, requesting an opinion of this department as to the compensation a township assessor is entitled to for taking and listing personal property and real estate.

Section 12328, R.S. Missouri, 1929, provides that a township assessor shall, within the time prescribed by law, take a "list" of the taxable property of his township and assess the value thereof "in accordance with the provisions of the general laws of this state in relation to the assessment of real and personal property by county assessors" (Chapter 59, Article 2, R.S. Missouri, 1929) except when the same are inconsistent with this article.

Section 12329, R.S. Missouri, 1929, requires the township assessor to make out a book in tabular form and alphabetical order containing the names of all persons, companies or corporations, and the list of their personal property and the value thereof. He must also list in this book all lands and town lots in his township and the value thereof. This book is to be delivered to the county clerk and is to be made out in such form as is prescribed in the general law relating to county assessors. For this, the township assessor is entitled to certain fees.

By the two above mentioned sections of the law pertaining to township assessors, we referred to the general law pertaining to county assessors for direction and authority for the township assessor to follow in performing his



duties.

Section 12331, R.S. Missouri, 1929, as amended, Laws of 1931, page 376, provides the compensation of a township assessor and is as follows:

"He shall receive, as compensation for his services, thirty-five cents for each list taken by him; and for each tract of land or town lot assessed by him, and properly entered in the township land book, he shall receive ten cents, one-half to be paid by the county and one-half by the state, as now provided by law: Provided, that all the personal property listed belonging to any one individual or company, or firm, shall constitute only one list, and all the land owned by the same person in any one section shall constitute but one tract, and all the land owned by the same person in any one block shall constitute but one lot, as to compensation."

It is for taking the list mentioned in this section that the township assessor is paid in part. It is to be noted that Section 12328, supra, directs the township assessor to "proceed to take a list of the taxable property of his township", and that no mention is made in said section as to whether the property listed must be real or personal. For this distinction, we must refer to the law relating to county assessors as is required by said section.

In State v. Gomer, 101 S.W. (2nd) 1.c. 66, it is held concerning county assessors that they are "not required to make or entitled to receive any compensation for making a list containing only real estate". This was based on an interpretation of Section 9756, R.S. Missouri, 1929. However, in Laws of 1937, page 570, this section was amended and the apparent purpose of this amendment was to nullify a part of the Gomer decision respecting the compensation of county assessors.

The 1937 amendment, outside of some minor changes as to the items of personal property required to be listed, made these changes: It provided that the assessor shall

December 22, 1938

"proceed to take a list of the taxable personal property and real estate in his county", and a sentence was added to the end of the new section which, however, does not affect us here. The words "and real estate" above underlined, did not appear in Section 9756 before it was amended and we now see by the addition of these words that this section specifically requires both personal property and real estate to be listed. The personal property and real estate as mentioned in Section 9756, supra, is that property for which the township assessor is paid for taking a list of under the terms of Section 12331, Laws of 1931, page 376.

On December 21, 1937, this department rendered an opinion to G.C. Beckham of Steelville, Missouri, upon this same subject, but that opinion overlooked that part of the amendment of Section 9756, supra, adding the words "and real estate", and for that reason, is erroneous.

CONCLUSION.

Therefore, it is the opinion of this department that a township assessor should obtain a list in the form prescribed by Section 9756, R.S. Missouri, 1929, as amended, Laws of 1937, page 570, from every person who owns taxable personal property and real estate in the township. For taking said list, he is entitled to thirty-five cents and said list is required to contain all personal or real property, or both, owned by one person in said township.

Section 9756, supra, as amended, was enacted with an emergency clause taking effect on approval - May 28, 1937. Previous to that time, the township assessor was not entitled to any compensation for taking a list containing only real estate.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

(Acting) Attorney General

COSTS) Costs cannot be taxed against any party to
HABEAS CORPUS) a habeas corpus proceeding.

January 3, 1938

Honorable John C. Pope
Prosecuting Attorney
Webster County
Marshfield, Missouri



Dear Sir:

This is to acknowledge receipt of your request of November 30, 1937 for an opinion, reading as follows:

"A person is held in the county jail for first degree murder without bail. He applies to the Supreme Court for a writ of Habeas Corpus, and the Supreme Court admits him to bail. Who is liable for the costs of such proceedings?"

A diligent search of our statutes has failed to reveal who would be liable for the costs in a habeas corpus proceedings. This very situation arose in the case of Ex parte Nelson, 253 Mo. 627. In this case, an application for a writ of habeas corpus was granted by the Supreme Court and the costs were taxed against the petitioner. Thereafter, a motion was filed by petitioner to set aside the order taxing the costs against him, and the court, in ruling upon the motion to set aside the order taxing the costs, said:

"At the common law no costs were recoverable. (City of St. Louis v. Meintz, 107 Mo. 611.) Costs in Missouri being, therefore, purely creatures of the statute, enactments in relation thereto must be strictly construed. (State ex rel. v. Seibert, 130 Mo. 1.c. 217; St. Louis & Gulf Railway Co. v. Cape Girardeau, etc. Railway Co., 126 Mo. App. 272; Lucas v. Brown, 127 Mo. App. 645.)

January 3, 1938.

"We find upon an examination of our statute in regard to habeas corpus no provision therein in regard to the taxation of costs. Reference must be had, therefore, to the general statute which provides (Sec. 2263, R. S. 1909) that 'in all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law.' In the application of this general rule to the case at bar, we are met with a condition which precludes the assessment of the costs against 'the other party' or the officer who had the petitioner in custody at the time of the issuance of the writ. The officer, who was the sheriff of Jackson county, held petitioner under a writ regular on its face which had been issued by a court having jurisdiction of the subject-matter. This was ample to protect the sheriff and there is, therefore, no authority for the taxation of the costs against him; nor is there authority for the taxation of same against the petitioner. In addition to the absence of a statute, there is a manifest injustice in burdening the successful party to a proceeding with the costs of same, especially in a habeas corpus suit where the purpose of the action is to secure the liberty of the petitioner. ***

"There being a casus omissus in this State in regard to the taxation of costs in habeas corpus proceedings, this court cannot, except by the usurpation of power, tax the costs herein against the petitioner or make any order in regard thereto. In the absence of such power we cannot and should not concern ourselves with payment of costs heretofore made by the parties to this proceeding or recognize any agreements entered into by them in regard to same."

#3 - Honorable John C. Pope

January 3, 1938.

We do observe, however, that certain charges relative to the allowing of the writ of habeas corpus may be paid by the petitioner. This is provided for by Section 1435 of R. S. Mo. 1929, reading as follows:

"The courts and magistrates allowing a writ of habeas corpus may, in their discretion, require, as a duty to be performed in order to render the service thereof effectual, that the charges of bringing up the prisoner and conveying him back, if remanded, shall be paid by the petitioner; and in such case the court or magistrate shall, on the allowance of the writ, specify the amount, which shall not exceed ten cents per mile; and the amount so to be paid shall be stated in writing on the writ, signed by the clerk, if in term, or by the officer by whom the writ is awarded."

CONCLUSION

In view of the above, it is our opinion that since the Legislature has not enacted any statute governing costs being taxed against any party to a habeas corpus proceeding, that no costs may be taxed against any party to such proceeding.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

COUNTY TREASURER:

If warrant is presented when no funds are available to pay the same, County Treasurer should follow the provisions of Section 12171, R. S. 1929.

January 8, 1938

118

Mr. E. H. Pittman
County Treasurer
Clinton County
Plattsburg, Missouri



Dear Sir:

This Department is in receipt of your request for an opinion of sometime ago based on the following facts and questions:

"We are speaking of County Warrants, only, that are subject to protest; and for the convenience of our taxpayers.

"For instance; where a warrant is presented to the County Treasurer for payment and requesting the money, making a blank indorsement, that is, just signing their name on back of warrant and not making an assignment, that is, the party presenting the warrant doesn't assign the warrant to any particular party, and the fund for which the warrant is drawn on not having enough money to pay warrant in full, not from a budget standpoint, but merely just for the time being, possibly until tax collections are turned over the following month and instead of taking credit for warrant on book, which would, of course, show an over-draft in that particular fund; Can the Treasurer pay warrant, of course, at par value, and the next day protest warrant making a deposit in bank of warrant at par value, which of course, with deposit would balance accounts.

Jan. 8, 1938

"For an example: Class No. 5 have in budget yet to spend this year \$7,581.64 Balance on hand cash \$160.69 - warrant properly filled out favor John Doe for the sum \$200.00 presents to treasurer for payment, indorses warrant as John Doe, Treasurer pays warrant \$200.00 later finds not enough money in fund to take credit on book, can we pay warrant and take credit for same through a deposit, if paid and deposited, both will be at par value."

We assume by the example which you have presented that you carry the county accounts according to the classes as contained in the Budget Act, Laws of Missouri, 1933, page 340 et seq., that is, the funds are not carried in a common account. Cash receipts of a county usually run irregularly during the months throughout the year. Generally, the receipts are unusually heavy during the months of November, December and January. The Budget Act, as originally written, contained no provision for any transfer of funds and hence it was necessary for any transfer, to make up any deficit in any class, to be made at the close of the fiscal year providing there was a surplus in some other class. But irrespective of the Budget Act and its terms, the original section governing your duty with respect to warrants being presented when no funds are available, should control the situation.

Section 12171, R. S. Mo., 1929, is as follows:

"No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

Jan. 8, 1938

Therefore, in answer to your specific question: Can the treasurer pay a warrant and the next day protest warrant making a deposit in bank of warrant at par value, which with deposit would balance accounts? we are of the opinion that it is your duty as Treasurer, if there is no money in the treasury for that purpose, that same should not be paid but that you should certify on the back of the warrant that there is no money in the treasury for that purpose. In order to constitute a valid assignment, the terms of Section 12172, R. S. Mo. 1929, should be followed, as was stated in the case of Isenhour v. County, 190 Mo. 163.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

CONSERVATION COMMISSION ACT: Fines collected for violation
of the Game and Fish Laws go to
SCHOOLS: the county public school fund
and not to the Conservation
Commission.

March 8, 1938.

Honorable Leo A. Politte,
Prosecuting Attorney,
Franklin County,
Union, Missouri.



Dear Sir:

We acknowledge receipt of your request of February 21st, which is as follows:

"Inclosed herewith please find circular letter which I have received from Conservation Commission, the purpose of which is to divert all fines for the violation of the Game Laws from the County School Funds to Funds of the Conservation Commission.

"I do not believe the terms 'fees, monies, or funds' as used in Amendment No. 4 apply to fines collected in the inforcement of the law of Game & Fish Laws. Certainly this Amendment should be construed stoutly against such a charge.

"I am advising the Judges of this County to ignore this letter until further notice. However, if I receive an opinion from your office stating that these fines must be turned over to the Commission, we will abide by your opinion in the matter."

Attached to the same is a form letter written by the Conservation Commission to all Justices of the Peace and Circuit Judges of Missouri, and of date February 11, 1938, in which form letter a part of Constitutional Amendment No. 4 creating the Conservation Commission is embodied, and in which form letter is also a resolution adopted by the Conservation Commission on January 17, 1938, which

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resolution directs that all Justices of the Peace, Circuit Clerks, "and all agencies which have to do with the assessment and collection of penalties for the infraction of the game and fish laws in the State of Missouri" be notified to transmit all funds accruing from fines levied by Justices of the Peace or Courts for infraction of the game and fish laws of the State to the Conservation Commission at Jefferson City, Missouri, within ten days following the assessment and collection thereof.

The form letter requests that effective March 1, 1938, all monies collected as fines for violation of the game and fish laws and regulations of the Commission "be remitted by you directly to the office of the Conservation Commission at Jefferson City, Missouri," and also states that upon receipt of the same, proper acknowledgement will be sent, and that the Conservation Agent will supply said Justices, Circuit Judges, etc., with proper remittance forms, etc.

We construe your question to be, tersely stated, the following: Do the fines collected in criminal prosecutions for violation of the Game and Fish Laws thereby become a part of the funds that must necessarily under the Conservation Commission Act be used for the purposes of that Act and no other?

In order for such fines to be so allocated by said Conservation Commission Act, it would be necessary that they be included in that part of the said Conservation Commission Act which recites:

"The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, * * * of the wild life resources of the state and for the administration of the laws pertaining thereto.

Section 8 of Article XI of the Constitution of Missouri, defining the source of the county school fund, states:

"All monies, stocks, bonds, lands and other property belonging to a county school fund; * * * also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the state * * * shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund * * *."

It will be noted that the Conservation Commission Act does not in terms say that all fines, or any fines, shall be expended or used by said Commission. It speaks of the term "fees" and of "funds arising from the operation and transactions of the commission," and the term "monies" as there used is given meaning by the other designations there made and is restricted to monies of the same general nature as those designated.

In United States v. Baumgartner, 259 F. 722, 725, speaking of the doctrine of ejusdem generis, the court says that it

"in its practical application simply means that 'general and specific words which are capable of an analagous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analagous to the less general.'"

The court there said:

"The same maxim or rule was stated by Lord Tenterden in a little different language: 'Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces "other" persons or things, the word "other" will generally be read as "other such like," so that persons or things therein comprised may be

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read as ejusdem generis with, and not of a quality superior to or different from, those specifically enumerated."

Under that rule it would seem that the fair meaning of the terms "fees, monies, or funds arising from the operation and transactions of said commission, and from the application and the administration of the laws and regulations" does not, as contained in said Conservation Commission Amendment, embrace and include the fines collected in criminal proceedings in enforcing the Game and Fish Laws. To hold that it did would be to repeal by implication Section 8 of Article XI of the Constitution, which latter specifically earmarks "all fines collected in the several counties for any breach of the penal * * * laws of the state."

Repeals by implication are not favored by the law, and neither a statute nor a constitutional provision will be repealed by implication by a later enactment of a statute or constitutional provision, respectively, if meaning can be given to both statutes or to both constitutional provisions. The more worthy desire and the course followed by the courts with reference thereto is to give force and effect to the earlier provision except insofar as the later provision is in conflict or wholly inconsistent with the earlier.

These fines are the result of the enforcement of the criminal laws of the State, rather than the administration of the provisions of the Conservation Commission Act. Said fines must necessarily come within the purview of Section 8 of Article XI, supra. Meaning can be given to this section and also to the Conservation Commission Act by holding that the fines so collected go to the public school fund. Meaning cannot be given to both acts as to the disposition of fines by holding that such fines go to the Conservation Commission.

CONCLUSION

It is our opinion that the fines collected in the counties, regardless of whether they be collected in proceedings before Circuit Courts or Courts of Justices of the Peace, as penalties for violation of the Game and Fish Laws cannot

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lawfully be paid direct to the Conservation Commission, and are not such monies or funds as are required under the Conservation Commission Act to be paid to or expended by said Conservation Commission, but, on the contrary, they are to be disposed of under the provisions of Section 8 of Article XI of the Constitution of Missouri, and required to be paid into the county public school fund.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

FISH AND GAME:

Prosecutions under chapter 43 Revised Statutes of Missouri, 1929, must be commenced within one year from date of violation.

April 5, 1938

4-7



Mr. Leo Politte,
Prosecuting Attorney,
Franklin County,
Union, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated April 1, 1938, for an official opinion, which is as follows:

"May a prosecution be instituted under Section 8236, Laws of Missouri, 1931, page 227 for felonious killing of a deer more than one year after the offense is alleged to have been committed, or does Section 8293 R.S. Mo., 1929, bar prosecution for felonious killing of deer after one years' time has expired.

Affidavit for information under Section 8236 has been filed against a defendant for feloniously killing a deer in 1936, but the Justice of the Peace refuses to bind the defendant over for trial in the Circuit Court until I obtain an opinion from your office on the above question. I would like to have an opinion on this question as early as possible because several prosecutions are waiting a decision in this matter."

Section 8236, Article II, chapter 43 of the Revised Statutes of 1929, was repealed in the Session Laws of Missouri, 1931, page 227, but was given the same section number as set

out in the Revised Statutes of Missouri, 1929, and is still a part of chapter 43, Article II of the Revised Statutes of Missouri, 1929. This section declared it unlawful to hunt for, or to kill or attempt to kill any deer, etc., and provided as a punishment at imprisonment in the state penitentiary for a term not exceeding two years, or by imprisonment in the county jail not less than thirty days, or by a fine of not less than one hundred dollars (\$100.00), or more than five hundred dollars (\$500.00), or by both such fine and imprisonment.

Under the general law of limitations of actions, the violation of this act could be prosecuted by commencement at any time within three years from the time of the violation, but under Section 8293, Article II, chapter 43 of the Revised Statutes of Missouri, 1929, the limitation has been reduced to the filing within one year. Section 8293 reads as follows:

"Limitation of prosecution.--Prosecutions under this chapter may be commenced within one year from date of violation of any provision of this chapter, either by indictment, complaint or information."

The word "may" as used in this section is mandatory and is used interchangeably with the words "shall" and "must". In the case of *Kansas City, Missouri v. J. I. Case Threshing Machine Co.*, 87 S.W. (2d) 195, 1.c. 205; 337 Mo. 913, the Court held:

"The words 'must, may, and shall' are constantly used interchangeably in statutes and without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the Legislature as determined by ordinary rules of construction. 59 C. J. 1081, Section 635; 25 R. C. L. 768, Section 12; 2 Lewis- Sutherland (2d Ed.) 1153, Section 640; Maxwell on Interpretation of Statutes (5th Ed.) 389; Endlich on Interpretation of Stat-

utes, 416-419, Sections 306, 307.
'A mandatory construction will usually be given to the word 'may' where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.' "*****"

As noted, Section 8293 limits the prosecution of all the violations under chapter 43 Revised Statutes of Missouri, 1929 in that it requires the commencement of the violation of any provision of this chapter to be commenced within one year while the ordinary limitations of a felony which is set out in Section 8236, Session Laws of 1931, page 927, is that the prosecution must be commenced within three years after the commission of such offense. This limitation is governed by Section 3392, Article 2, chapter 29 of the Revised Statutes of Missouri, 1929, which reads as follows:

"Indictments or informations required in three and five years, in what cases.--No person shall be tried, prosecuted or punished for any felony, other than as specified in the next preceding section, unless an indictment be found or information be filed for such offense within three years after the commission of such offense, except indictment or informations for bribery or for corruption in office may be prosecuted if found or filed within five years after the commission of the offense."

Section 3393, Article 2, chapter 29, R.S. Mo. 1929, reads as follows:

"When in one year.--No person shall be prosecuted, tried or punished for any offense, other than felony, or for any fine or forfeiture, unless the

indictment be found or prosecution be instituted within one year after the commission of the offense, or incurring the fine or forfeiture."

Also Section 3399, Article 2, chapter 29, R.S. Mo. 1929, reads as follows:

"Preceding sections construed.--
The preceding sections of this article shall not apply to any bill, complaint, information, indictment or action, which is or shall be limited by any statute to be brought, had, commenced or prosecuted within a shorter or longer time than is prescribed in said sections; but such bill, complaint, information, indictment or other suit shall be brought and prosecuted within the time limited by such statute."

Under this section any statute can be enacted which would limit the commencement for prosecution within a shorter or longer time than is prescribed in the general law. Sections 3392 and 3393, supra, cover the limitation of action under the general law. Section 8293, R.S. Mo. 1929 has made the limitation shorter than is usually set out in the general law. This section applies to all violations under Article 2, chapter 43 of the Laws of Missouri, 1929.

Section 8293, supra, is not ambiguous and plainly states that the action must be commenced within one year from the date of the violation of any provisions of chapter 43. In the case of O'Malley v. Continental Life Insurance Company, 75 S. W. (2d) 837 l.c. 839; 335 Mo. 1115, the Court held:

"The legislative intent in the enactment of the law is to be sought and effectuated. This is the rule of first importance in statutory interpretation. To ascertain such intent we invoke as aids such of the auxiliary rules of interpretation as may seem to bear with incidence as

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direct as may be upon the matter in hand. Briefly stated, these in substance recognize and require that the language of the act be considered (25 R.C.L., Section 216, p. 961); that each word be accorded its ordinary meaning, generally speaking; and that in construing a word or expression of a statute susceptible of two or more meanings the court will adopt that interpretation most in accord with the manifest purpose of the statute as gathered from the context (Id., Section 237, p. 994)."

In the case of State ex rel. Cobb v. Thompson, State Auditor, 5 S. W. (2d) 57, the Court stated:

"A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

* * *

"If the words (of the statute) are free from ambiguity and doubt and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can

be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.' Lewis-Sutherland Stat. Const. vol. 2 (2d Ed.) p. 698."

In the case of Dahlin v. Missouri Commission for the Blind, 262 S.W. 420, 1.c. 423, the Court said:

"A statute that is clear in its terms, and leaves no room for construction must be enforced as written but if it not clear, and there is any room for construction, then the reason and sense of the statute will control in determining its meaning."

The Legislature, in passing Section 8293, R.S. Mo. 1929, should have been aware that most felonies came within the statute of limitation of three years, and most misdemeanors came within the statute of limitation of one year, and by passing Section 8293, it was the intent of the Legislature that on actions under chapter 43 should be commenced within one year from the date of the violation.

The general law in respect to felonies, as stated before, relates that the commencement of the action must be commenced within three years from the date of the violation, but the special law as set out in Section 8293 sets out that under chapter 43, the commencement of the action must be commenced within one year from the date of the violation. In the case of State v. Harris, 87 S.W. (2d) 1026, 1.c. 1029; 337 Mo. 1052, the Court said:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary

repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."

In the case of *State ex rel. v. Brown*, 68 S.W. (2d) 55, 1.c. 59; 334 Mo. 78, the Court said:

"* * * * In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' *Tavis et al. v. Foley*, 325 Mo. 1050, 1054, 30 S.W. (2d) 68, 69; *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614, 626, 247 S.W. 129; *State ex inf. Barrett v. Imhoff*, 291 Mo. 603, 617, 238 S.W. 122. If there be any repugnancy between these two statutes, the general statute, section 4556, must yield to the special

statute, section 5613."

In the case of Tevis et al. v. Foley, 30 S.W. (2d) 68, 1.c. 69; 325 Mo. 1050, the Court said:

"* * * * In this situation the rule of construction is that, 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute.'" * * * * *

Betz v. Kansas City Southern Railway Company, 284 S.W. 455, 1.c. 462; 337 Mo. 913, the Court said:

"Judge Ragland, speaking for this court in banc in Grier v. Railway Co., 286 Mo. loc. cit. 534, 228 S.W. 457, reviewing the selfsame statute, recognized the well-settled rule when he said:

'The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used. All other rules are incidental and mere aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no office to fill. In such case there is no room for construction.'"'

Mr. Leo Politte

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April 5, 1938

CONCLUSION

In view of the above authorities, it is the opinion of this department that a prosecution cannot be instituted or commenced under Section 8236, Laws of Missouri, 1931, page 227, for the felonious killing of a deer more than one year after the offense is alleged to have been committed. Section 8293, R.S. Mo. 1929 provides for imprisonment in the state penitentiary and thereby designates the crime as a felony, but is not governed by Section 3392 which applies only as a general law in case of felony.

Section 8236 as above set out lawfully limits the commencement of the prosecution to a shorter term in conformity with Section 3399 of the Revised Statutes of Missouri 1929.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

MOTOR VEHICLES }
SCHOOL BUS }

School bus privately owned must be registered and obtain license plates.

April 22, 1938

4-22



Hon. John C. Pope
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 8, 1938, in which you request an opinion on the following question:

"Is a school bus driver, who owns his own bus and uses it only for the transportation of school children, required to purchase state automobile license plates?"

Section 7761, Extra Session Laws of 1933-34, is in part as follows:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank to be furnished by the commissioner for that purpose,".

The exception to the provisions of this section appear in Section 7767, R.S. Missouri, 1929, which is in part as follows:

"Motor vehicles used as ambulances, patrol wagons and fire apparatus, owned by any municipality of this state, shall be exempt from all of the provisions of this article while being

April 22, 1938

operated within the limits of such municipality, but the municipality may regulate the speed and use of such motor vehicles owned by them; and all other motor vehicles owned by municipalities, counties and other political subdivisions of the state shall be exempt from the provisions of this article requiring registration, proof of ownership and display of number plates:"

It is to be noticed that these exempted vehicles must be owned by the municipality, county or other political subdivision of the state.

Section 7761, supra, requires all motor vehicles to be registered and a license plate obtained except as "otherwise expressly provided". The exceptions to Section 7761 do not expressly exempt a motor vehicle unless it is owned by a political subdivision of the state. This school district - the political subdivision here - does not own this bus, but it is privately owned.

CONCLUSION

Therefore, it is the opinion of this department that a school bus, owned privately, even though used exclusively for the transportation of school children, must be registered and a license plate obtained therefor as provided in Section 7761, supra.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

TAXATION AND
REVENUE:

Expense of printing lists of delinquent lands under the Jones-Munger Law shall be paid out of the county treasury.

July 14, 1938

7-14



Hon. John C. Pope
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Mr. Pope:

We desire to acknowledge your request for an opinion on July 12th, in regard to who is liable for printing fee in publications for sale under the Jones-Munger Act, which is as follows:

"Would the county court be liable for the printer's fee for publishing the land descriptions of land to be offered for sale for delinquent taxes for the years 1935, 1936 and 1937 on tracts that were not sold and upon which there was no bid?"

That part of Section 9952 b of the Laws of Missouri 1933 relating to expense of printing the published list of delinquent lands is as follows:

"The expense of such printing shall be paid by the purchaser or purchasers of the lands and/or lots sold and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed the legal rate for the entire notice, as such legal rate is fixed by Sec. 13773, which cost of printing at the rate specified shall be taxed as part of the costs of the sale

July 14, 1938

of any land or lot contained in such list and disposed of at such sale, and the total cost of printing such notice shall be prorated against all such lands or lots so sold or redeemed prior to any such sale."

Said Section 9952b supra was amended in the Laws of Missouri 1935, at page 403, and that part of said section relating to the printing of published lists of delinquent lands, as amended, is as follows:

"The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

Said Section 9952b of the 1935 Laws of Missouri was in full force and effect before the publication for sale of lands on the first Monday in November of said year 1935.

CONCLUSION

Therefore, it is the opinion of this department that the expense of the printing of the lists of delinquent lands for sale under the Jones-Munger law for the years 1935, 1936 and 1937 shall be paid out of the county treasury.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
SVM:RT

COSTS: Sheriff entitled to fees, as set out in Section 11791, for duties performed under Section 3791, Session Laws 1937, page 222.

August 5, 1938

Honorable J. F. Ramsey, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

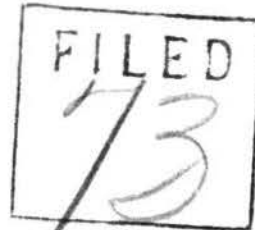
We acknowledge your request for an opinion dated July 5, 1938, which request reads as follows:

"The Laws of 1937, at page 221, make provision for the carrying out of the death sentence, when one is convicted and sentenced by the proper Courts, at the Missouri State Penitentiary under the supervision and direction of the Warden.

"Provision is also made for the certification of the action of said Courts to the Sheriff of the County in which conviction and sentence is had and, armed with this authority, the Sheriff is directed to deliver the one so convicted to the Warden at the proper time.

"As far as can be ascertained, no provision is made for paying the mileage, per diem or other items of cost necessarily incurred by the Sheriff for his services.

"Inasmuch as the convict is delivered to the Warden, not as a regular convict, but for safekeeping until the day of execution, the question has been raised as to whether



the aforesaid costs are properly chargeable to funds regularly appropriated for the support of the Penitentiary, or whether they should be taxed as costs in the Circuit Court where conviction is had and paid out of funds appropriated for the payment of criminal costs."

Section 3719, Laws of Missouri, 1937, page 222, reads as follows:

"When judgment of death is rendered by any court of competent jurisdiction a warrant signed by the judge and attested by the clerk under the seal of the Court must be drawn and delivered to the sheriff. It must state the conviction and judgment and appoint a day on which the judgment must be executed, which must not be less than thirty nor more than sixty days from the date of judgment, and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the warden of the State Penitentiary at Jefferson City, Missouri, for execution."

Under this section, the court must direct the Sheriff to deliver the defendant to the Warden of the State Penitentiary.

Section 11791, R. S. Mo. 1929, reads as follows:

" * * * For the services of taking convicts to the penitentiary, the sheriff, county marshal or other officer shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary, and each guard shall receive the sum of two dollars per day for the same, and the sheriff, county marshal or other officer

and guard shall receive five cents per mile for the distance necessarily traveled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the penitentiary; the sum of five cents per mile for each mile traveled, while being taken to the penitentiary, shall be allowed to the sheriff to cover all expenses of each convict while being taken to the penitentiary; and all persons, convicted and sentenced to imprisonment in the penitentiary at any term or setting of the court, shall be taken to the penitentiary at the same time, unless prevented by sickness or unavoidable accident. In cities having a population of two hundred thousand inhabitants or more, convicts shall be taken to the penitentiary not oftener than twice in any one month. When three or more convicts are being taken to the penitentiary at one time, a guard may be employed, but no guard shall be employed for a less number of convicts except upon the order, entered of record, of the judge of the court in which the conviction was had, and any additional guards employed by order of the judge shall, in no event, exceed one for every three prisoners; and before any claim for taking convicts to the penitentiary is allowed, the sheriff, or other officer conveying such convict, shall file with the state auditor an itemized statement of his account, in which he shall give the name of each convict conveyed and the name of each guard actually employed, with the number of miles necessarily traveled and the number of days required, which in no case shall exceed three days, and which account shall be

signed and sworn to by such officer and accompanied by a certificate from the warden of the penitentiary, or his deputy, that such convicts have been delivered at the penitentiary and were accompanied by each of the officers and guards named in the account."

As stated above, under Section 3719, Laws of Missouri, 1937, it provided that the defendant must be delivered by the Sheriff to the Warden, and in Section 11791, supra, it provided that in order that the Sheriff obtain his fees, the bill should be accompanied by a certificate from the Warden of the Penitentiary or his deputy that such convict had been delivered at the Penitentiary. Both the section under the 1929 statutes and the section under the 1937 Session Laws provided for the same duties of the Sheriff, and also provided for the taking of the convict to the Penitentiary. In reading the two sections together, and in construing the two sections together, one must look at the purpose of the two sections. Both sections had the same purpose and should be read together.

In the case of Betz vs. Columbia Telephone Company, (App.) 24 S. W. (2d) 224, the court said:

"To get at the true meaning of the language of the statute, the court must look at the whole purpose of the act, the law as it was before enactment, and the change in the law intended to be made."

Section 3719, Session Laws 1937, did not change the purpose of Section 11791, supra, and the Sheriff should be entitled to the same fees under Section 3719, Session Laws 1937, as he is entitled to under Section 11791, R. S. Mo. 1929. 59 C. J., at page 961, sets out the following:

"In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction

August 5, 1938

placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used."
(Citing Betz vs. Columbia Telephone Co., (App.) 24 S. W. (2d) 224.

Section 11791 does not say delivery for imprisonment, but says delivery to the Penitentiary, and the delivery must be certified by the Warden. Section 3719, Laws Missouri 1937, page 221, does not provide any other method of payment. Reading the two sections together, it was the intention of the Legislature to pay the Sheriff the fees allowed under Section 11791, supra, or some other payment would have been provided, for the reason that it specifically provided that the court must direct the Sheriff to deliver the defendant at a specified time to the Warden of the State Penitentiary at Jefferson City, Missouri, for execution.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the Sheriff is entitled to the fees as set out in Section 11791, R. S. Mo. 1929, for the taking of a convict to the Penitentiary under the duties imposed upon him by Section 3719, Session Laws of Missouri, 1937, page 222.

Yours very truly,

APPROVED:

W. J. BURKE,
Assistant Attorney General.

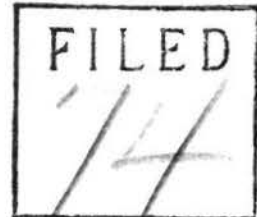
J. E. TAYLOR,
(Acting) Attorney General.

WJB:HR

LOTTERIES: Weekly drawings.

February 26, 1938

3/3



Mr. E. L. Redman
Prosecuting Attorney
Gentry County
Albany, Missouri

Dear Sir:

We have your request of February 24th for an opinion upon a scheme whereby prizes are given away to persons who register and who are required to be present at the time the prize is awarded in order to receive it.

This is nothing more than a lottery and is an identical plan with Bank Night heretofore condemned by the Supreme Court of this State and in most of the states of the Union.

Geo. Washington Law Review (May 1936)
pp. 475, 491.

Glover et al. vs. Malloska, 238 Mich.
216, 213 N.W. 107;

State vs. Danz, 250 Pac. 37, 140 Wash. 546;

Society et al. vs. Seattle, 203 Pac. 21,
118 Wash. 258;

Featherstone vs. Independent Service Station
Ass'n (Tex.) 10 S.W. (2d) 124;

State vs. Bader et al. 24 Ohio, N.P. (N.S.)
186, Affirmed in 21 Ohio L. Rep. 293.

Mr. E. L. Redman

-2-

February 26, 1938

CONCLUSION

It is therefore the opinion of this office that the drawing scheme referred to in your letter used by Montgomery Ward and others is in violation of the lottery law of this state.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

JURIES:
PETIT AND ALTERNATE:
SHERIFF'S FEE FOR SUMMONING:

Regular panel of petit jurors summoned at each regular term of the circuit court for which sheriff receives \$8.40 and mileage; alternate jurors only summoned when regular juror does not appear and when ordered by court.

April 12, 1938

4-15

Mr. E. L. Redman,
Prosecuting Attorney,
Gentry County,
Albany, Missouri.



Dear Sir:

This is to acknowledge yours of April 8, 1938, requesting an official opinion from this department, which is as follows:

"The County Court of this county has asked my opinion concerning a portion of the bill of the sheriff of our county for mileage and fees in summoning the regular list of alternate jurors, drawn by the County Court under the provisions of Sec. 8755, R.S. 1929.

In the regular way, prior to the January term of the Circuit Court, the County Court drew a list of petit jurors and alternate jurors and certified the lists to the Clerk of the Circuit Court. The Clerk of the Circuit Court, following a long practice here in this county, immediately thereafter prepared a summons for a jury to serve as petit jurors and affixed thereon the names of the regular petit jurors drawn by the County Court, which summons directed the sheriff to summons the therein named persons to appear before the judge of the Circuit Court of Gentry County on the 2nd day of the March term of Court, and also prepared and delivered to the sheriff at the same time a similar summons for

April 12, 1938

a jury, designating the list as alternate jurors, and commanded him in the same manner to summons them to appear to serve as alternate jurors for the Court on the same day. The sheriff served both of these summons and following a continuance of Court, because of illness of the judge, both sets of jurors appeared, the petit jurors and the alternate jurors. I would be pleased to have the opinion of your department as to whether or not the sheriff is entitled to his mileage and services for summoning the alternate jurors under the above circumstances.

I would like your opinion further concerning the construction of Sec. 8758 with regard to the term petit jurors, and as to whether or not that section contemplates that the clerk issue summons to the sheriff, or both the regular and alternate jurors, or for the regular petit jury only.

It would appear from the reading of Sec. 8756 and 8758 together that the alternate jurors should not be summoned by the clerk without order of Court after determining what regular jurors were disqualified or failed to appear."

Section 8755, R.S. Mo. 1929, provides in part as follows:

"The clerk of the county court so situated as to be unable to see the names on such slips shall, publicly, in the presence of said court and in open court, proceed to draw out names separately and singly from one township until he gets the number of names required from such township for petit jurors and an equal number as alternate jurors to serve on petit juries if summoned; and in the same manner shall continue to draw names from each of the remaining townships, separately and singly,

until he shall have drawn the names of twenty-four persons who shall serve as petit jurors at the next ensuing term of said court for which said petit jurors are drawn, and the names of twenty-four persons to be designated as alternate petit jurors, the names of said alternate petit jurors to be recorded and numbered consecutively from one to twenty-four, inclusive, in the order in which they are drawn:" * * * * *

From this section the law contemplates that only twenty-four men be drawn for the regular panel for each term of the circuit court. It also provides for the drawing of twenty-four alternate jurors for each such term. Webster's Dictionary defines the word "alternate" as:

"A substitute; one designated to take the place of another, if necessary in performing some duty."

With this definition of the word "alternate" in mind, the lawmakers enacted Section 8755, supra, providing for alternate jurors to take the place of regular jurors from the same township in case the regular juror for some cause does not serve. Section 8756, R.S. Mo. 1929 provides as follows:

"Except in cities having over three hundred thousand inhabitants, and in counties containing cities of fifty thousand inhabitants and less than three hundred thousand, whenever any person or persons drawn by the county court as a regular juror as provided in this article shall be disqualified or shall be excused by the court or for any reason shall fail to attend as such juror, the court shall order the sheriff to summon from the list of alternate petit jurors drawn by the county court a sufficient number of persons to serve as jurors for such term or part of term of said court

as follows: An alternate or alternates shall be summoned first from the township or townships in which the juror or jurors excused or failing to attend reside; and if for any reason an alternate from such township or townships cannot attend or be excused or the list of alternates from such township or townships shall have been exhausted then alternate petit jurors shall be summoned in the order in which their names shall have been drawn by the county court: Provided, that if it shall be necessary to fill vacancies in the jury panel for the trial of any one case the court may in its discretion order the sheriff to summon from the bystanders a sufficient number of qualified persons to fill such vacancies in such case."

This section clearly evidences the fact that the alternate juror is only to be summoned when and if the regular juror is disqualified or is excused by the court and then he is only summoned when so ordered by the court. Section 8758, R.S. Mo. 1929 provides as follows:

"The names of the persons so drawn shall be recorded by the county clerk in the records of the county court, and he shall as soon thereafter as practicable deliver to the clerk of the court for which such jury is drawn a certificate thereof, who shall record the same in a book to be provided for that purpose. And the clerk of the court for which the jury is drawn shall immediately thereafter issue a summons to the sheriff of the county, directing him to summon the persons thus drawn as petit jurors to appear on such day of the term of such court as shall be named in such summons by the clerk of said court to serve as petit jurors; and it shall be the duty of the sheriff to make service of such process at least

ten days before the first day of the term of court for which such persons are drawn, which summons shall be served by reading the same to the person so summoned or by leaving a copy of the summons at his usual place of abode with some member of the family over fifteen years of age, except in such cases as may be hereafter provided."

This section provides that when the list of petit jurors are drawn, they are to be certified by the county clerk to the circuit clerk who is then to issue a summons to the sheriff directing him to summons the petit jury only. The petit jury is a body of twenty-four men spoken of in Section 8755, supra. No provision is made in said Section 8758, supra, for summoning of the alternate petit jurors. The only provision we find for the calling of the alternate petit juror is found in said Section 8756, supra. Section 11789, R.S. Mo. 1929, provides as follows:

"Fees of sheriffs shall be allowed for their services as follows:

For summoning a standing jury... \$8.40."

By the term "standing jury", we think the law means the jury which is drawn by the county court and summoned by the circuit clerk on the certification of such list by the county clerk. This is the jury which, in ordinary terms, is standing by when the term of court opens and regardless of the number summoned, the statute provides for a fee of only eight dollars and forty cents (\$8.40). So if the clerk should, through a mistake, summons both the regular panel and the alternate panel, and the sheriff were to serve the summons on both panels, he has only summoned a standing jury for that term of the court and his fee for this service is prescribed by said Section 11789, supra, at eight dollars and forty cents (\$8.40), and for mileage as prescribed in said section.

As stated in the case of State ex rel. Troll v. Brown, 146 Mo. 401, 406:

April 12, 1938

"It is well settled that no officer is entitled to fees of any kind unless provided by statute, and being solely a statutory right statutes allowing the same must be strictly construed."

This ruling is and has been for a long period of time applied by the courts of this state.

By construing Sections 8755, 8756 and 8758 together it is apparent that it was intended that the regular panel of twenty-four jurors be summoned by the circuit clerk by authority of the certificate he receives from the county clerk as provided by said Section 8758, and that the alternate jurors be summoned only when ordered by the court as provided by said Section 8756, supra.

As there is no statutory authority for the circuit clerk to issue the summons for the alternate juror without an order of the circuit court, such act by the circuit clerk without such order, would be null and void, and as the sheriff is charged with the knowledge of the law on this question, any act he would perform under such a void summons would be null and void. As the statute provides only for the payment for services directed by the law, the sheriff would not be entitled to a fee for service or for mileage for summoning alternate petit jurors unless they are ordered by the circuit court.

CONCLUSION

It is, therefore, the opinion of this department that the sheriff is not entitled to mileage or to a fee for summoning an alternate petit juror unless he is so ordered by the circuit court.

Respectfully submitted,

TYRE W. BURTON,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SCHOOLS: Section 9284, R. S. 1929, governs the length of term of the school. The county superintendent cannot compel rural districts to hold more than eight months term.

May 4, 1938

5-5

Honorable E. L. Redman
Prosecuting Attorney
Gentry County
Albany, Missouri



Dear Sir:

This Department is in receipt of your letter of April 16, wherein you make the following inquiry:

"The county superintendent of schools of this county has recommended, as a part of his program for school advancement, nine months of school for the rural districts. Some of the districts are inquiring of him as to whether or not they can at this date provide for a nine months term.

"I should like an opinion of your office as to whether or not the board of directors of a common school has the power to extend the length of the school term to nine months where the issue has not been presented to the voters of the district. Also on that point, is there any other method provided for the extension of the term of rural schools, other than the provision for voting upon the question in the annual school election under the provisions of Sec. 9283, R. S. 1929?"

We have carefully consulted every statute which bears on the question which you present, and herewith quote every section which apparently throws any light on the matter.

Section 9195, R. S. Mo. 1929, is as follows:

"Whenever any school district in this state, now organized or that may be hereafter organized under the laws of this state, shall fail or refuse, for the period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body, and the territory theretofore embraced within such lapsed district shall be deemed and taken as unorganized territory, and the same, or any portion thereof, may be attached to any adjoining district or districts for school purposes, in the same manner as is now provided in section 9273: * * * *

Section 13, Laws of 1931, page 340, is as follows:

"The board of directors of each and every school district in this state is hereby empowered and required to maintain the public school or schools of such district for a period of at least eight months in each school year. In order that each and every district may have the funds necessary to enable the board of directors to maintain the school or schools thereof for such minimum term and to comply with the other requirements of this act, it is hereby provided that when any district has legally levied for school purposes (teachers' wages and incidental expenses) a tax of not less than twenty cents on each one hundred dollars of the assessed valuation of property therein, such district shall

be allotted out of the public school fund of the state an equalization quota to be determined by adding seven hundred and fifty dollars for each elementary teaching unit to which the district is entitled according to the provisions of section 14 of this act, one thousand dollars for each high school teaching unit to which the district is entitled according to the provisions of section 14 of this act, and the amount approved for tuition and transportation according to the provisions of section 16 of this act, and then subtracting from the total, which total shall be known as the minimum guarantee of such district, the sum of the following items: * * *

Likewise, we have examined the statute relative to the powers of the county superintendent of schools. Defining generally and enumerating the powers of the county superintendent of schools is Section 9457, R. S. Mo. 1929. Among the powers enumerated in said section we find nothing which could be construed as giving the county superintendent blanket authority to require all districts to maintain a nine months school.

By careful analysis of the sections heretofore quoted we find nothing which could be construed to authorize the board of its own initiative to maintain more than an eight months school, or, in other words, a nine months school. The board of education, or a board of directors, is created by statute and its powers and functions are expressly delegated to said board by statute. As was said in the case of Consolidated School Dist. No. 6. v. Shawhan, 273 S. W., 1. c. 184:

"Plaintiff district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it. *Armstrong v. School District*, 28 Mo. App. 169. It is conceded that plaintiff is an incorporated school district under the law, and that defendants were the legally elected directors thereof. It was held in *Bent v. Priest*, 86 Mo. 475, 482:

"The directors of a corporation occupy a fiduciary position. They are trustees and agents of the corporation and stockholders. In general they are governed by the same rules as are applied to trustees and agents."

The only remaining section pertinent to the question is Section 9284, R. S. Mo. 1929, the pertinent part being as follows, and particularly sub-section denominated "Fourth":

"To determine, by ballot, the length of school term in excess of eight months * * * *"

Conclusion.

We are of the opinion that the provision of Section 9283, R. S. Mo. 1929, mentioned in your letter, providing for the annual meeting, and the provisions of Section 9284, R. S. Mo. 1929, which outlines and enumerates the powers and the questions to be determined at the annual meeting, govern the length of the term of a school district; that the question of the length of the term is a matter to be determined by the patrons and the qualified voters of a rural school district and that neither the board of directors nor the county superintendent has the power to exceed the terms of the statute and determine of their own volition as to whether or not the length of the term shall exceed eight months.

Respectfully submitted

OLLIVER W. NOLAN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

LOTTERIES: GIVE*AWAY*NIGHT.

June 24, 1938

6-25



Mr. Virgil L. Rathbun
Prosecuting Attorney
Nodaway County
Maryville, Missouri

Dear Sir:

We have your request of June 22, 1938, for an opinion relative to "Give-Away-Night" at a local theater. This plan is described as follows:

"In short, he proposes to give away a cash prize once a week, anyone, whether a patron of his theater or not, can participate, without purchasing a ticket to the show. The drawing is held at the theater on a given night each week, but the participant does not have to be a ticket-holder to be eligible to the drawing. I enclose the letter of this theater owner, outlining his plan."

Your letter concedes that the two elements of a lottery, namely, prize and chance, are present in this scheme. The sole question turns upon the element of consideration.

The scheme as outlined in your letter is nothing more than the old Bank Night scheme recently held to be a lottery by the Supreme Court of this State, (Opinion not yet published). The mere fact that the theater intends to give away free chances and does not intend to require the

participants to purchase a ticket or pay an admission to the theater does not relieve the scheme of the lottery feature. There is still consideration present in the scheme. George Washington Law Review (May 1936), pp. 475, 491; Glover et al. vs. Malloska, 238 Mich. 216, 213 N.W. 107; State vs. Danz, 250 Pac. 37, 140 Wash. 546; Society et al. vs. Seattle, 203 Pac. 21, 118 Wash. 258; Featherstone vs. Independent Service Station Ass'n. (Tex) 10 S.W. (2d) 124; State vs. Bader et al. 24 Ohio, N.P. (N.S.) 186, Affirmed in 21 Ohio L. Rep. 293.

It is clear that those who call at a promoter's place of business, or give him their names and addresses, or submit themselves to his sales appeal, or otherwise put themselves to trouble or inconvenience, even of a slight degree, or perform some service, however small, and do the same at the suggestion, invitation or request of the promoter and in accordance with his offers, such acceptances, if made in order to qualify for participation in a distribution of prizes by chance sponsored by said promoter, constitute consideration in lottery law, except where some statute, as in Com. vs. Wall (Mass), 3 N.E. (2d) 28, uses the word "money". Thomas, Lotteries, Frauds and Obscenities in the Mails, p. 35. Thomas, Non-Mailable Matter, s. 16, p. 35. George Washington Law Review, May 1936, pp. 475, 491, n. 48. Brooklyn Daily Eagle vs. Voorhies, 181 Fed. 579. Maughs vs. Porter, 157 Va. 415, 161 S.E. 242 (1931).

It is wholly immaterial whether those participating in a drawing, walk or ride one hundred feet or one hundred miles to reach the place of drawing, because the distance traveled goes only to the amount of consideration. In construing an Illinois statute against the setting up of a lottery (in this respect similar to the Missouri statute) it was held that the performance of labor was a sufficient consideration to constitute the scheme a lottery. Loveland vs. Bode, 214 Ill. App. 399.

June 24, 1938

It is not necessary that the promisor receive any benefit, or that people pay directly or purchase a ticket. *Brooklyn Daily Eagle vs. Voorhies*, 181 Fed. 579, but the question is: Did the promisee (public) suffer any detriment or inconvenience? Consideration may be either a benefit to the promisor or a detriment to the promisee. *McNulty vs. Kansas City*, 198 S. W. 185. The promise made to the public by petitioner is to award a prize of a fixed sum of money. In accepting this promise, what loss, trouble or inconvenience is sustained by the public? If there is any loss, trouble or inconvenience, there is consideration given by the public. *Mayfield vs. Eubank*, 278 S.W. 243, 246; *Mayers vs. Groves, Brothers and Co.* 22 S.W. (2d) 174, 1. c. 177.

CONCLUSION

It is therefore the opinion of this office that the weekly "Give-Away-Night" is a lottery prohibited by Section 4314 R. S. Missouri 1929.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

CRIMINAL LAW) A person receiving or holding stolen property
VENUE) may be informed against in any county in which
he receives or holds such property.

November 25, 1938

11-26



Hon. E.L. Redman
Prosecuting Attorney
Gentry County
Albany, Missouri

Dear Mr. Redman:

This is in reply to your letter of recent date wherein you request an opinion from this Department on the question of where the venue is laid in the case of a person receiving stolen property in violation of the provisions of Section 4083 R.S. Missouri 1929. Your query goes to the point "Does the statute contemplate two offenses, one buying and one receiving stolen property, or is it but one offense, and will it take the delivery and final receiving of the hogs to complete the fact of the buying?"

The section to which you refer of buying and receiving stolen property is 4083 R.S. Missouri 1929, which is as follows:

"Every person who shall buy, or in any way receive, any goods, money, right in action, personal property, or any valuable security or effects whatsoever, that shall have been embezzled, converted, taken or secreted contrary to the provisions of the last four sections, or that shall have been stolen from another, knowing the same to have been so embezzled, taken or secreted, or stolen, shall, upon

conviction, be punished in the same manner and to the same extent as for the stealing of money, property or other thing so bought or received."

From the case which you have referred to in your request it seems that these two brothers have bought these hogs in one county and had them delivered to another county and then have held them in another county, and you are wondering now as to where the venue is laid in such a case. We note that Section 3378 R.S. Missouri 1929, fixes the venue of such cases. This section reads as follows:

"When any person shall be liable to prosecution as the receiver of any personal property that shall have been feloniously stolen, taken or embezzled, he may be indicted, tried and convicted in any county where he received or had such property, notwithstanding such theft or embezzlement was committed in another county."

Reading these two sections together it seems that the offense of Section 4083 is the receiving and holding of such property and that a person may be charged under Section 3378 with the commission of this offense in any county in which he receives or holds such property, notwithstanding that such property may have been purchased or taken in any other county.

CONCLUSION

This Department is therefore of the opinion that any person who buys, or in any way receives any goods, money, right in action, personal property or valuable security or effects whatsoever that have been embezzled, converted, taken

Hon. E. L. Redman

-3-

November 25, 1938

or secreted contrary to the provisions of the criminal laws, or which have been stolen from another knowing the same to have been so embezzled, taken, secreted or stolen may be prosecuted in any county in this state where such party may receive or hold such property taken as aforesaid.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:MM

SPECIAL ROAD DISTRICTS: Commissioners of special road districts organized under Article 9, Chapter 42, R. S. Mo. 1929, can not levy tax for maintenance purposes, nor can they divert money raised for payment of interest and bonds to maintenance fund.

January 17, 1938/7

Mr. W. B. Rissler
Clerk of the County Court
Sedalia, Missouri



Dear Sir:

This department is in receipt of your letter of some time ago, wherein you requested an official opinion based on the following facts:

"Before certifying the Road Levy, recommended by our Special Road District Commissioners, the County Court will appreciate an opinion from your office in regard to the Road Tax levied by our Special Road Districts for maintenance purposes.

"Pettis County is not a Township Organization and none of the Special Road Districts are organized under Section 8067 (Benefit Assessment): However, the Commissioners of certain Special Districts have certified a tax levy in excess of the amount required for the payments of Bonds and Interest, without a vote by the Inhabitants of the District.

"This levy is in addition to the General Road levy made by the County Court under Sections 7890 and 7891.

"The Railroad Companies contend the levy made by the Commissioners of Special Road Districts in excess

of that required for Interest and Redemption of Bonds, is illegal, unless authorized by a vote of the inhabitants of the District.

"An early opinion will be appreciated in order that we may proceed with the extension of taxes on our 1937 Tax Books."

It is apparent from your inquiry that the special road districts referred to are those organized under the provisions of Article 9, Chapter 42, R. S. Missouri 1929, and this opinion is directed accordingly.

Such districts are creatures of statutes and have only such powers as are expressly granted to them by statute. As was said in Harris vs. Bond Company, 244 Mo. 664, l.c. 695:

"These special road districts are newly-born citizens, dressed by the legislature in their own garbs, and they possess only such authority and rights as are expressly conferred upon them by the statutes of their creation."

Levies for taxes to create funds for the roads and bridges in said districts are provided for as follows:

Section 7890, R. S. Missouri 1929 reads:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road

tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

Section 22, Article 10, Constitution of Missouri, provides as follows:

"In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article X of the Constitution of this State, the county court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as State and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever, and the power hereby given said county courts and township boards is declared to be a discretionary power."

Section 23, Article 10, Constitution of Missouri, provides as follows:

"In addition to the taxes now authorized to be levied for county purposes, under and by virtue of section 11 of article 10 of the Constitution of this State, and in addition to the special levy for road and bridge purposes authorized by section 22 of article

X of the Constitution of this State, it shall be the duty of the county court of any county in this State, when authorized so to do by a majority of the qualified voters of any road district, general or special, voting thereon at an election held for such purpose to make a levy of not to exceed fifty cents on the one hundred dollars valuation on all property within such district, to be collected in the same manner as state and county taxes are collected, and placed to the credit of the road district authorizing such special levy. It shall be the duty of the county court, on petition of not less than ten qualified voters and taxpayers residing within any such road district, to submit the question of authorizing such special election to be held for that purpose, within twenty days after filing of such petition."

Section 8042, R. S. Missouri 1929, provides that all money collected as county taxes for road purposes, or for road and bridge purposes upon property within such special road district shall be credited to the special road district wherein said property is located, and shall be turned over to the commissioners of such special road district.

It will be seen from the above that taxes for road purposes in these special road districts are to be levied by the county court of the county in which said district lies. There is no provision in the law touching these special road districts whereby the districts themselves are authorized to levy taxes for maintaining roads and bridges.

Your inquiry suggests that it is the practice in your county for commissioners of such special road districts to certify to the county court a tax levy in excess of the amount

required for the payment of maturing bonds and accruing interest, with the intention of creating a maintenance fund for said district over and above the amount needed for said interest and maturing bonds. As stated above, the commissioners of said district have no authority to levy any tax. The money necessary to pay accruing interest on outstanding bonds and also to pay maturing bonds of such districts, is provided for by Section 7961, R. S. Missouri 1929, wherein, after providing for an election to test the sense of the voters of such district upon a proposition to issue bonds, it is said:

"If it shall appear that two-thirds of the voters voting at such election on said question shall have voted in favor of the issuance of said bonds, the board of commissioners of the special road district, or the county court, as the case may be, shall order and direct the execution of the bonds for and on behalf of such special road district or township, and shall provide for the levy and collection of a direct annual tax upon all the taxable property in said district or township sufficient to provide for the payment of the principal and interest of the bonds so authorized as they respectively become due. It shall be the duty of the clerk of the board of commissioners on or before the first day of May in each year, or the state auditor immediately thereafter, in case the clerk of the board of commissioners should fail or neglect, on or before the first day of May of each year, so to do, to certify to the county court of the county, or counties, wherein such road district is situated, the amount of money that will be required during the next succeeding year to pay interest falling due on bonds

issued and the principal of bonds maturing during such year. On receipt of such certificate it shall be the duty of the county court, or courts, at the time it makes the levy for state, county, school and other taxes, to, by order made, levy such a rate of taxation upon the taxable property in the road district, in such county or counties, as will raise the sum of money required for the purposes aforesaid."

While it is the duty of the clerk of the commissioners to certify to the county court the amount of money that will be required during the next succeeding year to pay interest falling due on bonds issued and the principal of bonds maturing during such year, yet in the last analysis, the county court is the authority which makes the levy of the tax, and it is the duty of the county court to determine what the amount of such tax should be.

It will be noted from the above portion of the statute quoted that after receipt of the certificate from the clerk of the commissioners of such district, it shall be the duty of the county court to make a levy of such a rate of taxation upon taxable property in the said district "as will raise the sum of money required for the purposes aforesaid". It seems clear that the court should determine the amount of money required for said purposes and that it would not be bound by the amount certified to them by the clerk as being necessary.

The funds derived from the levy, as determined by the county court, as being necessary to pay accruing interest and maturing principal of the bonds of said district, could not be used for maintenance purposes, even though there were an excess left after paying the amount due for that particular year. The funds for the maintenance of roads and bridges of such district are provided for as set forth in the first part of this opinion. The levy for interest and maturing principal of bonds is a special fund raised for a special purpose and could not be diverted to the maintenance of roads and bridges. The general principle as to diversion of tax monies is stated

in 61 C. J. page 1521, para. 2235, wherein it is said:

"Taxes which are set apart by the constitution of the state for particular uses cannot be diverted by the legislature to any other purpose, and neither can funds derived from taxes levied and collected for particular purposes be legally utilized for, or diverted to, any other purpose, some constitutional provisions expressly so providing."

Said Section 7961 above referred to further carries out the provisions of Section 12, Article 10, Constitution of Missouri, wherein it provides as follows:

"That any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same: * * * "

Any excess remaining after payment of the amount due for any year would constitute a sinking fund for the retirement of said bonded indebtedness as it would accrue thereafter.

While it is the duty of the county court to levy only such sum as would be reasonably necessary to pay the accruing interest and maturing principal of the bonds for such year,

yet a taxpayer could not refuse to pay the tax on account of it being excessive, unless he could show that the levy was grossly excessive. As was said in *State ex rel Johnson vs. Railroad Company*, 315 Mo. 1.c. 435, 436:

"Exactions from the people, as taxes or otherwise, in advance of any needs of the government are not only condemned by sound public policy but are violative as well of fundamental rights guaranteed by our organic law. The County Court of Cass County was therefore without power to levy a tax clearly in excess of what could at the time have been reasonably anticipated as necessary to pay the interest and principal of the funding bonds. However, the authority to determine what amount would be necessary for that purpose was vested in it, and unless there was a clear abuse of this discretionary power, its action in the premises cannot be interfered with. In other words, the amount levied must have been so grossly excessive as to constitute, constructively at least, a fraud upon the taxpayers. (*St. Louis Electric Bridge Co. v. Koeln*, ante, page 424; 3 *Cooley on Taxation* (4 Ed.) sec. 1031, p. 2088.)"

CONCLUSION

It is, therefore, the opinion of this department that the county court of your county should determine the amount of the levy which will be necessary to pay accruing interest and maturing principal of the bonds of such road districts organized

under the provisions of Article 9, Chapter 42, R. S. Missouri 1929, and that where such court finds the amount certified as necessary for said purposes by the clerk of the commissioners of special road districts is grossly in excess of the amount actually needed for said purposes, such county court should disregard the certification of said clerk and determine a levy which will yield the amount actually required.

It is also the opinion of this department that any funds remaining from the levy for interest and maturing principal of said bonds of said districts can not be used as a maintenance fund for said districts, but that the same would constitute a sinking fund for the retirement of the bonded indebtedness of said districts.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:RT

ELECTIONS:

Signer of petition may withdraw names any time before sufficiency of petition is determined.

October 14, 1938



Mr. E. Jay Rice
Presiding Judge
County Court of
Texas County
Houston, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads as follows:

"Some three weeks ago a petition was filed with the County Court, Texas County, Missouri, asking for a vote on 'County-wide Stock Law.' This petition was presented and filed early in September, and now a petition is filed by a number of the signers of the original petition asking that their names be stricken from the original petition.

"Can these signers of the original petition eliminate their names from this original petition by filing a petition asking that they be not considered as signers of the original petition?"

Section 12805, R. S. Mo. 1929, provides as follows:

"The county court of any county in this state, upon the petition of one hundred householders of such county, at a general election, and may upon such petition of one hundred householders, at a special election, called for that purpose, cause to be submitted to the quali-

fied voters of such county the question of enforcing, in such county, the provisions of this article. Said petitioners shall state in their petition to said court what species of the domestic animals enumerated in section 12797 of this article they desire the provisions of this article enforced against, and may include one or more of said animals in said petition; and said court shall cause notice to be given that such vote will be taken, by publishing notice of the same in a newspaper published in such county, for three weeks consecutively, the last insertion of which shall be at least ten days before the day of such election, and by posting up printed notices thereof at three of the most public places in each township in such county, at least twenty days before said election; said notices shall state what species of domestic animals on which the vote will be taken, to enforce the provisions of this article against running at large in such county, which shall be the same as petitioned for to said court."

It will be noted that the statute quoted above does not contain any express provision for the withdrawal of the signatures of the petitioners. 11 L. R. A., N. S. 372, states:

"None of the cases deny the right of the signer of a petition * * to withdraw his name therefrom while the same is in circulation for further signers and before it has been filed or presented to the person or body to whom it is addressed."

As was said in *Dagley v. McIndoe*, 190 Mo. App. 166:

"The statute * * * contains no express prohibition against the withdrawal of

a signer before the petition is acted upon and we can see no good reason for placing a strict construction on the statute with respect to withdrawal."

The question, therefore, is as to the particular stage of the proceedings in which this right to withdraw may be exercised. Where a petition is presented by a certain number of householders asking that a certain question be submitted to the voters of the county, it is the duty of the county court to ascertain whether the requisite number of signatures are attached to the petition. It is not until this matter is determined does the county court have jurisdiction to call the election. The authorities are in harmony that until the sufficiency of the petition is ascertained that the right of withdrawal still exists and it is not until the sufficiency is determined does the jurisdiction of the county court attach.

As was said in Mack v. Polecat Drainage District, 216 Ill. 56, 74 N. E. 691:

"* * * it was the duty of the court to ascertain whether the petition had been signed by the requisite number of property holders. Until these facts had all been determined, the court did not acquire general jurisdiction of the case; * * * * *"

In Littell v. Board of Supervisors, 198 Ill. 205, 65 N. E. 78, it is stated:

"Our examination of the decisions cited by council on either side from other courts on analogous statutes has led us to the conclusion that the act of signing such petitions is not an irrevocable act, and that it may be revoked at any time before the jurisdiction of the body authorized to act has been determined by it."

The status of the petition and its effect after being filed is given as follows in Board of Education of Putnam County v. Board of Education of Hartsburg, 146 N. E. 816:

"* * * the filing of the petition merely invokes the jurisdiction of the board or tribunal, and therefore the withdrawal of the names by the electors who originally signed them to the petition is permissible until the time that official action is taken upon the petition. The electors, having a right to invoke the jurisdiction of the board or tribunal, are entitled any time before jurisdiction is assumed by the board or tribunal to revoke their action. Withdrawal of the names does not render ineffectual the action of the board or tribunal because none has been taken, but simply nullifies the invoking of the jurisdiction. * * * * *"

The views expressed above have been followed by the court in this jurisdiction. In Fleming v. Fones, 91 S. W. (2d) 208, and Dagley v. McIndoe, 190 Mo. App. 166, 176 S. W. 243, it was held that signers of a petition filed with a city clerk could withdraw their names after the same had been filed but before the clerk had made his certificate to the council. Both cases hold that it is the duty of the city clerk to determine the sufficiency of the petition by ascertaining whether the signers meet the requirements of the statute and until he does determine this question that the right of withdrawal exists, however, once the petition has been determined to be sufficient in all respects by the clerk, and he has made his certificate to the city council then the right of withdrawal ceases to exist.

Mr. E. Jay Rice

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October 14, 1938

It is, therefore, the opinion of this department that persons who petition the county court to submit at an election a question of whether a stock law should be enforced in the county, may withdraw their names from said petition any time before the county court passes upon the question of whether the petition is sufficient. After the county court decides that the petition is sufficient the right of withdrawal ceases to exist.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

HEALTH:

DEFINITION OF **PUBLIC** HEALTH
NURSE:

is one
Public health nurse who is licensed and
registered as a nurse in Missouri and who
aids in the promotion of wholesome,
sanitary condition of community at large and
who is paid compensation out of the public
funds.

January 31, 1938

Mr. James S. Rollins,
Director of Department of Public
Health Education,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated
January 22, 1938, for an official opinion from this department
which is as follows:

"Will you kindly furnish this depart-
ment with a definition of the term,
"Public Health Nurse".

Under the provisions of Section 9039
R.S. Missouri 1929, a county may secure
a public health nurse by petition of
250 taxpayers. Some counties are attempt-
ing to evade the meaning of this Section
by appointing nurses who are entirely un-
qualified and who do not fit into the
general plan of the public health pro-
gram. Sections 13485 and 13488 give the
necessary requirements for a graduate
nurse. Under the requirements of the
United States Public Health Department
certain further courses are required.
(See enclosed pamphlet)

The United States Public Health Service
will educate any of these nurses along
public health lines who is under thirty
five years of age so it will not be any
expense to them."

Your request involves the construction of certain statutes
of Missouri pertaining to the health department of the state.
Section 13485 R.S. Mo. 1929 is as follows:

"No graduate nurse shall practice pro-
fessional nursing for hire, unless
licensed by the board as hereinafter
provided; except that no provision

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hereof shall be construed to prohibit gratuitous nursing, healing, or care of the sick by friends or members of the family or to prohibit nursing or care of the sick for hire, provided, that, said parties shall not in any way assume to be a registered nurse or attendance in the eleemosynary institutions of this state and of cities in this state now or hereafter having a population of 300,000 inhabitants or more; and except further that in the event of public emergency pronounced by the state board of health to exist in the state at large or any part thereof, unlicensed persons shall be permitted to nurse or care for the sick for hire during the continuance thereof. A person violating this chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) for each offense."

Section 13486 R.S. Mo. 1929 provides as follows:

"The board shall issue a license to practice as a registered nurse or registered obstetrical nurse in the state of Missouri.

1. Any person who shall be admitted to and pass the board's examination therefor.

2. Any applicant of good character who prior to January 1, 1924, shall submit to the board satisfactory written evidence, verified by oath if required, of

a. The right to practice as a registered nurse in the state of Missouri at the time of the passage of this chapter and payment of a fee of (\$1.00); or

b. Residence in the state of Missouri at the time of the passage of this chapter, graduation prior thereto from a school of nursing giving a two-years' course acceptable to the board, and a payment of a fee of (\$15.00); or

c. Graduation prior to the passage of this chapter from a school of nursing, accredited with the board under this chapter and payment of a fee of (\$15.00).

3. Any applicant of good character from another state or a foreign country who shall pay a fee of (\$15.00) and submit to the board satisfactory evidence, verified by oath if required, of due registration, as a registered nurse by another state or country, if in the judgment of the board said applicant's individual qualification be the equivalent of those required by this chapter."

As to the qualifications for admission to the examination for a license, Section 13488 R.S. Mo. 1929 provides as follows:

"The board shall admit to examination for license to practice as a nurse any applicant who shall pay a fee of \$15, and shall submit to the board satisfactory written evidence, verified by oath, if required, that said applicant:

1. Is twenty-one years of age;
2. Is of good moral character;
3. Has completed at least at least one year's course of study in a high school, or its equivalent except as otherwise provided in section 13489 hereof; and
4. Has been graduated from an accredited school of nursing giving at least a two-years' course in which the theory taught shall be proportioned to practice in a hospital to the satisfaction of the board. An applicant failing (to) pass such examination shall be re-admitted to re-examination within one year thereafter without a payment of an additional fee."

and Section 13490 R.S. Mo. 1929 makes the following provision pertaining to the qualification of applicant to take the examinations which are as follows:

"In lieu of requirement of sections 13488 and 13489 hereof, the board shall, after July 1, 1925, accept the following as

satisfactory preliminary education of applicants for examination for license as nurses.

1. Until July 1, 1925, graduates from grammar school or its equivalent.

2. Thereafter the successful completion of one year high school or its equivalent. But no applicant for examination after July 1, 1925, shall be debarred from such examination because of insufficient preliminary examination provided such applicant shall have matriculated in a school for nurses prior to July 1, 1925."

By Section 13492 R.S. Mo. 1929 it provides for the registration of such parties who have been licensed by the state board with the county clerk and when the party has thus registered in the office of the county of the licensee's residence, she is issued a certificate of registration and then is duly registered nurse in such county of her residence. Section 9036 R.S. Mo. 1929 is as follows:

"Whenever the state board of health considers it necessary to secure the aid and services of a visiting public health nurse, or to disinfect any building, residence or room in any hotel or dormitory, or other place in such city or county infected with infectious or contagious diseases, such board shall make formal written report of such fact to the county court or mayor of any city of the second, third, or fourth class, or both such court and mayor, and therein recommend the course of action necessary and advisable to be taken in relation thereto to prevent the spread of such infectious or contagious diseases; and in case said report is made to the mayor of any city he shall lay the same before the city council at its next meeting, and the said city council and the said county court at its next meeting after said report has been made as aforesaid, shall consider said report and recommendation and act upon it, and such city council and county court shall each be authorized to employ, at a fixed monthly compensation, a public health nurse, qualified

for such service by registration as such according to the laws of this state, to visit any family, home, boarding house, dormitory or club in which is a member or members, a person or persons afflicted with a contagious or infectious disease, and upon the consent of such person or family or parent or guardian, if a minor, to assist in nursing said person and to advise such person and the persons or members of the family, boarding house, dormitory or club, as to the proper methods to be pursued to prevent the spread of such infectious or contagious disease, and also to authorize some other proper person or persons to visit and disinfect any building, residence, room in any hotel or dormitory or other place therein infected with such infectious or contagious disease upon the consent of the owner thereof."

The nurse who is employed by virtue by provisions of the foregoing section, must be a registered nurse and registered under the provisions of section 13492, supra, and such person cannot become a registered nurse unless they have the license required by provisions of Section 13486 R.S. Mo. 1929 and such person is not authorized to take the examination for the license until they possess the qualifications required by Sections 13486, 13488 and 13490, supra. Section 9039 R.S. Mo. 1929 provides as follows:

"In case a petition is signed by two hundred and fifty taxpayers and presented to any city council of the second, third or fourth class or any county court, asking for the appointment of a public health nurse or nurses or that any place infected with infectious or contagious disease be disinfected, as designated in section 9036, it shall be the duty of said city council or county court, as the case may be, to provide for the appointment of said nurse or nurses and for the disinfecting of any infected place and to pay for the same as provided for in section 9038 hereof."

The sections cited above set out the plan and system provided by the legislature for the registration of nurses and section 9036 R.S. Mo. 1929 provides that the county health nurse shall be qualified for such service by registration as such according to the laws of the state of Missouri. From a reading of sections 9036 and 9039, it is quite evident that section 9039 hinges on section 9036 and for that reason the two sections should be read together and the nurse who is employed by public officials by virtue of the provisions of section 9039 should have the qualifications of the nurse designated in section 9036 which are:

"Registration as such according to the laws of this state."

It is very evident that the legislature intended that no person should be employed as a public health nurse and paid out of public funds unless they have the proper license and have been registered in the county of their residence.

"Public health is defined as meaning the wholesome, sanitary condition of the community at large."
State ex rel Pollock v. Becker, 289 Mo. 660.

By sections 9036 and 9039, supra, the way and means are provided by which a nurse may be obtained by a city or county for the general public health and section 9038 R.S. Mo. 1929 provides that such nurse may be paid out of the public funds.

CONCLUSION

It is, therefore, the opinion of this department that the definition of the term, "public health nurse" as applicable to the Missouri law is licensed and registered nurse under the laws of this state and who is employed to aid and promote the wholesome, sanitary condition of the community at large in which she is employed, and one who is paid compensation out of the public revenues.

It is also the opinion of this office, that by virtue of the provisions of sections 9036 and 9039, supra, the public

Mr. James S. Rollins

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1/31/1938

health nurse must be qualified for such service by registering in the county of her residence according to the laws of the State of Missouri, especially section 13492 R.S. Mo. 1929.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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INSURANCE DEPARTMENT:

Approval of Affidavit of Change
in Number of Directors of Postal
Life & Casualty Insurance Company.

February 3, 1938.

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Mr. George A. S. Robertson
Superintendent of Insurance
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter of
January 27th, in which you enclosed an Affidavit
of Change in Number of Directors of Postal Life
& Casualty Insurance Company, for our attention.

We have examined the Affidavit and find
that same is in due form and has the approval of
this Department.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

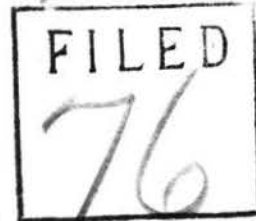
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PROBATION OFFICER:

(1a) Social Security Act does not repeal authority of county courts under Section 14182 R.S. Mo. 1929 to appoint county superintendent of public welfare. (1b) County Court may not appoint County Supt. under Sec. 14182 as probation officer only. (2) Circuit Court has no authority to appoint probation officer under Sec. 14171 R.S. Mo. 1929 when County Court appoints county superintendent of public welfare. (3) Circuit Court may with approval of county court pay salary to probation officer under Sec. 14174 R.S. Mo. 1929.

February 8, 1938.

Hon. James S. Rooney
Judge Circuit Court
Liberty, Missouri



Dear Judge Rooney:

We wish to acknowledge your request for an opinion under date of January 25, 1938, reading as follows:

"1. Does a county court by authority of Section 14182, R. S. Mo. 1929, have an appointive power of county superintendent of public welfare since the enactment of the State Social Security Commission and designating his work as that of Probation Officer only?

2. By Section 14144, R. S. Mo. 1929, does the Circuit Judge have priority of appointive power of County Probation Officer?

3. Does he have the authority to fix the salary such as established by law and such office expenses as necessary and designating the salary and necessary expenses of such office as part of the budget for the Circuit Court in a county of less than 50,000 population?"

I.

Section 4 of the Laws of Missouri 1937, page 470, relating to the powers and duties of the Social Security Commission, provides in part as follows:

"(4) to cooperate with the United States Children's Bureau in establishing, extending and strengthening child welfare services for the protection and care of homeless, dependent and neglected children, and children in danger of becoming delinquent, and to expend child welfare service funds for payment of part of the cost of district, county or other local child welfare services, and for developing state services for the encouragement and assistance of adequate methods of community child welfare organization, to administer or supervise all child welfare activities, including importation of children, licensing and supervising of child caring agencies and institutions except those conducted by any well known religious order, the operation of state institutions for children, and the supervision of juvenile probation under the direction of but not in derogation of the orders of juvenile courts. All powers and duties of the Commission shall, so far as applicable, apply to the administration of any other Act or state law wherein duties are imposed upon the Commission or the Commission is acting as a state agency."

Section 14182 of Article X, Chapter 125, R. S. Mo. 1929, relates to the appointment by county courts of county superintendents of Public Welfare, as follows:

"The county court in each county may in its discretion appoint a county superintendent of public welfare, and such assistants as it may deem necessary. Whenever the county court of any county has appointed a superintendent of public welfare such officer shall assume all the powers and duties now conferred by law upon the probation or parole officer of such county and shall assume all the powers and duties of the attendance officer in said county and all the powers and the duties of the attendance officer in any incorporated town or village having a population of more than 1,000 inhabitants, and no other or different probation or parole officer or attendance officer or officers shall be appointed by the judge of the juvenile court, by the county superintendent of public schools, or by the school board or any incorporated city, town or village school district or consolidated school district, providing, however, that the provision of this section shall not apply to counties which now have or which shall hereafter have a population of more than 50,000 inhabitants."

Your question is whether the county court still has the appointive power of county superintendent of public welfare under Section 14182 to act as probation officer since the enactment of the State Social Security Act.

In considering whether or not the State Social Security Act, Laws of Missouri 1937, p. 470, is repugnant to Section 14182 R.S. Missouri 1929, we have assumed that the Legislature must have had in mind the latter act at the time the former was passed.

In the case of State vs. Bader, 78 S. W. (2) 835, 839, the Supreme Court in speaking of the presumption that the Legislature had in mind a previous act or an act in pari materia, said:

"It is not to be presumed that the same body of men would pass conflicting and incongruous acts. The presumption is that they had in mind the whole subject under consideration; that, whilst the one general subject is touched in several separate acts, yet the legislative intent was that of a harmonious whole. In such case, it is the duty of the courts to so construe all the act in such manner that each and every part thereof may stand, if such construction can be attained, without doing violence to the language used in the several acts."

In the case of State vs. McCracken, 95 S. W. (2) (Mo. App.) 1239, 1241, the Court declares the following familiar rule of statutory construction:

"Statutes which are in pari materia should be read and construed together in order to keep all the provisions of the law on the same subject in harmony, so as to work out and accomplish the central idea and intent of the lawmaking branch of our state government, * * * *"

That the Legislature had in mind the whole subject under consideration is evident from an examination of Section(a) of the State Social Security Act wherein specific reference is made to Article X, Chapter 125, which relates to the appointment of superintendents of public welfare (Laws of Missouri 1937, page 468):

"***Sections 14188 and 14194 of Article 10, Chapter 125, Revised Statutes of Missouri 1929, be and the same are hereby repealed * * * *".

No reference is made to any other section in Article X, Chapter 125 of the R.S. Missouri 1929, and it is therefore evident that the Legislature intended that the Social Security Commission cooperate with existing state and federal agencies in the administration of the various child welfare services, including probation work.

From the foregoing we are of the opinion that the State Social Security Act does not repeal the authority of the county courts under Section 14182 R. S. Missouri 1929 to appoint a county superintendent of public welfare who when appointed assumes all the powers and duties of the probation officer of the county.

Ib.

You raise the further question whether the county court under Section 14182 may appoint a county superintendent of public welfare and designate his work as that of probation officer only.

The statute in unambiguous language declares that when the county court appoints a superintendent of public welfare he assumes all the powers and duties of probation and parole officer of the county and all the powers and duties of the attendance officer. The county court is given no authority to appoint a superintendent of public welfare and designate his work as that of probation officer only. That such was the intention of the legislature is evidenced by Section 14171 R. S. Missouri 1929, which authorizes the Circuit Court to appoint a probation officer as follows:

"The circuit judge shall designate or appoint an officer of the county or some other person to serve as probation officer under the direction of the court in cases arising under this article. The court may also designate or appoint one or more persons to act as deputy probation officers."

From the foregoing we are of the opinion that the county court does not have authority under Section 14182 R.S. Missouri 1929, to appoint a county superintendent of public welfare and designate his work as that of probation officer only.

II.

Your second question is whether under Section 14144 R.S. Missouri 1929, the Circuit Judge has priority of appointive power of county probation officer.

Section 14144 R. S. Missouri 1929, relates to appointment by the circuit courts of probation officers in counties of fifty thousand inhabitants and over. Your other questions deal with counties of less than fifty thousand inhabitants and we assume you meant to refer to Section 14171 R. S. Missouri 1929, supra, which deals with counties of less than fifty thousand inhabitants.

In the case of Poindexter vs. Pettis County, 246 S.W. 38, the Court said, l. c. 40:

"So as justly contended for by counsel for the appellant, the legal effect of the appointment of White was to automatically suspend the term of office of Poindexter, who was appointed under section 1144 of the Revised Statutes of Missouri 1919, as probation officer. All the duties devolving upon Poindexter as probation officer, by the act of 1921, supra, were transferred to White. State of Washington ex rel. Voris vs. City of Seattle, 74 Wash. 199, 133 Pac. 11, 4 A.L.R. 198; Donaghy vs. Macy, 167 Mass. 178, 45 N.E. 87.2

From the foregoing we are of the opinion that if the county court appoints a county superintendent of public welfare under Section 14182 the superintendent assumes among other powers and duties that of probation officer and the circuit judge would have no authority to appoint a probation officer under Section 14171 R.S. Missouri 1929.

III.

In reply to your third question we are enclosing copy of an opinion rendered by this Department to Mr. Cecil W. Roberts of Farmington, Missouri, under date of May 23, 1935.

February 8, 1938

The opinion upon the assumption that the county court had not appointed a superintendent of public welfare as provided in Section 14182 R. S. Missouri 1929, reached the following conclusion:

"Therefore, it is the opinion of this department that the county court is authorized to pay the salary of the probation officer out of class 4, Section 2, Budget Law of 1933, and the maximum salary shall not exceed one thousand dollars per annum, as of Section 14174, R. S. Mo. 1929, and shall be of such amount as the circuit court may with the approval of the county court prescribe. Furthermore, such approval of the county court shall be reasonable and not arbitrary.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM
Enclosure.

INSURANCE DEPARTMENT:

Approval of instruments changing name of the
Trans-Mississippi Life Insurance Company to
National Security Life Insurance Company.

February 23, 1938.

2-23



Honorable George A. S. Robertson
Superintendent of Insurance
Jefferson City, Missouri

Attention: Mr. J. F. Allebach
Deputy Superintendent

Dear Sir:

In compliance with your request of February 9, 1938, we are herewith returning, with our approval, instruments attached to your letter of request changing the name of the Trans-Mississippi Life Insurance Company to the National Security Life Insurance Company.

We approve all of the papers submitted in connection with the change of name and find that the corporation has complied with the statutes of Missouri in connection with the change of name of said corporation, and same has our approval.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG
Encs.

INSURANCE DEPARTMENT:

Approval of Articles of Association of
the Atlas Life Society, amended for change
to a stipulated premium life insurance
company under Article 4, Chapter 37, R. S. 1929.

March 15, 1938.

3-15



Honorable George A. S. Robertson
Superintendent
Insurance Department
Jefferson City, Missouri

Dear Mr. Robertson:

In compliance with your request of March 14th, we are returning with our approval the amended Articles of Association of the Atlas Life Society of Van Buren, Missouri, proposed to be reincorporated as provided in Section 5775, Revised Statutes of Missouri, 1929, as a stipulated premium life insurance company under Article 4, Chapter 37, Revised Statutes of Missouri, 1929. The enclosed Articles of Association are in proper form and same have our approval.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG
Enc.

INSURANCE : The foreign insurance corporations' right to
: license is dependent not on charter powers,
CORPORATIONS: but on rights granted by license.

April 16, 1938

4-18



Hon. George A.S. Robertson
Superintendent of Insurance
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request
for an opinion upon the following question:

"Is a foreign stock casualty in-
surance company, whose charter pro-
vides that it may issue participating
policies, entitled to be licensed to
do business in the State of Missouri?"

In the correspondence which accompanied your re-
quest for an opinion, the applicant for the license, the
Arex Indemnity Company, states that they do not wish to
issue any participating policies in the State of Missouri.
Therefore, the legality of a participating policy issued
by a foreign stock casualty company need not be passed upon.
The only obstacle to the granting of a license to the above
named company is the fact that its charter granted by the
State of New York allows it to write participating policies.

As to the nature of a license granted to a foreign
insurance company to do business within the state, we be-
lieve the rule is aptly stated in *Allin, Ins. Commissioner,
v. American Indemnity Company*, 55 S.W. 2nd 44, 1.c. 47, in
which the Court of Appeals of Kentucky, the highest court
of that state, said:

"* * the commissioner is not concerned
with the question of the charter powers
of the appellee company, whereby it is
authorized to write both fire and auto-
mobile insurance in states so permitting
it, but his proper inquiry is, what is the

4 copies

business, proposed by the company applying for a license, to be transacted in this state, and is it one not allowed by the laws of this state, or, if licensed, would he thereby be permitting a foreign corporation to transact its licensed business within the state under more favorable conditions than granted domestic corporations in a similar business?"

The above holding that in regard to licensing of foreign corporations, the State of Missouri is not concerned with charter powers of foreign corporations, but only with what powers it proposes to exercise within the State, appears to be the rule in Missouri.

In *Smoot v. Bankers Life Association*, 138 Mo. App. 438, 1.c. 466, 120 S.W. 719, the court said:

"* * this defendant, a foreign corporation, is authorized by the superintendent of the insurance department of this State to transact life insurance business in this State only and solely on the assessment plan."

To the same effect is *Missey v. Supreme Lodge*, 147 Mo. App. 137.

Moreover, if such a policy is illegal, upon which question we do not pass, the license could still be issued because the holdings of the Missouri courts have been that if the charter of a foreign corporation empowers it to do something that is illegal under the laws of Missouri, then such corporation may be licensed here, but has no right to do such illegal acts, and such power is treated as not existent in the charter. This view is tersely stated in *State ex rel. Railroad Company v. Cook*, 171 Mo. 348, in which the court en banc said:

"A foreign corporation admitted to do business in this State, either by comity or by express leave of the statute, can not transact any business which a domestic corporation of like character can not transact, anything in the charter of the foreign corporation to the contrary notwithstanding. In such case if the charter

April 16, 1938

of the foreign company contains a
grant of power not allowed by our law,
that grant will be treated simply as
if it had not been made."

The right of a foreign corporation to transact business in the State of Missouri is one that the courts jealously protect and give a liberal construction in order to insure this right. State ex rel. Railroad Company v. Cook, 181 Mo. 596, State ex rel. Tank Car Company v. Sullivan, 282 Mo. 261. As was said in the last mentioned case, l.c. 279:

"Looking to our statutory provisions for the public policy of the State, it will be readily observed that we have adopted a most liberal comity toward corporations organized under the laws of other states and countries. Indeed, we have placed them upon substantially the same footing as our own domestic corporate bodies and given them the same powers, and subjected them to the same obligations that are provided for like corporations in this State * * *."

The purpose of the laws relating to licensing of foreign corporations is taken by the courts as being not to exclude foreign corporations, but to merely restrict them so as to place them on an equal basis with domestic corporations and to provide for the protection of the public of the State.

CONCLUSION

It is, therefore, the opinion of this department that the Superintendent of Insurance, in licensing a foreign insurance company to do business in this State, looks not to the charter in order to determine the legality of such company's business, but rather to the type of business which is to transact within the state.

Hon. George A.S. Robertson

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April 16, 1938

It is further the opinion of this department that the foreign insurance company doing business within the State of Missouri, is controlled by the provisions of its license and not by its charter, and if the charter allows such insurance company to do something unlawful in Missouri, such provision is taken as not being within the charter at all insofar as it relates to the company's right to do business in Missouri.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED By:

ROY MCKITTRICK
Attorney General

AO'K:VAL

INSURANCE DEPARTMENT:

Approval of papers in connection with
the decrease of the capital stock of
the National Security Life Insurance
Company, a corporation. Art. 4, Chap. 37,
R. S. Mo. 1929.

May 23, 1938

5-24



Honorable George A. B. Robertson
Superintendent
Insurance Department
Jefferson City, Missouri

Attention: Charles L. Henson,
Chief Counsel

Dear Sir:

This is to acknowledge receipt of your
letter of May 21st, in which you request the opinion
of this Department as to the form and sufficiency of
the papers in connection with the decrease of the
capital stock of the National Security Life Insurance
Company, a corporation organized under the provisions
of Article 4, Chapter 37, Revised Statutes of Missouri,
1929.

We have examined the papers in connection
with this company, submitted with your letter of request,
and find same are in due form and have the approval of
this Department.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

Encs.

INSURANCE DEPARTMENT:

Approval of papers, as to form and sufficiency, submitted in connection with increase of capital stock of Postal Life and Casualty Insurance Company under Art. 4, Chap. 37, R. S. 1929.

June 4, 1938

67



Honorable George A. S. Robertson
Superintendent of Insurance
Jefferson City, Missouri

Attention: Mr. Charles L. Henson,
Chief Counsel

Dear Sir:

This is to acknowledge receipt of your letter of May 31st, in which you request the opinion of this Department as to the form and sufficiency of the papers submitted in connection with the increase of the capital stock of the Postal Life and Casualty Insurance Company, a corporation organized under the provisions of Article 4, Chapter 37, Revised Statutes of Missouri, 1929.

We have examined the papers submitted in connection with the increase of the capital stock of the above company from \$25,000 to \$100,000 and find same in due form and have the approval of this Department.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

7
INSURANCE DEPARTMENT:

Approval of papers submitted in connection with organization of Mutual Standard Casualty Company, Kansas City, Missouri, under Article 7, Chapter 37, R. S. Mo. 1929.

June 10, 1938

6-10



Honorable George A. S. Robertson
Superintendent
Insurance Department
Jefferson City, Missouri

Attention: Charles L. Henson,
Chief Counsel

Re: Mutual Standard
Casualty Company, Kansas
City, Missouri.

Dear Sir:

This is to acknowledge receipt of your letter of June 10th, in which you request the opinion of this Department as to the form and sufficiency of the papers submitted in connection with the organization of the above company, organized under the provisions of Article 7, Chapter 37, Revised Statutes of Missouri, 1929.

We have examined the Declaration of Intention and Publication and Affidavit of Publisher in connection therewith and the Articles of Association submitted therewith, and find same are in due form and have the approval of this Department.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

INSURANCE DEPARTMENT:

Approval of form and sufficiency of papers submitted in connection with the Postal Life and Casualty Company, under Article 2, Chapter 37, Section 5776, R. S. 1929.

June 21, 1938

6-21



Honorable George A. S. Robertson
Superintendent
Insurance Department
Jefferson City, Missouri

Attention: Mr. Charles L. Henson
Chief Counsel

Dear Sir:

This is to acknowledge receipt of your letter of June 18th in which you submit for our approval or disapproval, as to the form and sufficiency, papers in connection with the Postal Life and Casualty Company, a company organized under Article 4, Chapter 37, R. S. Mo. 1929, which desires to accept the provisions of Article 2, Chapter 37, as it may do under the provisions of Section 5776, R. S. Mo. 1929.

We have examined the following in connection therewith:

- (1) Statement amending articles of incorporation of the Postal Life and Casualty Insurance Company.
- (2) Minutes of special Directors' meeting of the Postal Life and Casualty Insurance Company with attached waiver of notice of meeting and approval of minutes and certificate of Secretary as to personnel of stockholders and directors.

June 21, 1938

- (3) Minutes of special stockholders' meeting of the Postal Life and Casualty Insurance Company approving action of Directors' meeting concerning amendment of charter, together with waiver of notice of such special stockholders' meeting, together with certificate of Secretary as to personnel of stockholders and directors.
- (4) Original copy of Second Amended Articles of Incorporation of Postal Life and Casualty Insurance Company, supported by affidavit of amendment executed by the President of the company.

We find that same are in due form and their form and sufficiency have the approval of this Department.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG
Encs.

SHERIFFS:

Must attend courts of record or criminal courts when in session whether his services be required or not.

August 15, 1938



Honorable L. L. Robinson,
Presiding Judge,
Osage County Court,
Chamois, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of July 22, 1938, requesting an opinion on the following question:

"Is the Sheriff entitled to compensation from two Courts for the same day should the Circuit and County Courts be in session on the same date, his presence being required in the Circuit and not in the County Court."

Several statutes are pertinent to this question. These are Sections 1870, 11789, 11513 and 11514, R. S. Mo. 1929.

Section 1870, supra, provides:

"The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; * * *"

Section 11789, supra, fixes the sheriff's compensation for such duty as follows:

"For attending each court of record

August 15, 1938

or criminal court and for each deputy
actually employed in attendance upon
each such court the number of such
deputies not to exceed three per day
----- \$3.00"

Section 11513, supra, provides:

"Any sheriff may appoint one or more
deputies, with the approbation of the
judge of the circuit court; * * * *"

Section 11514, supra, provides:

"Every deputy sheriff shall possess
all the powers and may perform any
of the duties prescribed by law to
be performed by the sheriff."

In State ex rel. Stevens v. Wurdeman, 295 Mo. l.c.
586, it is said: "Usually the use of the word 'shall'
indicates a mandate, and unless there are other things in
a statute it indicates a mandatory statute." The word
'shall' is used in Section 1870, supra, and under this
rule of law we think said section is mandatory.

Construing the four statutes above together, it is
plain that it is the mandatory duty of the sheriff to
attend each court of record or criminal court held in his
county when said court is in session. He may attend
either in person or by deputy. His compensation for each
day in actual attendance is three (\$3.00) dollars.

The mere fact that his attendance was not actually
required at the time does not excuse him from performing
his mandatory duty of attending the court, nor does it
prohibit him from receiving his statutory compensation
when he does so attend either in person or by deputy.

CONCLUSION

Therefore, it is the opinion of this department
that it is the mandatory duty of the sheriff to attend

Honorable L. L. Robinson

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August 15, 1938

when in session, each court of record or criminal court held in his county, either in person or by deputy, whether his services be required or not at the time of his attendance.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

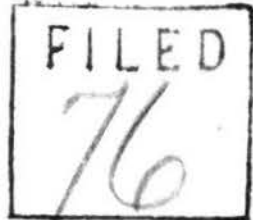
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:DA

WEAPONS: Owners of weapons are not required to register possession by the State of Missouri as is required under the National Fire Arms Act.

September 2, 1938



Mr. Floyd Roberts
Circuit Clerk
Columbia, Missouri

Dear Sir:

We are in receipt of your letter of September 1, 1938, requesting an opinion of this Department, as follows:

"We have numerous inquiries in regard to the matter of the registrations of firearms, in fact people are sent to my office by the Highway Patrol, Sheriff and Prosecuting Attorney and others under the assumption that there is a law requiring such firearms to be registered in the office of the Circuit Clerk.

Sections 4432 to 4436 provide for a permit to be issued by such Clerk for the purchase, trade, etc., of such weapons, but this does not seem to include registration; this must be Federal Statute. These inquiries are from people who already own the weapons and merely want to register them to comply with the law.

Please give me any information you may have in regard to this law. Perhaps I should obtain a book for this purpose. I am enclosing a form used in this office for issuing fire arms permit on the recommendation

September 2, 1938

of the Sheriff, and of course we register these in a bound book, but this does not seem to me to be the answer to the problem.

I also have a case today where a revolver arrived by express and the express company will not release same to the consignee without a permit from the Circuit Clerk. I suppose the regular permit as enclosed will take care of this situation.

Section 4433 R.S. Missouri 1929, in part reads as follows:

"No person, other than a manufacturer or wholesaler thereof to or from a wholesale or retail dealer therein, for the purposes of commerce, shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive, in this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, unless the buyer, borrower or person receiving such weapon shall first obtain and deliver to, and the same be demanded and received by, the seller, loaner, or person delivering such weapon, within thirty days after the issuance thereof, a permit authorizing such person to acquire such weapon. Such permit shall be issued by the circuit clerk of the county in which the applicant for a permit resides in this state, if the sheriff be satisfied that the person applying for the same is of good moral character and of lawful age, and that the granting of the same will not endanger the public safety."

September 2, 1938

As stated in your request the express company is lawfully requiring a permit such as attached to your request. The express company is complying with that part of Section 4433 which prevents delivery without surrender of the permit described in said section. We find no law to the effect that any firearms of any description should be registered in this state, but Section 1132, Title 26, Chapter 15(a), United States Code Annotated, enacted June 26, 1934, defines "firearm" as follows:

"The term 'firearm' means a shot-gun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition."

This definition was amended April 10, 1936, by Section 1132, to read as follows:

"The term 'firearm' means a shot-gun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition, but does not include any rifle which is within the foregoing provisions solely by reason of the length of its barrel if the caliber of such rifle is .22 or smaller and if its barrel is sixteen inches or more in length."

Section 1132d, Title 26, Chapter 15a, U.S.C.A.
reads as follows:

"Within sixty days after the thirtieth day after June 26, 1934, every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: Provided, that no person shall be required to register under this section with respect to any firearm acquired after the thirtieth day after June 26, 1934, and in conformity with the provisions of sections 1132 to 1132q.

Whenever on trial for a violation of section 1132e the defendant is shown to have or to have had possession of such firearm at any time after such period of sixty days without having registered as required by this section, such possession shall create a presumption that such firearm came into the possession of the defendant subsequent to the thirtieth day after June 26, 1934, but this presumption shall not be conclusive."

The word "collector" as set out in Section 1132d means "collector of internal revenue" in the district which the applicant or registrant resides.

September 2, 1938

As you notice most of Section 1132d is now obsolete for the reason that the time for complying with said paragraph (a) was limited to sixty days after the thirtieth day after June 26, 1934. No registration would be needed at this time if the owner since that time had complied with the manner of purchase of firearms as set out in Sections 1132 to 1132q of Chapter 15a, Title 26, U.S.C.A.

The punishment for the violation of any of the sections above set out, to-wit, 1132 to 1132q, is as follows:

"Any person who violates or fails to comply with any of the requirements of sections 1132 to 1132q shall, upon conviction, be fined not more than \$2,000 or be imprisoned for not more than five years, or both, in the discretion of the court."

CONCLUSION

In view of the above research it is the opinion of this Department that the State of Missouri does not require the registration of the possession of firearms, but that said registration is covered by the federal law and may be cited as the "National Fire Arms Act". It is further the opinion of this Department that the permit attached to your request is sufficient authority for the express company to release a revolver to the consignee in accordance with Section 4433 R.S. Missouri 1929.

Respectfully submitted,

APPROVED:

W. J. BURKE,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

WJB:MM

TAXATION:
SPECIAL ROAD DISTRICTS:
COLLECTION OF DELINQUENT
TAXES:

The County Collector is the proper party to sell lands for delinquent taxes due special road districts.

September 9, 1938 9/10

Mr. J. K. Robbins
Collector of Revenue
New Madrid County
New Madrid, Missouri



Dear Sir:

This is in reply to yours of recent date requesting an official opinion from this department based upon the following letter:

"The Conran-Gideon Road District of New Madrid County, is in the hands of Mr. R. F. Baynes as Trustee. The 1933 tax assessment is largely delinquent and will of course "Outlaw" Jan. 1st. next.

"The collector's opinion is Mr. Baynes is the proper party to force collection. Mr. Baynes' position is, the collector should proceed under the Jones-Munger Law, as other road tax is collected.

"The bondholders being somewhat irate, the collector of course wishes to escape responsibility and begs an opinion from your office as to his proper procedure."

From our research on this question, we find that the Conran-Gideon Special Road District of New Madrid County was organized under the provisions of Chapter 98, Article 13, R. S. Mo. 1919, which is now entered in R. S. Mo. 1929, as Chapter 42, Article 16. Section 8182 of said chapter provides in part as follows:

"The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district, and shall also have power and authority and be its duty to levy special taxes for the purpose of paying the interest on bonds when it falls due and to create a sinking fund sufficient to pay the principal of such bonds at maturity; and, whenever such commissioners shall, at any time between the first day of January and the first day of March of any year, file with the clerk of the county court a written statement that they have levied such tax, and stating the amount of the levy for each hundred dollars assessed valuation, the county clerk, in making out the tax books for such year shall charge all property taxable in such district with such tax, and such tax shall be collected as county taxes are collected.
* * *."

By this section provision is made for the financing of such road districts and the payment of the bonds and interest, if any, when same fall due. This section further provides that the tax levied for the payment of such expenses and bonds and interest shall be collected as county taxes are collected.

It appears from your request that the road district has disincorporated and that a trustee for it has been appointed. The duties of the trustee of such district are set out in Section 8198, R. S. Mo. 1929, which are as follows:

"The trustee shall have power to prosecute and defend to final judgment all suits instituted by or against the road district, collect all moneys due the same, liquidate all lawful demands against the same, and for that purpose shall sell any property belonging to such road district or so much thereof as may be necessary, and generally to do all acts requisite to

bring to a speedy close all the affairs of the road district, and for that purpose, under the order and direction of the county court, to exercise all the powers given by law to said road district."

While this section directs the trustee to collect all moneys due the district, yet we do not think this applies to the collection of taxes, current or delinquent, for special road districts, because special statutes have been enacted relating to the collection of taxes and the tax collector in these statutes is designated as the person who shall perform that duty.

When the taxes of the county or of a special road district become delinquent, they are to be entered into a back tax book, which is to be turned over to the county collector, and his duties are then set out in Section 9949, Laws of Missouri, 1933, page 427, which are as follows:

"The collectors of the respective counties and the collectors of such cities, respectively, shall proceed to collect the taxes contained in such 'back tax book' or recorded list of the delinquent land and lots in the collector's office as herein required, and any person interested in or the owner of any tract of land or lot contained in said 'back tax book' or in the recorded list of delinquent lands and lots in the collector's office may redeem such tract of land or town lot, or any part thereof, from the state's or such city's lien thereon, by paying to the proper collector the amount of the original taxes, as charged against such tract of land or town lot described in said 'back tax book' or recorded list of delinquent lands and lots in the collector's office, together with interest on the same from the day upon which said tax first became delinquent at the rate specified in section 9952."

The procedure for the sale of delinquent property for taxes is provided by the Act known as the Jones-Munger Act, Laws of Missouri, 1933, page 425, et seq. This Act designates the county collector as the person who shall sell lands for delinquent taxes.

As to this particular road district, we find that in the case of State ex rel. J. Porter Henry, et al. v. State Auditor, R. F. Baynes, Trustee for Conran-Gideon Special Road District, et al. (not yet reported), the court in directing a peremptory writ to the respondents for the purpose of enforcing the assessment, levy and collection of taxes to pay the outstanding bonds and interest due from said district, said:

"And we do command you, respondents County Court of New Madrid County, and Sullivan Thompson, Elon Proffer and O. R. Rhodes, as Judges of said Court, to require the respondent County Clerk, and R. L. Jones as such County Clerk, to make a supplemental tax book or a supplemental column in the regular tax books for the year 1938 and extend therein on all taxable property in said Road District the amount of said installment for 1938 and in like manner in each of the subsequent years 1939 to 1945 inclusive to require the County Clerk to make such supplemental tax book or supplemental column in the regular tax book and extend therein the aforesaid levies as hereinabove made for each of said years, and we do further command you, respondent County Clerk and R. L. Jones as such County Clerk, to make up such supplemental tax book or supplemental column on the regular tax book and to charge thereon all property taxable in said Road District each year commencing with the year 1938 as hereinabove set forth with the amount of such additional tax prescribed for such year, and to deliver the said book to the respondent Collector of the Revenue for New Madrid County for collection, and we do further command you, respondent Collector of the Revenue of New Madrid County, and J. K. Robbins as such Collector, to collect said tax each year as county taxes are

collected, and turn over the same less your commission to the respondent Trustee and R. F. Baynes as such Trustee; and we do command you, Trustee, and R. F. Baynes as Trustee when you shall have received the moneys so turned over by the Collector to pay the County Clerk the statutory fee and apply the remainder to the payment of the bonds and interest owing to the relators and to other bondholders, past due and unpaid, pro rata."

From the direction of the court in this case, we are convinced that the county collector is the proper party to enforce the payment of the delinquent taxes for the special road district which has been disorganized. After such taxes are collected by sale of delinquent lands or otherwise, then it is the duty of the county collector to turn such taxes over to the trustee of the district. The trustee has no authority to sell the lands for delinquent taxes due the district.

CONCLUSION

From the foregoing, it is the opinion of this department that the county collector is the proper and necessary party to enforce the collection of delinquent taxes due a special road district which has been disorganized, and if it is necessary to sell lands for such delinquent taxes, the county collector is the proper party to sell such lands.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

INSURANCE DEPARTMENT:

Approval of papers submitted in connection with increasing of capital stock and amending Article Fourth of the Articles of Incorporation of Utilities Insurance Company.

November 3, 1938

11/3



Honorable George A. S. Robertson
Superintendent
Insurance Department
State of Missouri
Jefferson City, Missouri

Attention: Mr. Charles L. Henson,
Chief Counsel

Dear Sir:

This is to acknowledge receipt of your letter of November 3d, in which you request the opinion of this Department as to the form and sufficiency of the papers submitted in connection with the increasing of the capital stock and amending Article Fourth of the Articles of Incorporation of the Utilities Insurance Company.

We have examined the certified copy of the papers submitted in connection with the increasing of the capital stock of said company from \$200,000 to \$300,000, and find same in due form and have the approval of this Department.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

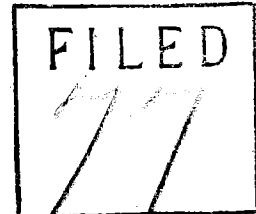
J. E. TAYLOR
(Acting) Attorney-General

CRH:EG
Enc.

INSURANCE: Secti 5768, Article IV, Chapter 7, R. S. Missouri 1929, requires policies issued under stipulated premium plan to specify sum of money payable upon happening of contingency insured against.

January 31, 1938

Mr. Virgil Rule
Assistant Actuary
Insurance Department
Jefferson City, Missouri



Dear Mr. Rule:

We wish to acknowledge your request for an opinion under date of January 29, 1938, wherein you state as follows:

"Please render this Department your opinion as to whether Standard Provision 17 of the enclosed policy issued by the Mutual Benefit Health and Accident Association, a stipulated premium company licensed to do business in this state under Article IV, Chapter 37 R. S. Mo. 1929, is valid."

Standard Provision 17 of the enclosed policy provides as follows:

"17. If the Insured shall carry with another company, corporation, association or society other insurance covering the same loss without giving written notice to the Association, then in that case the Association shall be liable only for such portion of the indemnity promised as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premium paid as shall exceed the pro rata for the indemnity thus determined."

Section 5768 of Article IV, Chapter 37, R. S. Mo. 1929, provides as follows:

"Every policy hereafter issued by any corporation, company or association doing business under the provisions of this article and promising any payments to be made upon a contingency provided for in this article, shall specify the sum of money which it promises to pay upon each contingency insured against and the time or times of payment after satisfactory proof of the happening of such contingency, unless the contract shall have been voided by fraud or breach of its conditions and warranties, or commuted, as provided for in section 5764, the company shall be obligated to the beneficiaries of the insured for such payment at the time or times specified and to the amount due under the policy. If any company fail or refuse to make such payment for ninety days after final judgment has been obtained under such claim, the superintendent or other officer charged with the supervision of insurance matters shall notify the company to issue no new policies until such indebtedness is fully paid, and no officer or agent of the company shall make, sign or issue any policy of insurance while such notice is in force."

In the case of *McPike vs. Circle*, 173 S. W. 71, 187 Mo. App. 679, 1. c. 686, the Court in referring to the above statute said:

"In this view, the certificate in suit must be regarded as a life insurance policy as if issued on the stipulated premium plan, and, according to the statute, reveal the amount of the sum insured in the policy, for such is the requirement of the statute with respect to policies of life insurance of that character.* * * *The amount promised in the event of death must appear in the policy and not to be ascertained through the search of by-laws and the constitution of the company."

Section 5747, Article III, Chapter 37 of the R. S. Missouri 1929, provides as follows:

"Every policy or certificate hereafter issued by any corporation of this state doing business in conformity with the provisions of this article, and promising a payment to be made upon a contingency of death, sickness, disability or accident, shall specify the exact sum of money which it promises to pay upon each contingency insured against, and the number of days after satisfactory proof of the happening of such contingency at which such payment shall be made, and upon the occurrence of such contingency, unless the contract shall have been voided for fraud or breach of its conditions, the corporation shall be obligated to the beneficiary for such payment at the time and to the amount specified in the policy or certificate; and the said indebtedness shall be a lien upon all the property, effects and bills receivable of the corporation, with priority over all indebtedness thereafter incurred, except as may be provided by the law in case of the distribution of assets of an insolvent corporation. If the corporation refuses or fails to make such payment for thirty days after after final judgment against said corporation, the failure to pay the amount of such final judgment within said period of thirty days shall ipso facto constitute a forfeiture of the charter of such corporation, and it shall be the duty of the superintendent of the insurance department forthwith to cause proceedings by quo warranto to be instituted against said corporation for the purpose of ousting it of its charter; and upon the dissolution of said corporation, the superintendent of the insurance department shall take charge of its assets and affairs, and wind up the same, as now provided by law in the case of life insurance companies."

The above section relates to companies doing an insurance business on the assessment plan. It is to be noted that the underlined portion is similar to the underlined portion contained in Section 5768 supra which relates to companies doing an insurance business on the stipulated premium plan. Section 5747 states that the policy or certificate "shall specify the exact sum", whereas Section 5768 states that every policy "shall specify the sum".

January 31, 1938

The Court in the case of Melville vs. Business Men's Accident Assurance Company, 253 S. W. (St. Louis Court of Appeals) 68, 1. c. 70, had before it for consideration the validity of a provision identical to the Stand Provision in the instant case.

The Court in holding such a provision invalid as it relates to companies doing business under the assessment plan said:

"When this policy was written the defendant was doing business on the assessment plan, subject to the provisions of what is now article 3, c. 50, Rev. Stat. 1919. Section 6157 of that article and chapter provides that every policy or certificate issued by any corporation doing business in conformity with the provisions of that article, promising a payment be made upon a contingency of death, sickness, disability, or accident, 'shall specify the exact sum of money which it promises to pay upon each contingency insured against.' etc. And it is plaintiff's contention that the policy provision here in question contravenes that statute and is therefore void. A consideration of this matter has led us to the conclusion that this contention should be sustained. The effect of this statute upon a policy provision of such character as that here involved has not been the subject of decision by our courts. But our courts have frequently had occasion to apply this statute, and have declared void various provisions of the contracts of insurance involved which were deemed repugnant to the mandate of the statute. See McFarland vs. Accident Ass'n. 124 Mo. 204, loc. cit. 221, 27 S. W. 436; Goodson vs. Accident Ass'n. 91 Mo. App. 339; Easter vs. Brotherhood of American Yeomen, 154 Mo. App. 456, 135 S. W. 964; Kribs vs. United Order of Foresters, 191 Mo. App. 524, 177 S. W. 766; Bondurant vs. Brotherhood of American Yeomen (Mo. App.) 199 S. W. 424. In this connection, see McPike vs. Mystic Circle, 187 Mo. App. 679, 173 S. W. 71, wherein effect was given to what is now section 6178, applicable to insurance on the stipulated premium plan, requiring the policy to 'specify the sum of money which it promises to pay,' etc. And we may note that there are cases

of like tenor involving a provision of the fraternal insurance statute (section 6405, Rev. Stat. 1919) providing that the certificate 'shall specify the amount of benefit provided thereby.' See Parker vs. Sovereign Camp of Woodmen (Mo. App.) 196 S. W. 424; Wilson vs. Brotherhood of American Yeomen (Mo. App.) 237 S. W. 212.

* * * * *

We think that the purpose of the lawmakers in enacting the statute was to require an insurer, coming within its terms, to distinctly and exactly specify in the policy the precise amount of insurance vouchsafed; and that when the amount is once definitely fixed by the policy, it may not be scaled down by stipulations inserted in the contract looking to partial avoidance of liability by providing that the sum named as indemnity shall be reduced in certain contingencies. Though it be that the insured may be able from the terms of the policy, with the attending circumstances, to arrive at the reduced amount to which the defendant company thus seeks to limit its liability, we think that when full effect is given to the explicit and forceful language of this statute the clause of the policy here in question is repugnant thereto and therefore void.

The statute does more than to require that the policy contain provisions from which the insured, with the information possessed or obtained by him, may compute the liability of the insurer by making deductions, in certain contingencies, from the principal sum named. It requires the insurer to state in the policy the exact sum of money promised to be paid, and to pay that sum upon the happening of the contingency insured against."

The case of State ex rel. Business Men's Assurance Company vs. Allen, 259 S. W. 77, 302 Mo. 525, was a certiorari to review the judgment of the Court in the above case on the ground that it is in conflict with the decisions and opinions of the Missouri Supreme Court.

The Court after setting out the opinion in the Melville case supra, observes that:

"The views expressed above seemingly accord with the views expressed by this court in McFarland vs. Accident Association, 124 Mo. loc. cit. 221, 27 S. W. 436. In that case Judge Macfarlane said:

'This question has, however, been put at rest in this state by the statute which authorizes and regulates insurance companies on the assessment plan. It requires all policies to specify the exact sum of money which the company promises to pay upon the happening of the contingency insured against and also requires the payment of such sum upon the occurrence of such contingency.'

* * * * *

In McFarland's case the amount could have been rendered certain by multiplying the number of members by two, and the number of dollars of the liability would appear. The facts for the calculation were as easily ascertainable as in the instant case. But the rule was announced that this statute meant something more than a mere calculation to find out the liability. The court was giving to the statute a sensible meaning, and that meaning was that the sum to be paid upon any contingency was to be expressed in exact figures. The ruling simply emphasized that portion of the statute by saying that the policy, in the language of the statute, 'shall specify the exact sum of money which it promises to pay upon each contingency insured against.' To 'specify the exact sum of money' does not mean that you can find out the 'exact sum' by some kind of calculation from facts to be developed.

There is no conflict of opinions shown, and our writ should be quashed."

January 31, 1938

The Melville case related to a company doing business on the "assessment plan", the statute providing that the policy "specify the exact sum". In the case before us the company does business on the "stipulated premium plan", under a statute providing that the policy "specify the sum". The Melville case after stating:

"Our records have frequently had occasion to apply this statute and have declared void various provisions of the contracts of insurance involved which were deemed repugnant to the mandate of the statute",

cites the McPike case *supra*, which related to a company doing business on the stipulated premium plan.

It is apparent from an examination of the above cases that the fact that the calculation is easily ascertainable is not the controlling factor. The statute says that the policy "shall specify the sum", and not the sum to be determined by calculation from facts to be developed.

From the foregoing we are of the opinion that Standard Provision 17 is in conflict with Section 5768 R. S. Missouri 1929, and therefore invalid.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

INSURANCE: Inter-indemnity or reciprocal insurance companies may write health and accident policies in this state and are required to comply with Senate Bill No. 123.

May 3, 1938

Mr. Virgil Rule
Assistant Actuary
Insurance Department
Jefferson City, Missouri



Dear Mr. Rule:

This Department wishes to acknowledge your request for an opinion, together with enclosure of Policy Form No. 703 of the Farmers Automobile Inter-Insurance Exchange of Los Angeles, California, providing indemnity for loss of life, limb or limbs, sight or time by accidental means. You ask the following questions:

"Can a reciprocal company write accident and health coverage in this State? If so, can we require them to meet the requirements of our law regarding suicide, misrepresentation, etc? See attached policy."

Chapter 37, Article XI, Section 5966 R.S. Missouri 1929, authorizes inter-indemnity or reciprocal insurance contracts providing indemnity from any loss that may be insured against under other provisions of the laws, except life insurance, as follows:

"Individuals, partnerships and corporations of this state, hereby designated subscribers, are hereby authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance."

Couch, Volume 1, paragraph 5, page 5, Encyclopedia of Insurance Law, in discussing the nature of insurance contracts makes the following statement:

"And broadly speaking it may be said that a contract of insurance is* * *except as to life and accident* * *one of indemnity".

And further at page 10 declares that:

"It is elementary that insurance other than that of life and accident where the result is death, is a contract of indemnity."

The only Missouri case we have been able to find on the subject of whether an accident policy is a contract of indemnity is that of Lemaitre vs. National Casualty Company, 195 Mo. App. 599, 186 S.W. 964, 1. c. 965. The Court in holding that accident insurance policies unlike policies of life insurance are contracts of indemnity for loss of time and consequences of injury especially when they are so labeled, said:

"The learned counsel for appellant argue that policies of accident insurance are, with policies of life insurance, exceptions to the rule that contracts of insurance are contracts of indemnity. We are unable to appreciate the force of this, either as a general principle or as applicable here. On the very face of the policy here involved and over clause a, which is the first clause providing for the payment of any sum, it is referred to as "accident indemnity for total disability," and throughout the policy, heading other clauses which are not here material and which we have not here quoted, it is referred to as a contract of indemnity. Thus, paragraph d is headed, 'Double Indemnity,'

paragraph e, 'Illness Indemnity,' paragraph i is headed, 'Special Death Indemnity,' paragraph j is headed 'Quarantine Indemnity.' Looking at this contract as a whole, construing it as a whole, it is very apparent that the main idea of it is indemnity, and the main feature in it is indemnity for loss of time in consequence of injury."

The enclosed policy makes a general statement in bold type that it insures

"For the Principal Sum of \$1000.00 with 100% Renewal Accumulation Feature, Weekly Disablement Indemnity of \$25.00 for 26 weeks and other indemnities provided in the Policy."

Under total disablement, partial disablement, hospital expenses and graduate nurse expense a "weekly indemnity" is provided for, and throughout the policy it is referred to as a contract of indemnity.

It is to be noted that in the later case above referred to the Court declares that neither "as a general principle or as applicable here" are policies of accident insurance "exceptions to the rule that contracts of insurance are contracts of indemnity".

From the foregoing we are of the opinion that Inter-Indemnity or Reciprocal Insurance Companies may write accident coverage in this State.

Health insurance would clearly be a contract of indemnity for loss of time and consequences of illness, and we are of the opinion that an inter-indemnity or reciprocal insurance company may write health insurance.

Your next question is, Assuming that reciprocal companies have authority to write accident and health coverage can they be required to meet the requirements of our law covering suicide, misrepresentations, etc?

Article XI, Chapter 37, Section 5977 R. S. Missouri 1929, exempts inter-indemnity and reciprocal companies from the insurance laws of the State except the retaliatory law, as follows:

"Except as herein provided no law of this state relating to insurance shall apply to the exchange of such indemnity contracts: Provided, however, that the provisions of the retaliatory law shall apply."

Referring to the above section alone it is evident that inter-indemnity and reciprocal companies would not be required to meet the insurance laws relative to suicide, misrepresentation, etc. The Legislature, however, in 1937 (Laws of Missouri 1937, Section 5965a, pp. 360, 361), enacted the following statute relating to health and accident policies (hereinafter referred to as the 1937 Act):

"No policy of insurance against loss or damage from sickness or the bodily injury or death of the insured by accident, and no riders, endorsements, supplementary or additional terms and provisions shall be issued or delivered to any person in this state by any company doing business in this state under the provisions of the insurance laws of the State of Missouri until a copy of the form thereof has been filed with the Superintendent of the Insurance Department for at least a period of thirty (30) days unless before the expiration of said thirty (30) days the Superintendent of the Insurance Department and the Attorney-General of the State of Missouri shall have approved of the same in writing. If during such period of thirty

(3) days or at any time thereafter, as provided in this section, the Superintendent of the Insurance Department or Attorney-General, in writing, disapprove of the form of such policy, it shall be unlawful for such policy to be issued or delivered in this State by the company filing same. If the Superintendent of the Insurance Department or the Attorney-General are unable, by virtue of their other duties, to determine whether or not they shall approve or disapprove the form of such policies within the thirty-day period herein provided, the Superintendent of the Insurance Department may extend the time within which they may approve or disapprove to a period not to exceed ninety (90) days from the date of filing such forms, and the company filing such form or forms shall be notified by the Superintendent, in writing, of such extension of time. The Superintendent of the Insurance Department and the Attorney-General shall not approve such forms of policies unless every part is plainly printed in type not smaller than long primer or ten point type nor unless there is printed on the first page thereof and on its filing back in type not smaller than eighteen point or great primer a brief description of the policy; nor unless the exceptions be printed with the same prominence as the benefits to which such exceptions apply. If the Superintendent fails, within the thirty-day period of time or within the extended period, as herein provided, to notify the company in writing of his disapproval, then the company may issue such form of policy, but nothing herein contained shall permit an insurance company to issue policies in violation of other provisions of the insurance laws of this State,

and nothing herein shall bar the Superintendent and Attorney-General from, at any time thereafter, disapproving such form after giving the company notice thereof and a hearing thereon. Whenever, the Superintendent or Attorney-General disapprove a policy form, as herein provided, the Superintendent shall notify the company filing same, in writing, giving the reasons therefor. The Superintendent and Attorney-General are hereby directed to approve for use in this State only policies conforming to the express provisions of the insurance laws of Missouri, and only such words, phrases, figures, terms and conditions of policy forms, riders, endorsements, supplementary or additional terms and provisions affecting policies or agreements for insurance which are specific, certain and unambiguous, to meet needed requirements for the protection of lives and property of assureds. Any policy filed with the Superintendent pursuant to this section, not conforming to the requirements herein, shall be, by the Superintendent and Attorney-General, disapproved. Nothing in this section contained shall be held to apply to life insurance, endowment or annuity contracts, or contracts supplementary thereto."

Can it be said that the above statute is applicable to reciprocal or inter-insurance companies? The case of Schott vs. Continental Auto Insurance Underwriters, 31 S.W. (2) (Mo. Sup.) 7, 1. c. 11, presents a situation analogous to the one in the instant case. The appellant's contention was that the Act of 1925 was not applicable to reciprocal or inter-insurance exchanges. The Court in holding that the 1925 law was applicable to reciprocal insurance companies, said:

"Appellant's argument in support of its contention under this head seems to run as follows: The act of 1925 (hereinafter called the Act) is a general law; said article 13 relating to reciprocal and interinsurance contracts, including said section 6385 is a special law; section 6385 provides that no law of this state relating to insurance shall apply to the contracts of companies operating as reciprocals; the act does not in express terms repeal or amend section 6385; and a general law does not repeal a prior special law by implication. 'It is* * *true that the presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later general act. The presumption is that the special is intended to remain in force as an exception to the general act.' 25 R.C.L. 927, Sec. 177. But there is no rule which prohibits the repeal of a special act by a general one, the question being always one of intention. And there can be no doubt but that it was the legislative intention that the act should apply to contracts of reciprocal companies by its express terms they are made subject to its provisions. The effect of the act in that respect, therefore, is to ingraft upon said section 6385 another exception."

The Act of 1937 is a general law, whereas Article XI relating to inter-indemnity or reciprocal insurance contracts, including Section 5977, is a special law. The question of the repeal of a special act being one of intention, we need only to examine the following underlined portions of the 1937 act, supra, to remove any doubt but that it was the intention of the legislature that the act shall apply to contracts of inter-indemnity or reciprocal insurance companies.

"No policy of insurance against loss or damage from sickness or the bodily injury or death of the insured by accident, and no riders, endorsements, supplementary or additional terms and provisions shall be issued or delivered to any person in this state by any company doing business in this state under the provisions of the insurance laws of the State of Missouri* * *"

(En Banc) 750, l. c. 756, the Court cites the Schott case and points out that:

"* * *a special act may be impliedly repealed by a general one and the question whether it has been so repealed is always one of legislative intention; Schott vs. Continental Auto Ins. Underwriters, 326 Mo 92, 31 S.W. (2d) 7; 59 C.J. Sec. 538. 'The special act is not repealed unless a different intent is plainly manifested, or where the two acts are irreconcilably inconsistent or repugnant, or where the general act covers the whole subject matter of the special one* * *or is clearly intended to establish a uniform rule or system for the whole state.' 59 C.J. Sec. 538; and cases cited in footnotes 85 and 89.

In applying the foregoing rule we are at liberty to take judicial notice of matters of common knowledge, of matter of current history as related to affairs of public interest and concern,* * *

May 3, 1938

Taking judicial notice of matters of common knowledge, and from an examination of the 1937 Act, it is at once apparent that the Legislature was striking at the practice of certain insurance companies to avoid payment of honest claims by resorting to such trickery as printing the benefits of the policies in bold print, whereas the exceptions were printed in small print cleverly hidden away in the body of the policy. There can be no question of the legislative intention to ingraft upon Section 5762 another exception.

Since Section 5965a declares that "the Superintendent and Attorney General are hereby directed to approve for use only policies conforming to the express provisions of the insurance laws of Missouri", it is our opinion that reciprocal or inter-indemnity insurance companies can be required to meet the requirements of our insurance laws respecting suicide, misrepresentation, etc.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

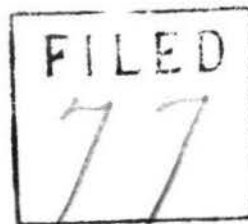
J. E. TAYLOR
(Acting) Attorney General

MW:MM

INSURANCE: Life insurance companies may provide a funeral benefit, ~~benefit~~ natural death indemnity in health and accident policy.

May 13, 1938

578



Mr. Virgil Rule
Assistant Actuary
Insurance Department
Jefferson City, Missouri

Dear Mr. Rule:

We wish to acknowledge your request for an opinion under date of May 2, 1938, together with enclosures, as follows:

"Can the Washington National Insurance Company, a regular life company, provide in their accident and health policies for Funeral Benefit and Natural Death Indemnity? See policy forms MP 2A--1 and WP 4--8."

I.

Chapter 57, Article 2, Section 5690 R. S. Missouri 1929, relating to life and accident insurance, provides as follows:

"Any number of persons, not less than thirteen, may associate and form a company for the purpose of making insurance upon the lives of individuals, and every assurance pertaining thereto or connected therewith, and to grant, purchase and dispose of annuities and endowments of every kind and description whatsoever, and to provide an indemnity against death, and for weekly or other periodic indemnity for disability occasioned by accident or sickness to the person of the insured; but such accident and health insurance shall be made a separate department of the business of the life insurance company undertaking it."

May 13, 1938

Under the above provision a life insurance company may write health and accident insurance but it must be done as a separate part of the business of the company.

Policy form MP 2A--1 of the Washington National Insurance Company states that:

"THIS POLICY PROVIDES INDEMNITY FOR
LOSS OF LIFE OR TIME BY EITHER
ACCIDENT OR SICKNESS AND FOR LOSS OF
LIMB OR SIGHT BY ACCIDENTAL MEANS, AS
HEREIN LIMITED AND PROVIDED."

No provision is made in the above policy for benefits for death resulting from natural causes.

The policy contains a funeral benefit and your question is whether same can be provided for in health and accident policies.

32 C.J. Section 175, page 1091, in discussing contracts of insurance, declares that:

"Being a voluntary contract, the parties may make it on such terms, and incorporate such provisions and conditions, as they see fit to adopt, and the contract as made measures their rights, provided of course the agreement does not violate any principle of the common law or any provision of a constitution or statute."

We have been unable to find any provision in our laws which would prohibit the inclusion of a funeral benefit in a health and accident policy if issued by a life insurance policy.

The only provision we have found relating to funeral benefits is that provided for by funeral associations under Article X of Chapter 32, R. S. Missouri 1929. However, it is

specifically provided by Section 5019 R. S. Missouri 1929, that:

"This article shall not be so construed so as to apply to life insurance companies, associations, or societies authorized to do business under the provisions of chapter 37, R. S. 1929, * * *"

From the foregoing we are of the opinion that the Washington National Insurance Company, a regular life insurance company, may provide a funeral benefit in their health and accident policies.

II.

Policy form WP 4--8 of the Washington National Insurance Company states that:

"This policy provides indemnity for loss of life, limb, sight or time by accidental means and death from natural causes, all to the extent herein limited and provided."

This policy also contains a funeral benefit. Your second question may be stated as whether a benefit may be provided for in health and accident policies for death resulting from natural causes.

Assuming that the benefit in the policy for death from natural causes is carried by the company as a separate part of its business, we are of the opinion that the Washington National Insurance Company, a regular insurance company, may provide a natural death indemnity in its health and accident policy.

Respectfully submitted,

APPROVED:

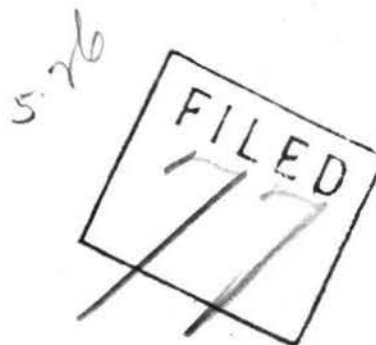
MAX WASSERMAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

MW:MM

ELECTIONS: Last Federal Decennial Census only bases for determining population.

May 24, 1938



Hon. H. I. Ruth
Presiding Judge
County Court of Butler County
Poplar Bluff, Missouri

Dear Sir:

We have received your request for an opinion of May 6th, which reads as follows:

"Within the past thirty day's, Mr. Wm. Gibson, Federal Census representative from Washington, D. C., completed taking the census of the city of Poplar Bluff, with the result that the population of the city of Poplar Bluff, according to his official announcement is now 10809.

"Under the 1933 laws of our state, page 240, section 2, it provides for registration of voters in all cities having a population of 10,000 or more.

"Wish you would kindly advise me in an opinion whether or not the qualified voters of Poplar Bluff will now have to register by reason of the increase in population.

"Your early reply in this connection will be greatly appreciated."

The Laws of Missouri, 1933, Section 2 on page 240, provides as follows:

"There shall be a registration of all the qualified voters in the cities of this State, now or hereafter having a population of 10,000 and less than 30,000 in habitants, except in cities in counties which now have or

hereafter may have 150,000 inhabitants or more and in which registration is now provided for by law, whether organized under general law or special charter, which registration shall be had under the provisions hereafter set forth; and the population of cities within the State containing such population shall for the purposes of this article be ascertained from and determined by the last decennial census taken by the Federal Government."

You will observe that the above section provides specifically that the population "shall, for the purposes of this article, be ascertained from and determined by the last decennial census taken by the Federal Government". The last decennial census taken by the Federal Government gives the population, as of the year 1930, as is provided by the Federal statutes to which the registration law refers.

Section 201, Chapter 4, found in 13 U. S. C. A. contains this law. It reads, in part, as follows:

"AUTHORIZATION OF DECENNIAL CENSUSES:
SCOPE OF INQUIRIES: TERRITORY INCLUDED.

"A census of population, agriculture, irrigation, drainage, distribution, unemployment, and mines shall be taken by the Director of the Census in the year 1930 and every ten years thereafter. The census herein provided for shall include each State, the District of Columbia, Alaska, Hawaii, and Puerto Rico. * * * "

The above act was passed June 18, 1929 and was enacted in lieu of and repealed a similar enactment of March 3, 1919, which provided that such census should be taken in the year 1920 and every ten years thereafter.

Section 202, Chapter 4, found in 13 U. S. C. A., provides that:

"The period of three years beginning the 1st day of January in the year 1930 and every tenth year thereafter shall be known as the decennial census period, and the reports upon the

May 24, 1938

inquiries provided for in said
section shall be completed within
such period. * * *

The effect of Section 202 is, that each periodical decennial census must be completed by the first day of January, three years after the first day of January in 1930 and 1940, etc. The decennial census period for the 1930 census therefore expired on January 1, 1933, which was prior to the time that Section 2 of the 1933 laws quoted above was passed. Consequently the recent census, which you state has just been completed for the City of Poplar Bluff, cannot be a part of or connected in anyway with the last decennial census as of the year 1930.

We have not investigated the decennial census of 1930 to ascertain the population of Poplar Bluff as given in that report. It has not been necessary to do so in order to write this opinion. If the population of Poplar Bluff is under ten thousand, according to the said decennial census of 1930, then no registration of the qualified voters will be required under the terms of Section 2 of the Laws of Missouri, 1933, page 240. If such census shows the population as more than ten thousand and less than thirty thousand, then registration will be required. The recent census to which you refer cannot, however, be the determining factor.

CONCLUSION

If the population of any city in the State of Missouri is ten thousand and less than thirty thousand according to the decennial census taken by the Federal Government, as of the year 1930, then Section 2 of the Laws of Missouri, 1933 at page 240, require that all the qualified voters therein shall register for elections.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Assistant Attorney General

SCHOOLS: (1) The Board cannot transfer teachers fund to the incidental fund; (2) Board is not liable personally for balance due teacher if contract is made within the anticipated revenue from every source; (3) Treasurer cannot pay warrants of 1936 out of 1937 funds.

January 14, 1938

Mrs. Anice Sanders
County Treasurer
Oregon County
Alton, Missouri



Dear Madam:

This Department is in receipt of your letter requesting an opinion involving several questions. For convenience, we will separate your various questions.

I.

"If a school board ordered me to transfer teachers fund to incidental fund as a loan with no intention of paying it back would I be responsible in any way for this fund?"

We are enclosing an opinion rendered by this Department on November 27, 1935, to Honorable J. T. Pinnell, Prosecuting Attorney of McDonald County, Missouri, wherein the question of transferring of school funds is discussed. We think the same properly answers your question.

II.

"Under present conditions it is hard to determine the exact amount of state money a district will get. In case a board drew a contract for more than they can pay would the board be liable for the balance due the teacher?"

The ordinary rule of law applicable to members of school boards and other commissions is to the effect that they

are not personally liable for their actions unless actuated and motivated by fraud or corruption. Under the statement of facts which you present the Board cannot determine with any degree of certainty the amount of revenue the district will receive during the given year. We think the principles as set forth by the court in the case of Jacquemin & Shenker v. Andrews, 40 Mo. App. 507, l. c. 511, answer your second question. The court in said case said the following:

"The provisions of the school law must be construed liberally so as to give them a practical effect. It might have been that the collection of the amount of the estimate of the annual meeting, for carrying on the school for that year, was delayed for some reason or that the income into the teachers' fund from the state or county may have been delayed, by reason of the default or miscarriage of some officer intrusted by law with the collection or disbursement of this fund, and thus it may have been prevented from reaching the county treasury at the proper time. We cannot think a warrant drawn upon the county treasury, under such circumstances when there was no fund then on hand to pay it, would hardly be deemed illegal or unauthorized. If the directors limit their drafts for any school year on this fund to the amount thereof derived from all sources for that year, it is not believed that because there is no money in the fund at the exact date of any warrant, and they knew this fact, this would be such an unauthorized exercise of power as to make them personally liable for the amount of the warrant so drawn. For aught that appears by the petition in this case, there may have, subsequently to the date of said warrant, come into the hands of the county treasurer money

of this fund out of which the same could have been paid. It is not charged in the petition that the defendants were guilty of any fraud or abuse of their trust, nor that the plaintiffs had suffered any damage or loss in consequence thereof. There is no allegation that they have, in the performance of their official function, departed from the requirements of the constitution or the statute except that they have caused a warrant to be drawn on a fund in which there was no money, at the time, and which they knew. To hold that the humble but necessary public duties of school directors can only be undertaken at the hazard of personal liability for every warrant to be drawn on the county treasury, when there does not happen to then be money in the fund against which it is drawn, is a doctrine too hard to be enforced in any court. There is no allegation of deceit or other misbehavior of these directors, which renders them liable on the warrant sued on. We think the petition states no cause of action upon these school warrants or any of them in favor of the plaintiffs, and that the judgment should be affirmed."

Therefore, in view of the above decision, we are of the opinion that the Board would not be liable personally for any balance due the school teacher. Of course, the school district would be liable for the same.

III.

"Should a treasurer pay a 1936 warrant out of 1937 funds for teacher would the treasurer be liable for this if the teacher of this year asked them to make it up?

In view of Section 12, Article X, of the Constitution of Missouri, it is the duty of school districts, as well as counties, not to incur any indebtedness to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters. A warrant which is issued on the current revenue for a given year should be paid out of the revenue of that year and not out of the funds for the subsequent year.

We think the ruling in the case of *State ex rel. v. Johnson*, 162 Mo. 621, 1. c. 629, relating to the power of county courts to issue warrants, is also applicable to schools districts. The court said the following:

"It was then anticipated that, though the county court might not issue warrants in excess of the levy for a year's current expenses, and that a creditor might rely upon the fact that his contract was within the amount of revenue levied and provided, and trust to the power of the State to enforce its taxes, still it might happen from some unforeseen cause enough of the estimated amount of revenue might not be collected to pay all the warrants drawn against it in anticipation. Under such circumstances it has never been ruled that such a creditor's warrant was absolutely void and extinguished by the non-payment in the year in which it was drawn. On the contrary, this court has often said in no uncertain terms that it was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years. (*Randolph v. Knox County*, 114 Mo. 142; *Andrew County v. Schell*, 135 Mo. loc. cit. 39; *State ex rel. v. Payne*, 151 Mo. loc. cit. 673;

Mrs. Anice Sanders

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Jan. 14, 1938

Railroad Co. v. Thornton, 152 Mo.
570; State ex rel. v. Allison, 155
Mo. loc. cit. 344; and on this point,
Reynolds v. Norman, 114 Mo. 509.)"

We are, therefore, of the opinion that the warrants issued in 1936 should not be paid out of 1937 revenue and funds. Such warrants can only be paid out of the surplus revenues of any year or from the delinquent taxes for the year in which the warrant was issued.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

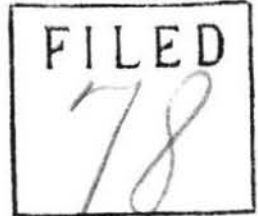
J. E. TAYLOR
(Acting) Attorney-General

OWN:EG
Enc.

WARRANT:--Issued out of justice court in one county, how served in another.

February 10, 1938

Mr. H. P. Savage
Memorial Building
429 Main Street
Rockport, Missouri



Dear Sir:

We have your request of February 8th for an opinion stating that the Sheriff of Jackson County has refused to execute a warrant in a felony case which was issued out of your justice court. Your inquiry is concerning the proper procedure to get this warrant executed.

In answer thereto I call your attention to Section 3470 R. S. Mo. 1929, which in part provides as follows:

"If the person against whom any warrant granted by a * * * justice of the peace * * * be in any other county, it shall be the duty of any magistrate * * * in the county in which such offender may be * * * on proof of the handwriting of the magistrate issuing the warrant to indorse his name thereon, and thereupon the offender may be arrested in such county by the officer bringing such warrant * * *"

Mr. H. P. Savage

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February 10, 1938

This statute clearly sets forth your procedure. You are entitled to send the sheriff or constable of your county to Jackson County to make the arrest, and the only requirement is that the sheriff or constable find some justice of the peace and get the warrant indorsed, after which the officer can go and make the arrest.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

FEES: Execution fee of One hundred twenty-five dollars provided for in Section 11791 R. S. Missouri 1929, not payable to warden of penitentiary.

February 24, 1938

Hon. J. M. Sanders
Warden, Missouri State
Penitentiary
Jefferson City, Missouri



Dear Sir:

We have your request of February 20, 1938, for an opinion as to whether or not the warden of the State Penitentiary is entitled to charge and collect a fee of One hundred twenty-five dollars made payable by Section 11791 R. S. Missouri 1929, for the execution of a death warrant.

This One hundred twenty-five dollar fee was payable to sheriffs who executed the death warrants under the old hanging law. It was not merely for compensation but went to cover all expenses incurred by the sheriff in executing a person by the old method of hanging. The method by hanging, has now been repealed and all executions are to be carried out by administration of lethal gas in the State Penitentiary under the Laws of Missouri 1937, page 221. The 1937 law merely provides, Section 3725 supra, that the warden shall make a return upon a death warrant to the court upon which the judgment was rendered showing the time, mode and manner in which it was executed.

In view of the fact that the warden receives no fees and his compensation is by way of a salary provided by Section 8391 R. S. Missouri 1929, it is apparent that the One hundred twenty-five dollar fee made payable to sheriffs and other officers in Section 11791 supra, was never intended to be made payable to the warden.

Hon. J. M. Sanders

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February 24, 1938

It is therefore the opinion of this office that the fee of One hundred twenty-five dollars as provided for in Section 11791 R. S. Missouri 1929 is not payable to the Warden under the Lethal Gas Law.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

ASSESSORS: Compensation in counties of 40,000 or less in view of Section 9756, R.S. Missouri, 1929, as amended in Laws of 1937, page 570.

January 26, 1938

Mr. O.G. Schell
Assessor of Miller County
St. Elizabeth, Missouri

Dear Sir:



This department is in receipt of your letter of January 17, 1938, in which you request an opinion as follows:

"As Assessor of this county I am asking your opinion on several matters and hope you shall see fit to give me the desired information.

"First--

Do I get paid for one list only on resident or non-resident land owners, regardless in how many sections their land lies? Or do I have to make a separate list for each tract the owner possesses and if so, do I get the stipulated pay for each tract, provided they are in different sections.

"Second--

In the case of non-resident lists--do I have to list all of their holdings on one list, or do I make a list for a man's holdings for each separate tract---if the latter, what do I get paid for?

"As an example for instance we have Church & Blaser, who own hundreds and hundreds of acres scattered in some 25 or possibly more sections--how many lists do I make and what am I entitled to?"

Before we can proceed to determine the compensation of an assessor in the particular examples which you have set forth, we must first determine what the compensation of an assessor is in counties not exceeding 40,000 persons in population, which includes Miller County.

Section 9806, R.S. Missouri, 1929, as amended in Laws of 1931, page 359, is in part as follows:

"The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding forty thousand, thirty cents per list in counties having a population of more than forty thousand, and not exceeding seventy thousand, and twenty-five cents per list in counties having a population in excess of seventy thousand inhabitants, and shall be allowed a fee of three cents per entry for making real estate and personal assessment books, all the real estate and personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other half out of the state treasury: Provided, that nothing contained in this section shall be so construed as to allow any pay per name for the name set opposite each tract of land assessed in the numerical list."

A "tax list" as this term is used in Section 9806, supra, is that account of taxable property made by the owner thereof upon oath and delivered to the assessor, or prepared by the assessor in accordance with the provisions of Section 9760, R.S. Missouri, 1929, when for any cause, a list is not given the assessor. It is for taking this list that the assessor is paid.

In *State v. Gomer*, 101 S.W. 2nd 57, the Supreme Court of Missouri on November 12, 1936, rendered a decision which required a comprehensive review of the laws which fixed the

compensation of county assessors. It was held in this case "that an assessor is not required to take the list described in section 9756, R.S. 1929, from persons who own no 'taxable personal property in his county' and is, therefore, not required to make the list required by section 9760, R.S. 1929, for only real estate owned by non-residents of his county" (because their personal property is taxable elsewhere), and that not being required to take a list containing only real estate, an assessor is not "entitled to receive any compensation for making a list containing only real estate".

The effect of this case was to give to an assessor compensation for making or taking a list only when that list contained personal property.

Section 9756, R.S. Missouri, 1929, provides when and in what manner the assessor shall take "a list of taxable personal property in his county", and provides that said lists shall contain; first, a list of all the real estate and its value; second, a list of the personal property enumerated in said section and its value.

The Gomer case, supra, held that the list referred to in Section 9806, supra, did not include the list of all the real estate and its value provided for in this section, because the list of real estate was not required to be taken by Section 9756.

In Laws of 1937, page 570, Section 9756 was repealed and reenacted. Outside of some minor changes as to the items of personal property required to be listed, this new section made these changes. It provided that the assessor shall "proceed to take a list of the taxable personal property and real estate in his county", and a sentence was added to the end of the new section as follows: "The word 'list' as used in Section 9806 of the Chapter (Section 9806 fixes the assessor's compensation) shall include all the lists required under this section to be taken."

The words "and real estate", above underlined, did not appear in Section 9756 before it was amended, and we see by the addition of these words that this section now specifically requires both personal property and real

estate to be listed. The sentence added to the end of the new section specifically provides that the list mentioned in Section 9806, supra, means the lists required to be taken under Section 9756, Laws of 1937, page 570, which is a list of both personal property and real estate.

Numerous presumptions are indulged in by the courts as aids in the construction of statutes. Some of these which apply here are; that the legislature is presumed to be aware of the settled law of the state and by enacting a new law, seeks to make some change therein. *Reed v. Goldneck*, 112 Mo. App. 310. Also, that it is to be presumed that the legislature acted with full knowledge of the judicial decision under the preexisting law when passing a statute. 59 C.J. 1008; *State ex inf. v. Meeker*, 296 S.W. 411 (Mo.); *Thompson v. United States*, 246 U.S. 547, 62 L. Ed. 876.

Indulging in these presumptions here, we think the intention of the legislature in repealing and reenacting Section 9756, R.S. Missouri, 1929, in the form it now appears in Laws of 1937, page 570, was to nullify the ruling of the court in *State v. Gomer*, supra, insofar as that decision holds that an assessor is not required to make or entitled to receive compensation for taking a list containing only real estate.

✓ In *State v. Gomer*, 101 S.W. 2nd, 1.c. 66, the court drew nine conclusions concerning the duties and compensation of assessors. These conclusions concisely set out the compensation to be paid and we shall set them forth here with the exception of the third which has been completely nullified by this amendment. Also, we shall interpolate into them the changes this amendment has brought about and will omit matters required to be omitted by the new law. The interpolations will be indicated by parenthesis and underlined.

"First. That an assessor should obtain a list in the form prescribed by section 9756, R.S. 1929 (Mo. St. Ann. para. 9756, p. 7872), (as amended Laws of 1937, page 570), from every person who owns 'taxable personal property' (and real estate) in his county, (and its value).

"Second. That whenever from any cause a list of any taxable personal property (and real estate) is not delivered to him by the owner or his representative, then the assessor shall make a list thereof as required by section 9760, R.S. 1929 (Mo. St. Ann. para. 9760, p. 7877), or if the owner of such property is deceased then as required by section 9763, R.S. 1929 (Mo. St. Ann. para. 9763, p. 7879).

"Fourth. That an assessor is required to make 'Part First' of his book, denominated 'The Land List' from the list of taxable lands in his county furnished by the Secretary of State, the government maps and plats on file in his county, the last assessor's book and other information or records (see section 9797, R.S. 1929 (Mo. St. Ann. para. 9797, p. 7901); and that he shall use the information obtained from the lists taken from personal property owners and from other sources to aid him in obtaining a correct description of all tracts of land, in placing the name of the true owner opposite each tract, and in ascertaining its value.

"Fifth. That an assessor is required to make 'Part Second' of his book denominated 'Personal Property,' from the lists taken by him from property owners, or made out by him whenever, for any cause, it has not been possible to obtain from the owner a list of any taxable personal property which he has been able to locate.

"Sixth. That as compensation for making the numerical assessment in

the land list, an assessor should be paid such amount as may be allowed by the county court not to exceed the sum of 3 cents for each and every tract so assessed; but that all contiguous lots in the same square or block which can be consolidated into one tract, lot, or call shall be counted as one tract.

"Seventh. That as for compensation for taking the lists required to be delivered to him by owners of personal property (and real estate) (in counties of not more than 40,000 population) an assessor should be paid 35 cents for each list taken and should also be paid a fee of 3 cents per entry for each entry, of a property owner's name and the personal property assessed to him, in the alphabetical list in the part of his book covering personal property.

"Eighth. That an assessor is entitled to thirty-five cents per list for each list he takes which contains personal property (or real estate), whether he takes it from the owner or makes it on his own view or other information obtained as specified under section 9760 or section 9763, R.S. 1929 (Mo. St. Ann. paras. 9760, 9763, pp. 7877, 7879).

"Ninth. That the county and the state shall each pay one-half of the compensation for taking lists, and for making proper entries in both the land list and the personal property list."

In Sparks v. Clark, 57 Mo. 58, and Davidson v. Laclede Land and Development Co., 253 Mo. 223, it is said that all subdivisions of a section of land belonging to the same person should be counted as one tract although such subdivisions may not be contiguous.

Applying the foregoing to your particular examples, we conclude that an assessor is only entitled to be paid for making or taking one list of the property owned by one person, whether he be a resident or non-resident, and that this list should contain all the taxable property of that person, both real and personal. The fact that the land may lie in more than one section makes no difference in fixing the compensation of the assessor for taking or making the "tax list".

CONCLUSION

Therefore, it is the opinion of this department that the taxable property of a non-resident is to be assessed in the same manner as that of a resident. The assessor is entitled to receive thirty five cents for each list he takes. All the property, both real and personal, owned by one person in the county should be contained in one list. That as compensation for making the numerical (or alphabetical) assessment or entry of land in that part of his book denominated "land list", an assessor is entitled to receive as compensation a sum to be fixed by the county court, not to exceed three cents for each tract so assessed, and entered in the land list. But that for the purpose of determining the number of tracts for which the assessor is to be paid, all tracts of land owned by the same person in any one section of land, are to be counted as one tract. That for making the alphabetical assessment or entry of personal property in the part of his book denominated "personal property", an assessor is entitled to receive three cents for the entry of each property owner's name and all the personal property assessed to him. This fee of three cents is paid only for the entry of the name, and all the personal property and not for each item of personal property.

APPROVED by:

Respectfully submitted,

J.E. TAYLOR
(Acting) Attorney General

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

LLB:VAL

ELECTIONS:

Hotel keeper convicted of refusal to furnish list of tenants to election commissioner is not considered a crime connected with the exercise of right of suffrage.

Oct. 29, 1938

Mr. Maurice Schechter
809 Wainwright Bldg.
St. Louis, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of Oct. 26, 1938, with reference to elections. Your letter reads as follows:

"The Prosecuting Attorney of the City of St. Louis has issued informations against lodginghouse keepers, based on Section 22 of the "Registration Act in cities of 600,000 or more inhabitants", which section is found on page 251 of the Laws of Missouri, 1937. The defendant that I represent is charged with neglecting or failing to comply with the provisions of that section, which is a misdemeanor, punishable by a jail term not exceeding six months, or a fine of not less than \$100.00, nor more than \$1,000.00, or by both such fine and imprisonment.

"Section 12 of the same Act, found on pages 244 and 245, provides that a person cannot vote if (2) he has been convicted of a felony, or of a crime connected with the exercise of the right of suffrage and has not been granted a pardon therefor. Section 29 of the Act, found on page 256, provides that it shall be the duty of the clerk of the court where any person has been convicted of a

misdeemeanor connected with the exercise of the right of suffrage, to furnish to the Election Board, the name of the person convicted of said misdemeanor and his place of residence.

"The question in my mind is whether a person convicted of violating Section 22 can be denied the right to vote, because will the failure of furnishing such information to the Board be connected with the exercise of the right of suffrage?

"I have taken this matter up with the Prosecuting Attorney, and we are of the opinion that we should receive a construction by your office on Section 22 as to whether a violation thereof would be "connected with the right of suffrage."

Section 12 of the Session Laws of Mo., 1939², page 245, in describing who should not be entitled to vote reads in part as follows:

"If he has been convicted of a felony, or of a crime connected with the exercise of the right of suffrage and has not been granted a full pardon therefor"

The above quotation is the part that you desire to be construed by this office. Bouvier's Law Dictionary defines "suffrage" as voting; the act of voting. As a general rule the intention of the legislature or of law makers will prevail over the literal sense of the terms in a statute. In the case of State v. Schwartzmann Service, Inc., 40 S. W. (2d) 479, par. 1-3 the court said:

"It is a cardinal rule, universally

accepted, that, in the exposition of a statute, the intention of the law-maker will prevail over the literal sense of the terms; its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from its context; from the occasion and the necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion. The object of all rational interpretation is to reach the true intent and meaning of the law-making authority, as expressed in the language it has employed to convey the thought. All other rules are subordinate to that great one. The chief canon of construction is that which requires us to find the legislative intent and purpose. The intent and spirit of the legislative act should be made to speak, if such can be done without doing violence to express language."

Can it be said that the legislature intended that every conviction of each misdemeanor that in the most remote circumstances might interfere with a person voting, should deprive the wrongdoer of voting? Section 22, Session Laws of 1937, p. 251 reads as follows:

"Upon the demand of any election commissioner, the landlord, proprietor, keeper, manager, clerk, or other persons in charge of any lodging house, boarding house, inn, bath house, hotel or tavern in such city, shall, not less than three nor more than five days prior to the first day of registration for every election and also not less than three nor more than five days before every election, file with the election commissioners a written statement,

which shall be open to public inspection, sworn to by him, upon his personal knowledge, setting forth the name of every person residing in his lodging house, boarding house, inn, bath house, hotel or tavern, the period of the continuous residence of such person ending at the date of such statement, the number of the room, bed or cot that such person occupies, and the period for which such persons engaged board or lodging, and such other information as the election commissioners, or any one or more of them may require. Any landlord, proprietor, keeper, manager, clerk or person in charge of any lodging house, boarding house, inn, bath house, hotel or tavern, neglecting or failing to comply with the provisions of this article, shall be deemed guilty of a misdemeanor and upon conviction shall be sentenced to the city or county jail for a term not exceeding six months or be fined not less than \$100 nor more than \$1000 or by both such imprisonment and fine. If any person shall wilfully make a false written statement he shall be deemed guilty of a felony and upon conviction shall be imprisoned in the penitentiary for a term of not less than two years nor more than five years."

This section only states that the wrongdoer in case of refusal to comply with the demand of the election commissioner shall be deemed guilty of a misdemeanor. It does not say that the proprietor shall then be guilty of a misdemeanor connected with the exercise of the right of suffrage. Could it be considered that the crime of the landlord was a violation of this clause? It is possible that the tenants are not even voters and so how could a proprietor violate the law in connection with the exercise of the right of suffrage?

The Supreme Court of the state of Mo. in construing statutes in reference to voters are very liberal and in the case of Chomeau v. Roth, 72 S. W. (2d) page 997, par. 5, the court said:

"If, as the evidence shows, upon matriculation at the seminary the students abandoned their former residences, entering the school with the fixed intention of not returning to their original homes permanently, are they to be disfranchised from thenceforth until they acquire a residence after graduation? We think not. Rather, the policy of the law is to construe election laws liberally in aid of the right of suffrage. * * *

The United States Supreme Court in construing the interpretation of the phrase "exercising the right of suffrage" in the case of United States v. Souders (U.S.) 27 Fed. Cas. 1267, 1269 said:

"It would seem there ought not to be any difficulty in arriving at the signification of the words in the act of Congress providing that "if, at any election for representative," etc., "any person shall, by force, threat, menace, intimidation, or otherwise, unlawfully prevent any qualified voter from freely exercising the right of suffrage," etc. When a man is spoken of as "exercising a right," it is commonly understood that he is doing something. When a voter casts his ballot into the box, do we not say that he is "exercising the right of suffrage"? Can any words be used that better define the act of voting? And, when he exercises this right "freely," does he not do it according to his pleasure, without any constraint either upon his mind or his body?

His will must not be controlled, and his physical opportunity for doing the act must not be interfered with. Any control over the one or interference with the other encroaches upon his freedom of action, and produces the mischief which the words of the statute were designed to guard against and cure. And what is it to prevent a voter from exercising this right? It is to put such a restraint upon his volition, or his body, that he cannot perform the act; producing by threats or otherwise such apprehension of personal loss or injury as to induce him not to vote or to vote contrary to his wishes, being a restraint upon his will, and an intervening between him and the ballot box, so as to render it physically impossible for him to cast his vote, being the restraint upon his body. *United States v. Souders* (W.S.) 27 Fed. Cas. 1267, 1269."

In view of the above construction, could it be said that the proprietor was doing anything connected with the exercising of the right of suffrage, especially in the case where no legal or illegal voters were in his hotel, rooming house, inn etc? The legislature surely only intended that the wrongdoer should do some overt act in connection with voting on election day and not in isolated crimes that are too remote to be connected with the exercise of the right of suffrage.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the operators of a lodging house, who have refused to comply with the provisions of Section 22, page 251 of the Laws of Mo., 1937 has not committed a misdemeanor

Mr. Maurice Schechter

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Oct. 29, 1938

connected with the exercise of the right of suffrage.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

WJB:WW

RECORDER OF DEEDS -- May purchase new abstract and index to
trust deeds and be reimbursed by county court

January 6, 1938

Honorable J. Scott Graham
Circuit Clerk and Ex-officio Recorder
Madison County
Fredericktown, Missouri



Dear Sir:

This is to acknowledge receipt of your request
of January 1, 1938, for an opinion, reading as follows:

"We have in our office an index to Trust
Deeds, which is used every day and the
book is practically all in pieces. A
large number of the pages are loose. I
have consulted various firms who inform
me that the record cannot be rebound
with any success.

"I have consulted the County Court about
the matter and they do not wish to go
to the expense of buying a new book and
recopying it. I am wondering if I would
be safe in ordering and rewriting a new
book, as I feel that I am the one to be
responsible for the maintenance of the
record. I would also like to know if
the fee for rewriting the record is
extra above the salary allowed the Cir-
cuit Clerk."

At the outset of our opinion, we observe that by
virtue of your being the Circuit Clerk in a county of less
than 20,000 population, you also act as Recorder of Deeds.
Laws Mo. 1933, page 360.

We direct your attention to applicable statutes.

Under the provisions of Section 11527 of R. S. Mo. 1929, it is provided that the county court shall provide suitable books for the Recorder of Deeds. Said section reads in part as follows:

"The recorder shall keep his office at the seat of justice, and the county court shall provide the same with suitable books, *** "

It is provided by Section 11546 of R. S. Mo. 1929 that the Recorder shall keep an abstract and index of deeds. Said section reads in part as follows:

"The recorder of each county in this state shall keep in his office a well-bound book or books, to be known as the 'abstract and index of deeds,' ** "

From these statutory considerations, which are plain, unambiguous and mandatory in their terms, you will have noticed that the county court is required to provide the Recorder of Deeds with "suitable books", which books are to be used in the recordation of instruments of writing required to be recorded; also, that the Recorder is required to keep in his office "a well-bound book or books." From this it follows, what are "suitable" and "well-bound books"? Webster defines the word "suitable" in the following language:

"Capable of suiting; proper; appropriate."

In the case of White vs. U. S. 69 Fed. 93, the court held that the test of the suitability of an article for a certain purpose is not whether it is commonly used therefor, but whether it possesses actual, practical and commercial fitness for that purpose.

In the case of Miller vs. Estabrook, 273 Fed. 143, 151, the U. S. Circuit Court of Appeals (4th) considered a

statute of the code of West Virginia that required the Clerk of the County Court to admit to record and record deeds and other writings in a "well-bound book." It was argued that the claim of title was not good, because the Clerk recorded the deed in a book which contained other records, when the statute required such deeds to be recorded in a "well-bound book" set apart and exclusively used for such recordations. The court, in ruling this contention, said:

"We think, if the clerk recorded the instruments mentioned in one of two or three such books, preserved and indexed as required by the statute, so that the books and contents were readily accessible to all persons concerned with land titles and liens, this would be a substantial compliance with the law."

(underscoring ours)

These observations lead us to conclude, in construing the words as have been used in our statutes, in order to arrive at the legislative intention, that a suitable and well-bound book means one which possesses actual and practical use, properly preserved so as to be readily accessible to those concerned. The importance of such book need not be stressed in the course of this opinion.

If, as you have suggested by your request for an opinion, the "index to Trust Deeds, which is used every day and the book is practically all in pieces", and "a large number of the pages are loose", it cannot be said or argued that such book is still suitable and is well-bound so as to fulfill the requirements of the statute.

In reaching our conclusion, we are not unmindful of Section 11563 of R. S. Mo. 1929, relating to the making of a new abstract and index for deeds, which reads in part as follows:

"When the county court of any county in this state shall consider it necessary to provide a new abstract and index of deeds for the recorder's office of such

county, ** such court may, by an order duly entered of record, direct the same to be done by the recorder or some other competent person, and when any such abstract and index shall become so worn and defaced as to be illegible, such court shall, ** direct the recorder or some other competent person to copy the same in a suitable book; *** "

Other parts of the statute relate to the fee for making up the new abstract and index and the copying of such abstract and index.

It may be that the county court is mindful of this section of the statute wherein an apparent discretion is given them for determining when an abstract and new index is necessary, but even though a discretion is vested in the county court to determine when a new abstract and index of deeds may be made, what is the Recorder to do in the event the county court does "not wish to go to the expense of buying a new book and recopying it?"

A somewhat similar situation arose in the case of *Ewing vs Vernon County*, reported in 216 Mo. 681. In this case the court considered what is now Section 11527, supra, together with other sections placing a duty upon the Recorder of Deeds. The county court did not want to pay for janitor service for the Recorder, and after considering other sections of the statute, the court said: (l.c. 692)

" ** it becomes plain that the county is to furnish the necessities in furniture, fixtures, etc., to preserve the county records and make them usable by and useful to the general public. ** "

In ruling upon whether or not the county court was required to pay for janitor service which the Recorder had assumed as a personal liability when the court refused to pay for such service, the court said: (l.c. 693)

January 6, 1938

"And if the county court, as the agent of the general public in county affairs, without legal right or excuse, refuses to do that duty in the recorder's office, what is the recorder to do? His only sensible course is to do what this recorder did, viz., avoid an unseemly wrangle, pay it out of his own pocket and trust to the courts and the law to reimburse him. *** "

It is to be observed, before concluding, that a Recorder of Deeds may not only be liable civilly in an action on his official bond, if such Recorder be negligent in the performance of his duties, to the detriment of any persons, but may also be liable criminally. Section 11564 and Section 11565, R. S. Mo. 1929.

As relates to the second question propounded in your request for an opinion regarding the fee for re-writing the record, which is made the subject of this opinion, I am enclosing copy of an opinion dated January 4, 1938, directed to the Honorable Melvin Englehart, Prosecuting Attorney of Madison County, Missouri, which opinion was written by Harry H. Kay, Assistant Attorney General, and approved by J. E. Taylor, Acting Attorney General, wherein you will find this subject fully discussed.

CONCLUSION

In view of the above, it is the opinion of this department that if any county court refuses to purchase a new abstract and index to trust deeds when such book is not practical and usable, that the Recorder of Deeds may pay for such abstract and be reimbursed by the county court.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:FE
7-1-38

TAXES: Distribution of Private Car Tax.

December 5, 1938



Mr. Byron B. Sconlon, Jr.,
Deputy County Clerk
St. Joseph, Missouri

Dear Mr. Sconlon:

Your letter of October 24, 1938, addressed to Mr. Lloyd King, State Superintendent of Schools, has been referred to this Department for attention. Your letter states as follows:

"A few days ago we received a State Treasurer's draft for \$1,119.82 listed as Private Car Tax and apportioned to Buchanan County on its total enumeration.

"As we understand sections 10062 and 10063 R.S. Missouri, we are to distribute this money on a basis of enumeration to the different townships in the County. If this is true, will the City of St. Joseph be entitled to its portion in Washington Township or should the money be used for roads in Washington Township outside of St. Joseph only.

"So as to avoid any transfer of funds later, please advise as to the correct method of distributing said Private Car Tax."

The solution of your question rests on the construction to be given Sections 10062 and 10063 R.S. Missouri 1929, without any aid from the Courts of Missouri, inasmuch as the problem you state has not been passed upon by our courts.

December 5, 1938

In view of the fact that the meaning intended by these sections is exceedingly obscure and confusing we are cast on the presumption that by reason of that portion of the fund Buchanan County received from the state in the first instance, under Section 10061, being contributed to, or created, as it were, by all the school children of St. Joseph, it would seem both logical and fair to conclude that where the county in turn comes to apportion the amount received from the State to the respective townships in the county based upon the number of all the school children in each respective township, each such township receives its portion as a whole, or as a township, irrespective of whether such township does or does not contain a city within its boundaries.

Hence, the school children of St. Joseph being an aid in procuring the portion of the fund due Washington Township by reason of the provision of Section 10062, we repeat, it appears both logical and fair that St. Joseph should share in the part which is due Washington Township.

While the fund is allocated and earmarked for a specified purpose, yet we do not believe that any part of it is to be distributed or turned over to the city, but on the contrary is held by the County as a separate fund to be used throughout the township by the road commissioners, road overseers or street commissioner, as the case may be, as and when the County Court may direct for the purpose named in Section 10063.

Respectfully submitted,

APPROVED:

J. W. BUFFINGTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

JWB:MM

RECORDER OF DEEDS:

Cities of 600,000 or more and counties 200,000 to 400,000. Trustee's Deeds. Recorders in cities of 600,000 or over and counties of 200,000 to 400,000 shall require that the unpaid obligations securing deeds of trust or mortgages be presented to him before recording Trustee's Deeds under foreclosure for such mortgages.

January 4, 1938

Mr. Oliver Senti,
Associate City Counselor,
City of St. Louis,
St. Louis, Mo.

1-8



Dear Sir:

This office acknowledges your request dated December 31, 1937 for an opinion pertaining to the recorder of deeds which is as follows:

"A Trustee's Deed to real estate foreclosed under a deed of trust securing seventy notes for \$500.00 each has been presented to the Recorder of Deeds for recording, together with all of the notes except two, the holder of which is suing the corporation from which they were purchased for specific performance (payment of the notes in full), and refused to surrender them to the Trustee.

The Recorder's Office has inquired of this department whether it can record the Trustee's Deed without all of the unpaid notes being presented, in view of the provisions of Section 3096a, Laws of Missouri 1933.

The Statute should be enforced uniformly throughout the State and we have therefore advised the Recorder's office to be governed by your construction of its provisions.

Will you please advise this office whether, under the circumstances stated, the above-mentioned Trustee's Deed should be recorded, so that we can advise the Recorder in accordance with your interpretation?"

The office of the recorder of deeds is a statutory office.

Section 11526, page 360 Laws of Missouri, 1933 provides as follows:

"There shall be an office of recorder in each county in the state containing 20,000 inhabitants or more, to be styled, 'The office of the Recorder of Deeds.'"

In the case of Lamar Township v. City of Lamar, 261 Mo. 171, 1.c. 189, the court said:

"Officers are creatures of the law whose duties are usually fully provided by the statute."

And in 46 Corpus Juris, page 1031, Section 287, we find the rule stated as follows:

"The powers and authority of public officials are fixed and determined by law, subject to such limitations as may be imposed by the Constitution."

The legislature with the power to create an office may provide its powers and may from time to time diminish them.

The general powers and duties of the recorder of deeds in cities now or hereafter containing six hundred thousand (600,000) population or more or in counties which now or hereafter containing a population of two hundred thousand (200,000) to four hundred thousand (400,000) are set out in Section 11574a page 362, Laws of Missouri 1933. This section requires the recorder to record every deed, mortgage, conveyance, deed of trust, etc., which are presented to him for record. Section 3039 R.S. Mo. 1929, provides that:

"Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

Section 11543 R.S. Mo. 1929 provides as follows:

"It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; second, all papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government; third, all marriage contracts and certificates of marriage; fourth, all commissions and official bonds required by law to be recorded in their offices; fifth, all written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father, and maiden name of the mother of such child or children."

The legislature in 1933 enacted a special law pertaining to the duties of the recorder which is found at page 193 Laws of Missouri and in Section 3096a which is as follows:

"In all cities in this State which now have or which may hereafter have 600,000 inhabitants or more and in all counties of this State which now have or may hereafter have 200,000 inhabitants and less than 400,000 inhabitants, no trustee's deed or mortgagee's deed under power of sale in foreclosure of any deed of trust or mortgage shall be accepted by the recorder of deeds for record unless the principal note or notes or other principal obligations which were unpaid when the foreclosure sale commenced and for the default in payment of which foreclosure is had, are produced to

the recorder, or if said notes are lost then the affidavit of the owner of the principal notes or obligations that they are lost. Upon such trustee's or mortgagee's deed being filed for record, the recorder shall make a notation on the margin of the record of the deed of trust or mortgage, and on the said principal note or notes or other principal obligations showing that such deed in foreclosure has been filed of record, in substantially the following form: 'Deed under foreclosure filed **** 19***** *****Recorder.'

Except, whenever any trustee's deed or mortgagee's deed under power of sale in foreclosure of any mortgage or deed of trust providing for the issuance of more than one principal note or bond shall be presented for recording, it shall be accepted by the Recorder of deeds for record upon the presentation to the Recorder of the unpaid principal note or notes or bonds required by such mortgage or deed of trust to permit the trustee to sell the property under foreclosure sale. A foreclosure sale shall be deemed to have commenced within the meaning of this act upon the first publication of the notice of sale."

In construing the foregoing facts pertaining to the powers and duties of the recorder we find that the legislature by said Section 3096a limited the recorder in such cities and counties therein set out, in his duties and required that before he was authorized to record a Trustee's Deed under power of sale and foreclosure he should require the production of the principal note or notes or other principal obligations which were unpaid when such foreclosure sale commenced and for the default in payment of which the foreclosure was had.

From the authorities hereinbefore set out, the legislature had the power to create the office of the recorder and it had the power to prescribe his duties as set out in said Section 3096a in reference to the recording of Trustee's deeds.

By the second paragraph of said Section 3096a, if the deed of trust or mortgage authorizes a foreclosure in case of

January 4, 1938

default of one or more of the notes or bonds secured, then the recorder shall accept the trustee's deed under foreclosure upon a presentation of the unpaid note or notes or bond which are required by such deed of trust to permit the trustee to sell the property under foreclosure.

CONCLUSION

It is therefore the opinion of this department that the recorder of deeds in cities now or hereafter containing six hundred thousand (600,000) or more inhabitants and in counties now or hereafter containing not less than two hundred thousand (200,000) nor more than four hundred thousand (400,000), when a trustee's deed or mortgagee's deed under power of sale in foreclosure of any deed of trust or mortgage, is presented to him for record, shall require to be presented to him the unpaid principal note or notes or other principal obligations which were unpaid when the foreclosure sale commenced and for the default in payment of which such foreclosure is had, except in the following case: If the deed of trust or mortgage provides for foreclosure in case of default of any part or all of the notes or bonds, then the recorder is authorized to accept for record, such trustee's deed upon the presentation to him of such unpaid note or notes of bonds, the default in payment of which would authorize a foreclosure.

Respectfully submitted

TYRL W. BURTON
Assistant Attorney General

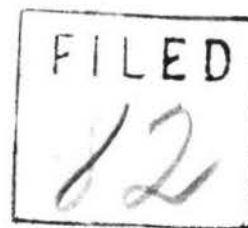
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

COURT HOUSE REMOVAL: Sufficiency of Petition.

July 8, 1938 7/13



Hon. L. B. Shuck
Prosecuting Attorney
Shannon County
Eminence, Missouri

Dear Sir:

We have your request for an opinion as to the validity of the petition presented to the County Court asking for the removal of the county seat of Shannon County from its present location to the town of Winona, to be submitted to the voters at the General Election in November. A copy of the petition, without signatures, as presented, is as follows:

"We, the undersigned citizens and qualified voters of Shannon County, Missouri, composing at least one-fourth of the qualified voters of said county, hereby petition your honorable body, the County Court of said County, for removal of the County Seat and seat of justice of said Shannon County, Missouri, from Eminence in said county, where it is now located, to the City of Winona in said county; and petition your honorable body as such County Court, that you make an order of record of said Court directing that the proposition to remove such seat of justice to the place named in said petition, to-wit: Winona, Shannon County, Missouri, be submitted to the qualified voters of said County, at the next General Election to be held in said County and State of Missouri, on the first Tuesday after the first Monday, in November, 1938, it being Tuesday, November 8th, 1938.

And otherwise that said Court carry out the provisions of the Statutes and laws of the State of Missouri in such case made and provided.

The City of Winona hereby offers and donates the present City Hall and square on which same is located, and Tenders, Donates and Pledges a good and sufficient deed to said property or offers and donates the Ball Park property, complete with good and sufficient deed to said county for County Seat."

The Courts take judicial notice of the existence of a city, its population and lawful powers conferred upon its governing body. The last paragraph of the petition relating to the offer of the City of Winona to donate a site for the Court House is void and of no binding effect. The persons who signed this petition have no authority to bind the City of Winona and there is no obligation on the City of Winona to donate the present City Hall or a site for a County Court House.

It is apparent that this petition was presented under and by virtue of Section 12073 R. S. Missouri 1929. This section provides that one-fourth of the voters of a County may petition the County Court for removal of the County Seat, which proposition shall be submitted to the qualified voters of the County at the next general election.

Commenting upon this statute the St. Louis Court of Appeals in State ex rel. vs. Garrett, 76 Mo. App. 295, l. c. 303, said:

"Prior to the revision of 1865, the corresponding section to the one quoted, provided that an order for the removal of the seat of justice of a county could only be made upon the petition of three fifths of the taxable inhabitants of the county. This requirement necessarily prevented the submission of more than one

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proposition of removal at the same election, for the obvious reason that two petitions containing the requisite number of signers could not be obtained. In 1865 the section was amended so as to require the signatures of one fourth of the voters of the county, thus making it possible to secure the requisite number of signers to two or more petitions. Therefore as to the question involved the amended statute becomes doubtful and ambiguous, and in construing it resort must be had to the rules which govern in the construction of doubtful or ambiguous statutes. The object of all statutory construction is to get at the true meaning or intention of the legislature, and that meaning should be adopted which accords best with the general purpose of the act."

Certain questions of fact arise in connection with this petition, all of which must be determined by the County Court. The first question is: Did one-fourth of the voters of Shannon County sign the petition? It is the duty of the County Court to ascertain the number of voters who signed the petition; the appearance of names on the petition does not satisfy the state statute, the County Court must investigate and determine whether or not the required number of voters signed the petition.

It is also necessary for the County Court to determine who are eligible voters, and for this purpose we refer you to Section 10178 R. S. Missouri 1929, setting forth the qualifications of voters. In compliance with this statute it is necessary for the County Court to determine, as a fact, that at least those who signed the petition are citizens of the United States, are over the age of twenty-one years, have resided in the State one year preceding the November 1938 election, and have resided in the county, city or town where they propose to vote at least sixty days prior to the November 1938 election. The County Court shall not consider as signers of the petition persons who do not meet these qualifications.

It is also the duty of the County Court to eliminate from the petition the names of any signers who may be an officer, sailor or marine in the regular army or navy of the United States.

The County Court shall not count any name on the petition which is that of a person kept in an eleemosynary institution at public expense or while such person may have been confined in any public prison. It is also the duty of the County Court to eliminate from the petition the names, if any, of any person who has been convicted of a felony or other infamous crime or convicted of any misdemeanor connected with the exercise of the right of suffrage, who has not received a full pardon.

It is also the duty of the County Court to ascertain as a fact that the persons whose names appear on the petition actually signed the petition, since the writing of their names thereon by some one else whether authorized or not is not sufficient.

The above matters of fact rest exclusively in the jurisdiction of the County Court, since in this matter it acts, as an administrative agency and not in a judicial capacity, and for the further reason the opinions of the Attorney General must be limited to questions of law and this office has no authority to decide disputed questions of fact. 6 C.J. p. 811, Section 16.

If said petition meets the above and foregoing requirements as to the number of voters signing said petition, then the last paragraph of the petition with reference to the donation of the City Hall in Winona, being a void clause, may be treated as surplusage and totally disregarded herein, and the matter may be submitted to the voters at the November election.

Hon. L. B. Shuck

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July 8, 1938

The County Court possesses the same powers at a Special Term as it does at a Regular Term, to pass upon the petition and matters connected therewith. Sections 2085, 2086 and 2087, R. S. Missouri, 1929; State vs. Fulton, 152 Mo. App. 345, l.c. 350.

CONCLUSION

It is therefore the opinion of this office that the County Court may pass upon the questions of fact raised by this petition at a Special or Adjourned Term of the County Court, and if the County Court finds as a fact that one-fourth or more of the legally qualified voters of Shannon County have signed the petition herein, then it may make an order directing that the proposition to remove the County Seat be submitted to the qualified voters at the November 1938 election.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

LOTTERIES: Shar-Sho Night is a lottery.

July 11, 1938



Hon. H. J. Simmons
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

We have your request for an opinion as to the operation of "Shar-Sho Night", and whether the same is in violation of the lottery laws of this State. You also enclosed with your request an application entry for Shar-Sho Night award.

For the purpose of determining whether or not a lottery is established, "consideration" as used in the statutes, is not limited in the strict sense in which that term is used when considering whether or not an enforceable contract has been entered into. *Bader vs. Cincinnati*, 21 Ohio L. Rep. 293, citing *Bell vs. State*, 5 Sneed (Tenn.) 37, *Hudelson vs. State*, 94 Ind. 426. *Brooklyn Daily Eagle vs. Voorhies*, 181 Fed. 581, and *Equitable Loan & Security Company vs. Waring*, 117 Ga. 599.

It is not necessary that the promisor receive any benefit, or that people pay directly or purchase a ticket. *Brooklyn Daily Eagle vs. Voorhies*, 181 Fed. 579, but the question is: Did the promisee (public) suffer any detriment or inconvenience? Consideration may be either a benefit to the promisor or a detriment to the promisee. *McNulty vs. Kansas City*, 198 S.W. 185. The promise made to the public by petitioner is to award a prize of a fixed sum of money. In accepting this promise, what loss, trouble or inconvenience is sustained by the public? If there is any loss, trouble or inconvenience, there is consideration given by the public. *Mayfield vs. Eubank*, 278 S.W. 243, 246; *Mayers vs. Groves, Brothers and Co.* 22 S.W. (2d) 174, 1. c. 177.

July 11, 1938

Where an enterprise distributes without charge tickets, coupons or chances of any kind entitling the holders to participate in a distribution of prizes by lot or chance, and this is done for the purpose of inducing or stimulating pay patronage, the pay patronage thus induced constitutes a consideration and the enterprise is a lottery containing the essential elements of prize, chance and consideration, and this is true whether all or only a part of the holders become pay patrons, and even though it is possible for the recipient of such ticket, coupon or chance to meet all the conditions of participation and obtain a prize without the payment of any money therefor. This is the law in England, *Willis vs. Young et al.* 1 K. B. 448 (1907), 3 B. R. Cases, 976, the rule in the federal courts, *Central States Theatre Corp. vs. Patz*, 11 Fed. Supp. 566 (1936), *General Theatres vs. Metro-Goldwyn-Mayer Dist. Corp.* 9 Fed. Supp. 546 (1935), and post office department, *George Washington Law Review*, May 1936, pp. 482-492; the holding in several state courts, *Glover et al. vs. Malloska*, 238 Mich. 216. *State vs. Danz*, 140 Wash. 546, 250 Pac. 37. *Featherstone vs. Ind. Service Ass'n.* (Tex. 10 S.W. (2nd) 124. *City of Wink vs. Amusement Co.* (Tex.) 78 S.W. (2nd) 1065. *Com. vs. Wall* (Mass.) (1936) 3 N.E. (2nd) 28, and the opinion of the law writers, *Thomas, Lotteries, Frauds and Obscenity in the Mails*, ss. 15, 16, pp. 22, 35. *Thomas, Non-Mailable Matter*, s. 16, p. 35. 45 *Harvard Law Review*, 1196, 1210. *George Washington Law Review*, May 1936, pp. 488, 491.

It is therefore the opinion of this office that Shar-Sho Night is nothing more or less than "Bank Night" under a different name and is a lottery in violation of the felony statute, Section 4314 R.S. Missouri 1929.

Respectfully submitted,

APPROVED:

FRANKLIN E. REAGAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

FER:MM

CIRCUIT CLERK: Circuit Clerk cannot appoint deputy without approval of the Circuit Judge.

August 22, 1938



Mr. John E. Short
Circuit Clerk
Ray County
Richmond, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of August 6, 1938, requesting an opinion from this department, which is as follows:

"I would like an opinion in the matter of the paying deputies in the Circuit Clerk and Ex-Officio Recorder's office.

"I have three people working in the two offices. One has been working in the place of one who was deceased on the 25th of July, and not being under a court order of the Circuit Judge, would the county court have the right to issue a warrant to her for her services.

"I have not as yet appointed a successor to the man who passed away on the 25th of July and am using an extra girl to do the typing in the recorder's office, but she not having been approved by the Circuit Judge, I thought that before the warrant could be issued to this extra girl that it might be the Circuit Judge would have to make an order allowing her salary until I make an appointment."

Section 11680, R. S. Mo. 1929, reads as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

This section is the general law as to the appointment of deputies by every clerk, but the specific law as to the appointment of deputy circuit clerks in 1929 was Section 11812. Under Section 11812, the appointment of deputies was made by the circuit clerk and approved by the circuit court. Section 11812 was amended by the Session Laws of 1933, at page 369, which required the approval of the appointment of deputy circuit clerks by the county court. This session law was amended by the Session Laws of 1937, page 446, to be known as Section 11812. This section reads as follows:

"Every Clerk of a Circuit Court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the Judge or Judges of the Circuit Courts, as such Judge or Judges shall deem necessary for the prompt and proper discharge of the duties of his office. The Judge or Judges of the Circuit Court, in its order permitting the Clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which said order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the County Clerk. The Clerk of the Circuit Court may at any time, discharge any deputy or

assistant, and may regulate the time of his or her employment, and the Circuit Court may, at any time, modify or rescind its order permitting an appointment to be made."

Under the amendment of Section 11812 in the Session Laws of 1937, the approval of the appointment of deputy circuit clerks must be made by the circuit judge or judges.

The term "court" as used in Section 11680, supra, refers to all courts of record, including the circuit court. It therefore appears, with reference to the appointment of deputy circuit clerks, that two acts are necessary, (1) the appointment of such deputy by the circuit clerk, and (2) the approval of such appointment by the circuit judge or judges.

The duty to appoint a deputy circuit clerk is placed upon the circuit clerk, and it is the duty of the circuit judge or judges to approve or disapprove such appointment.

Such is the construction placed upon a similar term "approved by the Court" in *Butler v. Sullivan*, 108 Mo. 630, 1. c. 638. In that case the statute gave the county clerk the power to employ attorneys "with the approval of the county court" to aid the prosecuting attorney in the handling of tax suits. The Supreme Court, in construing this term in that case, 1. c. 638, said:

"The statute neither authorizes the county court to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; this compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the

court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court."

22 R. C. L., Section 84, page 433, makes this statement:

"Wherever, under a constitutional or statutory provision, the appointment is required to be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office."

In the case of State v. Stafford, 34 Pac. (2d) 1. c. 379, the court said:

"Thus it is apparent that the phrases used in the two constitutional provisions and that employed in the act creating the Bureau of Agriculture do not differ in effect, but under each the appointments under consideration come within the general rule that 'where a person is appointed to an office under a constitutional or statutory provision that the appointment may be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office, except in the case of such a vacancy in the office that the duties of the office are no longer being discharged.'"

In Apfel v. Mellon, 33 Fed. (2d) 1. c. 806, the court defines the term "approve" or "give approval" as follows:

"We agree with the contention of the appellees. The statute provides that an association formed under the act shall not become a body corporate until after the articles of association and organization certificate have been duly made and filed, and after the Federal

Reserve Board has approved the same and issued a permit to it to begin business. The word 'approved' naturally imports the exercise of judgment and discretion; and the power to approve ordinarily implies a power to disapprove.

"To 'approve' or give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. The word 'approve' does not, *ex vi termini*, necessarily import the exercise of discretion, but from the connection in which the term is used it often involves the idea of discretion and adjudication, and is seldom construed as requiring a mere ministerial act. 4 C. J. 1464."

In the case of *State v. Standard Oil Company*, 16 S. W. (2d) 1. c. 582, the court said:

"The word 'direct' has many meanings, but, as used here, we think it means that, when the tax commission, on investigation, finds that a suit should be instituted, it has the authority to cause the Attorney General to institute such a suit, and the word 'approved' necessarily implies the exercise of discretion on the part of the tax commission in permitting such a suit to be instituted."

The city ordinance of the City of Jefferson provides that when a vacancy exists or shall occur in the regular police force of this city, it shall be the duty of the marshal, with the advice and consent of a majority of the members elected to the city council, to appoint some suitable and competent person to fill such vacancy. In the case of *Schulte v. City of Jefferson*, 273 S. W. 1. c. 170, the marshal of said city appointed the plaintiff a regular city policeman, but the city council refused to confirm said appointment. Plaintiff brought suit against the city to recover salary alleged to be due from defendant for performing the services of a police officer. The court, 1. c. 172, said:

"It is well settled--

"Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc. p. 1372; Meachem's Public Office and Officers, Secs. 114, 124; 22 R. C. L. p. 433, Sec. 84.

"Plaintiff was not a de jure officer until at least confirmed by the council. If anything at all, he was a de facto officer, and such officer is not entitled to the emoluments of the office. 29 Cyc. 1393; Sheridan v. City of St. Louis, 183 Mo. 25, 39, 40, 81 S. W. 1082, 2 Ann. Cas. 480; Luth v. Kansas City, 203 Mo. App. 110, 113, 218 S. W. 901; Throop on Public Officers, Sec. 517."

In the case of Huls v. Lawrence, 300 S. W. 1. c. 1018, the court states:

"The word 'approves' carries with it the idea of doing something more than merely substituting the answers of the jury for the judgment of the court. It shows that he did something more than to formally or mechanically, so to speak, accept the opinion of the jury."

The meaning of a power or duty conferred upon an official to approve or disapprove another official act, is set out in Makenson v. Dillon, et al., 171 Pac. 673, 1. c. 676, in the following language:

"The grant to New Mexico is to be effectuated by selection, not only of these lands granted in quantity, but also as indemnity, and they are to be

selected under the direction and subject to the approval of the Secretary of the Interior. The words 'subject to the approval' we do not regard as giving the Secretary of the Interior discretion to arbitrarily refuse a selection for no reason at all. These words are to be understood to mean that the Secretary of the Interior shall investigate and pass upon and render judgment as to whether the lands selected are within the terms of the grant, and, if so, it is his duty to list them to the State."

Although the 1937 Session Laws, page 446, provide that the circuit clerk shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge or judges of the circuit court, as such judge or judges shall deem necessary for the prompt and proper discharge of the duties of his office, yet the circuit clerk is limited in the appointment of his deputies by the County Budget Act of 1933, page 340, Missouri Statutes Annotated, Par. 12126a, page 6433.

In answering your request, I am presuming that your budget was approved by the budget officer, and in that case the Budget Act would not affect the appointment as set out in your request. This was so held in *State ex rel. Hill v. Thatcher*, 94 S. W. (2d) 1053.

I am also presuming, under the facts set out in your request, that you do not desire your present appointee as a permanent appointment, but only for a short period. As a suggestion, it would be proper to appoint your present employee, who you state has not been approved by the circuit judge, and have the approval made by the circuit judge, and later on make a permanent appointment of the deputy whom you desire to take the place vacated by the death of your former deputy. It has been held that the circuit clerk may discharge his deputy at any time and appoint another in his or her place.

In the case of *Horstman v. Adamson*, 101 Mo. App. 119, 1. c. 124, the court said:

August 22, 1938

"The rule is well established that an appointment to office for a definite term confers upon the incumbent the right to serve out the full official period, unless forfeited by misconduct, for the permanence of the official tenure negatives the authority of the appointing power of removal at will. But where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results. These principals have been frequently recognized in numerous decisions, alike by the Federal courts as well as by the courts of many States, including our own."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county court cannot issue a salary warrant to the extra girl appointed by you in your office until this appointment as a deputy circuit clerk is approved by the circuit judge of your district.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

TAXATION AND
REVENUE:

Certificate holder under Senate Bill 94 failing to pay subsequent taxes forfeits priority when said land is sold for same. Limitation of redemption begins to run on date of issuance of second certificate.

October 26, 1938

Mr. Arthur U. Simmons
Attorney at Law
20 South Central Avenue
Clayton, Missouri



Dear Mr. Simmons:

We desire to acknowledge your request for an opinion on October 20th, which is as follows:

"As you know I am attorney for Willis W. Benson, Collector of St. Louis County, and I would appreciate an opinion on the following:

FACTS:

In 1935 a tax certificate was issued to John Smith under the Jones-Munger Law for purchases of delinquent taxes under said law. John Smith failed to pay the taxes prior and subsequent to issuance of a certificate of purchase. In 1936, the property again came up for sale because Smith had failed to pay the taxes on said property. Jones bid this property in and a certificate of purchase has been issued. Smith goes to Jones and gets Jones to assign his interest in his 1936 tax certificate.

The question is whether the two year redemption begins in 1936 or whether it begins on the prior 1935 certificate.

Mr. Arthur U. Simmons

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October 26, 1938.

We have been holding that since Smith did not pay his taxes and the property was again sold and Jones received it, that the certificate would begin to run from the latter sale. Since Smith loses all of his rights in this property by reason of his failing to pay the taxes for a subsequent purchase other than receiving his money back that he paid for his 1935 certificate and the fact that he might get an assignment of later purchase has been held, by us not to alter the fact.

I would appreciate very much if you would straighten us out on this matter in order to save litigation.

Thanking you very much I am,"

An answer to your inquiry necessitates a construction of Section 9957 and 9957c of the 1933 Session Acts of Missouri which are as follows:

"If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall

execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold. In making such conveyance, when two or more parcels, tracts, or lots of land are sold for the non-payment of taxes to the same purchaser or purchasers, or the same person or persons shall in anywise become the owner of the certificates thereof, all of such parcels shall be included in one deed."

"Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which such holder makes demand for deed, and any purchaser that shall suffer a subsequent tax to become delinquent and a subsequent certificate of purchase to issue on the same property included in his certificate, such first purchaser shall forfeit his rights of priority thereunder to the subsequent purchaser, and such subsequent purchaser shall at the time of obtaining his certificate redeem said first certificate of purchase outstanding by depositing with the county collector

the amount of said first certificate with interest thereon to the date of said redemption and the amount so paid in redemption shall become a part of said subsequent certificate of purchase and draw interest at the rate specified in said first certificate but not to exceed ten percent per annum from the date of payment. Said holder of a certificate of purchase permitting a subsequent certificate to issue on the same property, shall, on notice from the county collector, surrender said certificate of purchase on payment to him of the redemption money paid by the subsequent purchaser."

The Supreme Court in defining the rights of a certificate holder under an old Missouri statute, somewhat similar to the above statute in *Hilton vs. Smith*, 33 S. W. 464, 134 Mo. 499 l. c. 509, said:

"At the time the back-tax suit was commenced, interpleader Smith held certificates of the purchase of the land at collector's sales for taxes levied for the years 1874 and 1875. The time allowed by the law (2 Wag. St. p. 1202, Sec. 208), in which the owner could redeem, had expired, and he was, and for some time had been, entitled to a deed. What title to, interest in, or lien upon land, a certificate of purchase secures to the holder is a question upon which there is a difference of opinion. It may be said, generally, that the right is no larger than the statute gives. The law of 1872

only gives the right to the redemption money in case the land is redeemed, and to a deed when the time of redemption has expired. In the absence of provisions of law defining the rights of the holder of a certificate of purchase, the generally accepted rule is that until the delivery of a deed he takes no title to the land, either legal or equitable. Black, Tax Titles, Sec. 322; Burroughs, Tax'n 321. The rule is announced by this court in Donohoe vs. Veal, 19 Mo. 336, as follows: 'If the law did not propose to give the purchaser title to the land until two years should elapse from the time of the purchase, then it did mean that the title should remain in the owner for that period; and the right of the purchaser was to receive his money, with high penal interest, during the delay of redemption. It appears very clearly the design of the two acts that the title to the property sold for taxes shall remain undisturbed until the deed is actually executed by the register, and that until that act is performed the title is in the former owner.' It was further held in that case that the doctrine of relation did not apply to such sales, and the title acquired under the deed did not relate back to any prior act or proceeding. The law of 1857 made the certificate prima facie evidence of title, yet the court held that it never intended to confer title, but was mere evidence of title, authorizing the purchaser to take possession of the premises for a limited period. Clarkson v. Creely, 40 Mo. 114. In Parsons vs. Viets, 96 Mo. 413, 9 S. W. 918, this court, in considering the rights of one holding a certificate acquired under a sale made pursuant

to the laws of 1872, held that he acquired thereunder no right to the possession of the premises, and in taking possession he was a trespasser and disseisor. After the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector. The law thereafter gives him no lien upon the land for any sum, except, in case his title fails, he may secure a lien under 2 Wag. St. p. 1206, Sec. 219. Pitkin vs. Reibel, 104 Mo. 511, 16 S. W. 244."

The first purchaser, by permitting a subsequent tax to become delinquent and a subsequent certificate of purchase to issue on the same property included in his certificate, forfeited his rights of priority thereunder to the subsequent purchaser and when such subsequent purchaser deposited with the County Collector the amount of said first certificate with interest thereon to the date of the issuance of said second certificate, such acts fully met the requirements of the statute. The first certificate was thereby redeemed and not even a mere naked right existed thereunder.

The only outstanding right against the land, subsequent to the above procedure, was that existing under and by virtue of the 1936 or second certificate and the limitation provided in Section 9957, supra, began to run beginning with said second sale.

CONCLUSION

Therefore, it is the opinion of this department that the holder of a certificate issued by the Collector upon the sale of lands under Senate Bill 94 of the 1933 Session Acts, suffering a subsequent tax to become delinquent and

Mr. Arthur U. Simmons

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October 26, 1938.

a sale therefor, forfeits his rights of priority thereunder. That upon the payment of such second certificate holder, to the Collector, of the amount of the first certificate and interest up to the time of the issuance of said second certificate, the first certificate and all rights thereunder are redeemed. Therefore limitation of redemption begins to run from the date of issuance of the second certificate to-wit, that of 1936.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting Attorney-General

SVM:LB

NEPOTISM: Sister-in-law of County Clerk, acting without official appointment and merely assisting clerk, without compensation, does not violate Art. XIV, Sec. 13, Mo. Constitution; but if sister-in-law is officially appointed deputy clerk, with or without salary, then it appears to be violation of the amendment.

October 31, 1938

11/✓



Honorable L. B. Chuck
Prosecuting Attorney
Minence, Missouri

Dear Sir:

On October 26, 1938, you wrote us the following letter and requested an official opinion on the same:

"I am requested by a number of citizens of this county to secure the opinion of your office on the question of whether a Clerk of Court is authorized under the law to use a sister-in-law as a deputy clerk either with or without the payment of a salary."

Section 13, Article XIV, of the Constitution of Missouri, provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Oct. 31, 1938

You use the expression in your letter, "under the law to use a sister-in-law as a deputy clerk either with or without the payment of a salary." If the sister-in-law is acting without official appointment and is merely assisting the clerk without compensation, then we believe the opinion rendered by this Department on October 4, 1933, to Honorable Elliott M. Dampf, Prosecuting Attorney, Jefferson City, Missouri, a copy of which is enclosed, which is applicable to the situation. But if the sister-in-law is officially appointed deputy clerk, with or without salary, then it appears to be a violation of the amendment itself by its own contents, as the amendment does not mention that the relative within the fourth degree either by consanguinity or affinity, shall receive compensation. Of course, if the party is receiving compensation, it would appear that it is a clear case of violation of the nepotism act.

We base the above conclusions on the decisions in the cases of State ex rel. McKittrick v. Becker, 81 S. W. (2d) 948; State ex inf. Ellis v. Ferguson, 333 Mo. 1177; and State ex rel. McKittrick v. Whittle, 333 Mo. 705. The original decision which declared Section 13 of Article XIV, supra, to be self-executing is that of State ex inf. Norman v. Ellis, 325 Mo. 154.

We are enclosing a copy of an opinion rendered on December 19, 1935, to Honorable N. Elmer Butler, Prosecuting Attorney, Galena, Missouri, in which the contents of the above mentioned cases are quoted and explained.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG
Encs.

RECORDER OF DEEDS: Recorder should not release a mortgage or deed of trust when a copy of the original note is used.

December 8, 1938



Honorable John E. Short
Recorder of Deeds
Richmond, Missouri

Dear Sir:

We have your letter of December 6, 1938, which reads as follows:

"Would appreciate it very much if you will please advise me, whether or not the copy of the note enclosed is sufficient to make a proper release.

"I am advised that it is but according to the Laws of Missouri, 1935, Section 3099, Page 209, it seems to me that is not sufficient. As I understand copies could be made of notes and signatures added and presented for release, and not be the original note but according to said Section 3099, it would be hard to misrepresent a release even tho the note or mortgage was not identified."

Your request does not state if the note enclosed in your letter is secured by real estate or personal property.

I.

If the note is secured by a mortgage or deed of trust on chattels or personal property, this opinion will be based on the following authorities:

Section 3099, Laws of Missouri, 1935, page 209, reads as follows:

"Such recorder shall enter in a book, to be provided by him for such purpose, the names of all the parties to such instrument, arranging the names of such mortgagers or grantors alphabetically, and shall note thereon the time of filing such instrument or copy, for which said recorder shall receive a fee of twenty cents. Said fee shall also include and cover all costs for discharging said mortgage or deed of trust according to the methods hereinafter provided. Such mortgage or deed of trust, when satisfied, shall be discharged by any of the following methods:

"1. By the mortgagee, cestui que trust, his agent or assigns, on the margin of such index, which shall be attested by the recorder.

"2. Upon the presentation by the mortgagor or grantor of the original mortgage or deed of trust, and upon such mortgagor or grantor making affidavit before such recorder that the instrument presented by him is the original of the copy on file, and that such mortgage or deed of trust has been fully paid and satisfied.

"3. Upon presentation or receipt of an order in writing, signed by the mortgagee or cestui que trust thereof, attested by a justice of the peace, or any notary public, stating that such instrument has been paid and satisfied.

"When any of these provisions have been complied with, it shall be the duty of the recorder to enter in a column for that purpose the word 'satisfied,' giving date. When a chattel mortgage shall be satisfied as above provided, the recorder may deliver said mortgage to the holder of the note secured thereby, or, if the holder of said note refuse to receive

the same the recorder may destroy said mortgage. Provided, that the recorder may deliver to the parties entitled thereto, or destroy all such mortgages now remaining on file in his office and which have been entered satisfied on the chattel mortgage register."

Section 3099, Laws of Missouri, 1935, page 209, is an amendment of Section 3099, R. S. Mo. 1929. The amendment is a verbatim copy of Section 3099 with the exception of the insertion of the words "of twenty cents. Said fee shall also include and cover all costs for discharging said mortgage or deed of trust according to the methods hereinafter provided," instead of the words "of ten cents."

Section 3099 is a part of Article 3, Chapter 22, of the Revised Statutes of Missouri, 1929, and only applies to mortgages or deeds of trust on personal property. The first section, 3097, of Article 3, Chapter 22 begins as follows: "No mortgage or deed of trust of personal property." Section 3099, Laws of 1935, page 209, only applies to personal property and the mortgages and deeds of trust described in said article are secured only by personal property.

In arriving at the original intention of the Legislature in enacting any law, one must read all sections in reference to the same subject matter and as set out in the same article. In the case of *State ex rel. Geo. B. Peck Co. v. Brown*, 105 S. W. 909, 1. c. 911, 340 Mo. 1189, the court said:

"In construing statutes in *pari materia*, endeavor should be made, by tracing history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature or to discover how the policy of the Legislature with reference to the subject matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only

acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible the statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms, nor will it be presumed that the Legislature intended to leave on the statute books two contradictory enactments.' 16 Cyc. 1147. We approved the above excerpt in State ex rel. Columbia National Bank v. Davis, 314 Mo. 373, 284 S. W. 464."

The only change made in the enactment of the new Section 3099, Laws of 1935, was the cost of filing such instrument, and is still a part of Article 3 which prescribes the method of filing and satisfying chattel mortgages. It will also be further noticed in Section 3099, Laws of 1935, that the Legislature does not mention recording, but only the filing of a mortgage. There is no procedure to file a mortgage of real estate without recording. Section 3099, Laws of 1935, in describing how a chattel mortgage shall be released, does not mention the note, but only the mortgage in all three of the methods described.

In case of a conflict as to the title of chattels between the holder of a note and the holder of the chattel mortgage to secure payment of the note, the mortgage controls. In the case of International Harvester Co. v. Threlkeld, 44 S. W. (2d) 182, 1. c. 184, 226 Mo. App. 600, the court said:

" * * * but the mere use of such notes in the chattel mortgage ought not to contravene or control the express terms of such mortgage or the legal implication arising from the subsequent giving and taking thereof."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the only methods to release and satisfy a chattel mortgage are: (1) The mortgagee, cestui que trust, his agent or assigns, may satisfy the mortgage on the margin of the index, which shall be attested by the recorder; (2) the mortgage may be satisfied by the mortgagor or grantor of the original mortgage or deed of trust, who shall make an affidavit before such recorder that the instrument presented by him is the original of the copy on file, and that such mortgage or deed of trust has been fully paid and satisfied; or (3) the mortgage may be satisfied upon the presentation or receipt of an order in writing, signed by the mortgagee or cestui que trust thereof, attested by a justice of the peace, or any notary public, stating that such instrument has been paid and satisfied. The three methods above set out are the only ways in which a mortgage or deed of trust upon personal property can be satisfied.

II.

If the note is secured by a mortgage or deed of trust on real estate, this opinion will be based on the following authorities.

I am assuming from your request for an opinion that the release and satisfaction is being attempted with a copy of an unidentified note and the original note has not been presented at the time of the release and satisfaction.

Section 3078, R. S. Mo. 1929, was amended by the Laws of Missouri, 1933, page 196, which enacted Section 3078, which partially reads as follows:

"In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder,

who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided. If such note or notes are not presented for cancellation for the alleged reason that they have been lost or destroyed, the recorder, before allowing any entry of satisfaction to be made on the record or any deed of release to be placed on the file or record, shall require the cestui que trust named in the mortgage or deed of trust desired to be released or his legal representatives, to make oath, in writing, stating that the note or other evidence of debt named in the mortgage or deed of trust sought to be released have been paid and delivered to the maker thereof or his representative, and the recorder shall also require the maker of such note or notes, or his legal representative, to make affidavit, in writing, that the note or notes in question have been paid, and cannot be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same; provided, however, that, if such note or notes shall not have been delivered to the maker or his legal representative, the affidavit so required of the cestui que trust or his legal representative shall recite that the note or other evidence of the debt named in said mortgage or deed of trust has been paid and cannot be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same, and the term legal representatives as used in this section shall include assigns; and the affidavit of the maker of such note or notes or his legal representative shall recite that said note or notes have been paid; the affidavits so required shall be recorded in the same manner as deeds, in a permanent record, and the recorder shall make a notation upon

the margin of the mortgage so satisfied giving the number of the book and page wherein said affidavit has been recorded.

* * *

Under this section, a mortgage or deed of trust can only be satisfied by the mortgagee, cestui que trust or assignee either satisfying the record or filing for record a deed of release. In case of satisfaction acknowledged by the payee or assignee, or in case of a full deed of release being offered for record, the note or notes must be produced and cancelled in the presence of the recorder, who shall record same on the margin of the record and attest it with his signature. Where the note is lost or destroyed, the law does not provide that a copy of the note can be resigned by the makers and the note released by the mortgagee on the copy. In some cases this has been done, but if known by the recorder and the original note should later appear in the hands of a purchaser in due course, the recorder would be liable on his bond for releasing the mortgage if it could be shown that he knew that the note used was not the original note secured by the mortgage, but was a copy made for the purpose of satisfying the record. When the note is lost or destroyed, the recorder should require the cestui que trust named in the mortgage or deed of trust desired to be released, or his legal representatives, to make oath, in writing, stating that the note or other evidences of debt named in the mortgage or deed of trust sought to be released has been paid and delivered to the maker thereof, or his legal representative, and at the same time the recorder shall also require the maker of such note or notes, or his legal representative, to make affidavit, in writing, that the note or notes in question have been paid and can not be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same. It further provides that if such note or notes have not been delivered to the maker, or his legal representative, the affidavit so required of the cestui que trust, or his legal representative, shall recite that the note or other evidence of the debt named in the mortgage or deed of trust has been paid and can not be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same. The affidavits

above set out shall be recorded the same as any other instruments. The methods of releasing deeds of trust and mortgages upon real estate as above set out are the only methods of releasing where the original note is not obtainable.

If a chattel mortgage is filed and recorded in the same manner that a real estate mortgage is filed and recorded, then the chattel mortgage can be released in the same manner as a real estate mortgage as above set out.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the copy of the note enclosed in your request is not sufficient to make a proper release of a mortgage or deed of trust either upon real estate or personal property.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

COUNTY COURT:

Under Section 11794 R.S. Mo. 1929 County Court is not authorized to make an order for sheriff to receive a different amount for boarding prisoners charged with felony than the amount for prisoners charged with misdemeanor.

January 7, 1938

1-21

Honorable Forrest Smith,
State Auditor,
Jefferson City, Mo.



Dear Sir:

This will acknowledge receipt of your request of December 31, 1937 for an official opinion which reads as follows:

"We are in receipt of an official opinion rendered by your department on January 3, 1935 and one on February 12, 1935 with reference to board of prisoners, which two opinions are conflicting.

In our recent audits we have found that there are now seventeen counties in the southern part of the state making a separate charge for boarding prisoners where the same is legally taxed as charges against the state from the amount which is legally charged against the county for boarding prisoners.

That custom seems to be spreading in some of the northern counties. The same food is served to the prisoners where the state pays the charges as is served to the prisoner where the county pays the cost and this unfair discrimination is costing the state a considerable sum of money.

I am unable to see from reading Sections 11794 and 11795 R.S. Mo. 29 how the County Court can legally make an order segregating these charges.

January 7, 1938

I would like to have an opinion from your department clarifying these two conflicting opinions."

As mentioned in your request, Section 11794 R.S. Mo. 1929, reads as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

Section 11795 R.S. Mo. 1929 reads as follows:

"It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, and it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills."

Both of these sections are the general law in reference to furnishing board for prisoners while confined in the county jail. There are two exceptions to this general

law which will be referred to later on in this opinion. In referring to Section 11794, there is no mention in the section which gives the county court authority to name a different sum for a prisoner who, according to law, the board of which would be charged to the state and the section does not contain any authority which would permit the county court to make a different charge or sum for the board of a prisoner charged with a misdemeanor and therefore not subject to payment by the state. This section is not ambiguous and should not be in court for a construction.

In the case of State ex rel. Cobb v. Thompson, State Auditor, 5 S.W. (2d) 57, the court held:

"A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. A standard text states the rule as follows: 'If the words (of the statute) are free from ambiguity and doubt and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.' Lewis-Sutherland Stat. Const. vol. 2 (2d Ed.) p. 698.

Relator is not seeking a construction of the act, but insists that we amend it by adding the words, 'and until their successors are appointed and qualified.' This we are without authority to do. That power is assigned to the legislative branch of the government. In Lewis-Sutherland Stat. Const. vol. 2 (2d Ed.) p 737, it is said:

'Where the omission is not plainly indicated and the statute as written is not incongruous or unintelligible and leads to no absurd results, the court is not justified in making an interpolation.'

To the same effect, Johnson v. Barham, 99 Va. 305, 38 S.W. 136, where it is said:

'It is safer in a case which admits of doubt, where the court finds itself at all involved in conjecture as to what was the legislative intent, that the particular object which may reasonably be supposed to have influenced the Legislature in the particular case should fail of consummation than that courts should too readily yield to a supposed necessity, and exercise a power so delicate, and so easily abused, as that of adding to or taking from the words of the statute.'

Under the ruling State ex rel. Cobb, the county courts or the appellate courts cannot interpolate any other words or phrases which would allow the county court to make an order upon the county clerk which would segregate the charges for board of a state prisoner and a county prisoner in a different amount, which, of course, would not exceed seventy five cents (75¢) a day for each prisoner.

Article 3, chapter 84, Section 11840 R.S. Mo. 1929 which applies to the board of prisoners in counties containing a population of one hundred fifty thousand (150,000) to five hundred thousand (500,000) inhabitants, reads as follows:

"Immediately after the taking effect of this article, and at the end of each year thereafter, and oftener if though proper, the county court shall fix the amount per day that may be expended by the marshal for furnishing board to the prisoners confined in the county jails, and the amount so fixed per day shall be the amount of costs taxed for that purpose against prisoners who shall be convicted, and be paid by the state for boarding those chargeable by law to the state: Provided, that such amount shall not exceed the sum of thirty cents per day. The food provided for prisoners shall be wholesome and properly prepared, and the marshal shall exercise business economy on behalf of the county, paying no more than the most reasonable rates for articles of food and the hire of the employes, and he shall, in the exercise of his trust, be under the superintending control of the county court at all times. It shall be the duty of the marshal at the end of each month to report in writing, duly verified by affidavit, to the county court, the names of all prisoners in the county jails of the county to whom he has furnished board, the number of days has been so furnished by him, and all expenses incurred for that month in providing and causing to be furnished food to such prisoners, showing name, amount and exact cost of each article of food, voucher therefor, with the name of person from whom purchased, also the name of each employe, the purpose for which he was employed, and the exact amount to be paid him for his services, without any bonus or rebate or profit from either to the marshal or any intermediary whomsoever, instigated or

created by the marshal; and any such marshal, deputy or employe of any such marshal who shall violate any provision of this section shall upon conviction thereof, be punished by imprisonment in the penitentiary not exceeding three years, or by imprisonment in the county jail not less than six months or more than one year, or by fine not less than one hundred dollars nor exceeding one thousand dollars, or by both such fine and imprisonment. The county court shall allow and cause to be issued a warrant upon the county treasury, to the marshal, for the exact expense so incurred, in boarding such prisoners, not exceeding in aggregate the amount aforesaid per day fixed by it."

In Article 4, chapter 84, Section 11840 R.S. Mo. 1929, the same terms were set out as in Section 11840. The only difference being that in Section 11840, the maximum charge was thirty cents (30¢) per day for each prisoner. In Section 11849, which section applies to the board of prisoners in counties which at that time contained or may thereafter contain a city of seventy five thousand (75,000) inhabitants and less than two hundred thousand (200,000) inhabitants. Section 11849 was amended in the 1937 Session Acts at page 444. This amendment was only for the purpose of raising the charge for the board of prisoners from thirty cents (30¢) per day for each prisoner to forty cents (40¢) per day for each prisoner.

Section 11849 as amended in the 1937 Session Acts of Missouri and Section 11840 of the Revised Statutes of Missouri 1929, are identical in every respect except the charge per day for the board of each prisoner. In Section 11839 as amended by the 1937 Session Act, the county court has been authorized to fix the amount per day that may be expended by the sheriff for furnishing board to the prisoners confined in the county jail, and the amount so fixed per day shall be the amount of cost taxed for that purpose against prisoners who shall be convicted and be paid by the state for boarding those chargeable by law to the state. According to this part of the Section 11849, there is no question but that the state must pay the amount

fixed by the county court for the board of prisoners chargeable by law to the state providing that such amount shall not exceed the sum of forty cents (40¢) per day under Section 11849 and thirty cents (30¢) per day under Section 11840 R.S. Mo. 1929. This, of course, only applies to the special acts as set out by legislature and not the general act upon which you require an opinion. I am setting out the special acts for the reason to show that if it was the intent of the legislature that Section 11794 as above set out could be construed differently than the exact wording of the section by orders of the county court upon the county clerk in reference to pay for the board of prisoners, the legislature would have only need to have used the general law being Section 11794 R.S. Mo. 1929 to provide a different sum than that mentioned in the two special acts.

The two special acts, Section 11840 and Section 11849 R.S. Mo. 1929 as above set out go further with a proviso that even after the state is chargeable by the amount set by the county court and which is charged against the state, it then becomes the duty of the sheriff to provide for all of the prisoners and it sets out the manner in which he should pay for food and provide for necessary employees in and about the jail for the preparation of the food and also goes further that he must make a report as to the exact amount that he has paid out for supplies and other articles of food in the preparation of the board for prisoners. The two special acts then go further that the county court shall allow and cause to be issued a warrant upon the county treasury, to the sheriff, for the exact expenses he incurred in boarding such prisoners, not exceeding in aggregate the amount aforesaid per day fixed by it. The purpose of the proviso was to save money, if possible, for the board of prisoners whose expenses for board would be chargeable against the county only. There is a possibility where there is a large number confined in a jail that the sheriff may be able to furnish the board for the county prisoners at a saving, but in any event under the two special acts the state is charged with the amount fixed per day by the county court and any saving made by the sheriff would be of no benefit to the expense charged against the state.

In 59 Corpus Juris, page 952, Section 509, the rule was stated as follows:

"(1) The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in

January 7, 1938

their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it because of some supposed policy of the law, or because the legislature did not use proper words to express its meaning, or the court would be assuming legislative authority. Where, however, the language is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court of ascertaining the true meaning. If the intention of the legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with the general principles of law. Courts should not attribute to the legislature the enactment of a statute devoid of purpose, but where the language is clear and unambiguous but at the same time incapable of reasonable meaning, that the court cannot construe the statute to give it a meaning. The court cannot attribute to the legislature an intent which is not in any way expressed in the statute."

According to this ruling, Section 11794 R.S. Mo. 1929 need no construction. In 59 Corpus Juris, page 974, Section 577, the rule was held as follows:

"(1) While the meaning to be given a word used in a statute will be determined from the character of its use, words in common use are to be given their natural, plain, ordinary and commonly understood meaning, in absence of any statutory or well established technical meaning unless

January 8, 1938

it is plain from the statute that a different meaning was intended, or unless such construction would defeat the manifest intention of the legislature. The words are to be interpreted with due regard to the subject matter of the statute and its purpose, and it may be necessary, in order to give effect to the legislative intent, to extend or restrict the ordinary and usual meaning of words; but the words of a statute are not to be given a forced, strained, or subtle meaning."

It is also the general rule that interpreting a statute other sections which apply to the same manner shall be read together with the section subject to interpretation. This was so held in the case of *State ex rel. Columbia National Bank of Kansas City v. Davis, Judge et al.*, 284, S.W. 464, 1.c. 470, where the court held:

"Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law."

According to the authority in *State v. Davis*, as above cited, and reading the special Sections 11840 and 11849 as above set out, there can only be one conclusion but that the intention of the legislature in passing Sections 11840 and 11849 was they legally gave the county court authority to make different charges for state prisoners and county prisoners for their board and by their act have legally given that authority which has illegally been assumed by county courts who do not come within the two special acts to make orders for different charges which is legally set out in the two special acts.

CONCLUSION

In conclusion will say that it is the opinion of this office that county courts in all counties except the county courts which come within the provisions of Sections 11840 and 11849 of the Laws of the State of Missouri have no authority to make an order to the sheriff allowing him a different sum for the board of a prisoner chargeable to the state which would be different from a charge for the board of a prisoner chargeable to the county and it is the conclusion of this office that the same charge must be made for the board of a county prisoner as that charged to the state for the board of a state prisoner providing the charge should not be more than the maximum amount allowed for the board of each prisoner by the county court.

In rendering this opinion, another opinion on the same subject matter has been withdrawn on this date by this office. The withdrawn opinion was dated February 12, 1935 and was given at the request of Honorable Sam M. Wear of Springfield, Missouri, and is no longer to be considered as the opinion of this office.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

COUNTY BUDGET ACT: In counties of less than 50,900 inhabitants not necessary for officer to call for bids, by advertising or otherwise, for purchase of supplies.

January 22, 1938



Honorable John B. Smoot
Prosecuting Attorney
Scotland County
Memphis, Missouri

Dear Sir:

This Department is in receipt of your letter of January 19th, requesting an opinion relative to the County Budget Act as passed by the General Assembly in 1933. Your question is as follows:

"Does Section 19 require that every purchase of supplies made by a county officer be advertised in a newspaper or notice posted on a bulletin board in the Court House before the County Court is authorized to pay the obligation so created by the purchase? If an officer of the county submits his budget for the fiscal year and sets forth therein various items that will be needed in his office during said year and the budget is approved by the County Court and State Auditor, is it necessary thereafter for said officer to call for bids by advertising in a newspaper or posting of notice on a bulletin board in the court house in purchasing the various items contained in his budget before the County is obligated to pay for said purchases."

The County Budget Act, page 340, Laws of 1933, contains twenty-two sections. In reality it is an act governing

the financial structure, revenue and expenditures of the counties according to population, which will be noted by Section 9, page 346, as follows:

"In all counties in this state, now or hereafter having a population of more than 50,000 inhabitants, according to the last federal decennial census, the presiding judge of the county court shall be the budget officer of such county, or the county court in any such county may designate the county clerk as budget officer. The budget officer shall receive no extra compensation for his duties under this Act, and Sections 9 to 20 inclusive of this Act shall apply to such Counties.

Knowing the County of Scotland to be less than 50,000 inhabitants, the first eight sections and Sections 21 and 22 of the Budget Act govern your County exclusively. Section 19, relating to contracts, pertains to counties of more than 50,000 inhabitants.

There is no provision in the first eight sections which compels an officer of the county to request bids by advertising in newspaper or otherwise for the purchase of various items contained in the budget. Section 3, page 342, of the Act, contains the provisions relative to the duties of the officers to furnish the Clerk of the County Court the estimated amount required for the payment of salary or expense of every nature during the current year, and it contains no provision for requiring bids for supplies during the current year.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

COUNTY TREASURER: Should refuse to pay criminal costs due Sheriff when sheriff is indebted to county for amount greater than such costs. May pay such costs when county court makes finding sheriff is not indebted to county

February 2, 1938

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Mr. Smith:

This will acknowledge receipt of your letter of January 22, 1938, in which you pass on to this Department the following inquiry:

"Your recent audit of this county showed the sheriff Mr. S. J. Harris kept returnable fees amounting to around three thousand dollars, I have on my Criminal Court Cost Record about eight hundred dollars due him. He claims them for the reason that judgment has not been taken against him, should I continue to hold fees due him?

"Should Mr. Harris bring to the County Court proof that his deputy hire was much more than his books showed at the time of the audit, and the County Court issued an order for the payment of his fees to him, Would I be free to pay him?

"Please render me your opinion on the above.

"Thanking you in advance I am

"Yours Truly

"O.C. Ferguson, Treasurer of New Madrid County. "

Honorable Forrest Smith

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February 2, 1938

In your letter accompanying the above inquiry you state that the amount of \$3,293.34, found by your office to be due from the sheriff, was the excess in fees retained by the sheriff over the maximum amount of \$5,000.00 allowed by law.

Section 11828, Revised Statutes Missouri 1929, provides as follows:

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. * * * * *
* * * * * After the first day of January, 1891, every such officer shall make return quarterly to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; and for any statement or omission in such return contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

Section 11829, Revised Statutes Missouri 1929, reads as follows:

"The county court shall at each regular session examine such statement, and may examine any person as to the truth of the same, and allow all necessary clerk or deputy hire, and deduct the same from the aggregate amount received by said executive or ministerial officer, and if there be an amount

still in the hands of said officer exceeding the sum specified in the preceding section, the court shall ascertain the amount of such excess over and above the amounts allowed to be retained by said officer and paid to deputies and assistants, and make an order directing such officer to pay the amount so ascertained into the county treasury."

Section 12153, Revised Statutes Missouri 1929, reads as follows:

"All collectors, sheriffs, marshals, clerks, constables and other persons chargeable with moneys belonging to any county shall render their accounts to and settle with the county court at each stated term thereof, pay into the county treasury any balance which may be due the county, take duplicate receipts therefor, and deposit one of the same with the clerk of the county court within five days thereafter."

Section 3854, Revised Statutes Missouri 1929, provides as follows:

"The county treasurers shall pay out all such fees to the proper owners as the same may be called for: Provided, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he or she, as the case may be, is not at the time indebted to the state or county,

on account of delinquent back taxes, or is indebted to the state or county on account of any fine, penalty, forfeiture or forfeited recognizances, or costs for a violation of any criminal statute of this state, or for contempt of any court, no matter if the same shall have been paid by oath of insolvency as provided by law; or is indebted to the state or any county on account of any funds coming to his hands by reason of any public office; Provided further, that after deducting the amount of the indebtedness of the claimant, if any, on account of any or all of the various causes hereinbefore enumerated, the treasurer shall pay him the balance, giving duplicate receipts for the separate amounts paid, one of which shall be filed with the county clerk, who shall charge the treasurer with the same, but if the indebtedness of the claimant, equals or exceeds the amount of his fees, the treasurer shall give him credit for the amount of his fees, stating on what account, and shall make duplicate receipts for the same, one of which he shall deliver to the claimant and the other he shall file with the county clerk, who shall charge the treasurer with all such receipts, and in his regular settlements with the county court the treasurer shall make a full and complete exhibit of all his acts and doings under section 3853 to 3858, inclusive."

It is clear from Section 3854, supra, that before the treasurer can lawfully pay the sheriff the criminal costs due him, such sheriff must furnish the treasurer satisfactory evidence that he is not indebted to the county on account of any funds which came to him by reason of his office of sheriff. As the matter stands now there is

an audit on file showing the sheriff to be indebted to the county for funds unlawfully retained by him. In the face of this audit the treasurer could not legally pay the criminal costs due the sheriff.

Your second inquiry is as to what the position of the treasurer would be if the county court issued an order for him to pay the sheriff the said costs.

By the foregoing statutes quoted from it will be seen that it is the duty of the county court to audit the settlements of the sheriff as to his fees and to determine whether said officer has in his hands funds which he has not properly accounted for. If the county court does audit such accounts of the sheriff and makes a finding that said officer is not indebted to the county, then we think the treasurer would be obliged to pay the criminal costs due the sheriff, upon being furnished with a certified copy of the order of the county court making such finding. The courts of this state have uniformly held that the treasurer is a ministerial officer and is not required to investigate and determine for himself the legality and validity of warrants issued by the county court, and by similar reasoning we must conclude that where it is the duty of the county court to audit the accounts of the sheriff and in doing so said county court makes a finding that there is nothing due from that officer to the county, then the treasurer is not required to determine whether that finding is correct but he may accept the same as regular.

We do not mean to say that a finding by the county court upon an audit of an officer's account is res adjudicata or that such finding precludes the county from showing that there is actually an indebtedness due it from the officer. It is well settled that county courts do not act judicially in managing the financial affairs of the county. As was said in *State ex rel. v. Diemer*, 255 Mo. 1. c. 351:

"In the allowance of claims
against a county or in settling
with county officers, county

courts do not act so strictly as a court, or in the performance of a judicial function, that their allowance or disallowance of a claim is res adjudicata. Something of substance might be said in favor of the contrary theory, but at an early day this court considered our statutes and announced the doctrine, on the reason of the thing and because of a good public policy, that county courts in the allowance of claims, as in settling with officers, acted as a mere public board of audit, as ministerial, administrative or fiscal agents for the county and not strictly as a court, hence we have uniformly refused to apply the doctrine of res adjudicata to their orders allowing or disallowing claims against the county, or to their settlements with county officers. That doctrine has always been adhered to and must be accepted as settled."

We merely say that if a finding is made by the county court upon an audit of the sheriff's accounts that such officer is not indebted to the county, the treasurer would be justified in accepting such finding for the purpose of determining whether he should pay criminal costs due such official.

CONCLUSION

It is, therefore, the opinion of this office that the county treasurer should not pay criminal costs due the sheriff so long as the amount shown by

Honorable Forrest Smith

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February 2, 1938

the audit of the State Auditor to be due from the sheriff to the county has not been settled for and is greater than the amount of such costs due the sheriff.

It is our further opinion that if and when such sheriff produces to the treasurer a certified copy of a finding made by the county court, upon an audit of the sheriff's accounts, that such officer is not indebted to the county on account of any funds which came to his hands as sheriff, the treasurer would be free to pay the criminal costs due the sheriff.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

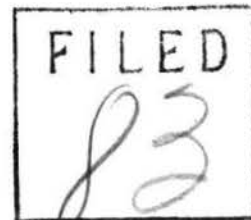
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SPECIAL ROAD DISTRICTS: Interpretation of proviso in
Section 8026, Revised Statutes
Missouri 1929

February 5, 1938

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Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri



Dear Sir:

This will acknowledge receipt of yours of January 29, 1938, which reads as follows:

"I would like your opinion on the following:

"Under Section 8026, Revised Statutes of Missouri, 1929, under the 'provided' apparently the city council of a city located more than ten miles from the county seat may make a written certificate of their choice of commissioner, designating their first, second and third choice and that such certificate shall be given the same consideration as though the Board and Mayor were present at the meeting of the Court. I would like to know what is meant 'given the same consideration.'

"In other words, according to my understanding, if the Mayor and members of the city council meet with the County Court, each member of the council and each member of the Court has a vote,

however, under the proviso, a situation could arise where a majority of the members of the council might favor one candidate and two members of the council oppose, when yet the certificate would show that this man was the choice of the council. Again, if the council certifies only one choice, what action may the Court take.

"I probably have failed to make myself clear, but what I actually desire is your interpretation of the proviso of this Section 8026."

The proviso you inquire about reads as follows:

"Provided that where the city is located a greater distance than ten miles from the meeting place of the county court, the mayor and city council of the city or town within the road district for which commissioners are to be appointed, may make a written certificate of their choice of the commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such

certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided, that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk."

This proviso has been interpreted by the Supreme Court of Missouri in the case of State ex Inf. v. Meyer, 321 Mo. 858, 12 S. W. (2d) 1. c. 490-491, as follows:

"It is clear the lawmakers by this proviso only intended to relieve the mayor and councilmen from attending the meeting if the city was located more than ten miles from the meeting place. By the proviso, the city is not authorized to make a written certificate of its choice, but the mayor and members of the council are authorized to do so. The choice designated in the certificate must be given the same consideration as though the mayor and members of the council were present. We have ruled the statute as originally enacted authorized each member of the meeting to cast a vote; and, if the choice designated in the certificate is to be given the same consideration as though a member was present and voting, then his choice designated in the certificate must be counted as a vote for commissioner. The requirement that the first, second and third

choice be designated has reference to the first meeting after the organization of the district, when three commissioners are to be appointed. Thereafter, at a meeting for the appointment of only one commissioner, the first ballot might not result in an appointment; if so, on the second ballot the absent member's second choice could be voted, and so as to his third choice."

As we read the proviso in the light of the interpretation given to it by the Supreme Court in the foregoing case, it provides a method by which the members of the city council and the mayor can register their votes for commissioner without being personally present at the time of the selection of such commissioner. In other words, it provides a system of "absentee voting," so to speak, for the mayor and councilmen. The proviso provides that "the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court." If the mayor and board were personally present there is no assurance they would all vote the same way nor is there any assurance that any one candidate would receive a majority of the votes of the mayor and board. Therefore, if the choice and selection of the mayor and board is to be given the same consideration as if they were personally present at the time of voting, then the vote of each member of the board and of the mayor must be shown in the certificate. Otherwise, as suggested in your letter, the successful candidate might be selected without receiving the majority of the votes of the combined body selecting him.

As pointed out in the Meyer case, supra, the

city is not authorized to certify its choice for commissioner, but the mayor and members of the council of such city are authorized to certify their choice.

Your next question is,

"What action should the county court take if the mayor and council certify only one choice?"

We might answer this question by asking, "What should the county court do in case the mayor and members of the council were personally present at the time of voting but would all vote on each ballot for the same persons?" In other words, if councilman Jones voted on all ballots for the same man, and, likewise, other members of the council and the mayor only had one choice, what would the county court do? In such a case there might be a deadlock in the voting, resulting in no selection being made. The point we make is that there is no way to make the mayor and members of the council designate first, second and third choices if they are personally present, and if the certificate provided for by the proviso under discussion is to be given the same consideration as though the mayor and members of the council were present, then we can not see how they can be compelled to designate first, second and third choices in their certificate. We think that the votes which they certify would have to be counted as certified whether more than one choice is designated or not.

CONCLUSION

It is, therefore, the opinion of this office that under the proviso in Section 8026, Revised Statutes Missouri 1929, the certificate provided to be sent to the county court should contain the separate votes of the mayor and of each member of the council and that such votes should be counted by the county court in the same manner as if the mayor and members of the council

Honorable Wayne V. Slankard

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February 5, 1938

were present and cast their votes for their choices shown in the certificate, and if only one choice is certified the vote must be counted on each ballot for that choice.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

HHK LC

SCHOOLS: Necessity for voting for free transportation
annually - who may vote on proposition

February 21, 1938

Mr. G. Frank Smith
Superintendent of Public Schools
Holt County
Oregon, Missouri



Dear Sir:

This is to acknowledge your letter dated January
31, 1938, as follows:

"Will you please give me information on the following:

"Calling your attention to Sec.
9197. Free transportation of
pupils - how obtained - by whom
paid.

"Questions:

- "1. Is it necessary to vote transportation for each year? I read 'for the whole or for the part of the school year'
- "2. Who are qualified to vote on this proposition? I read 'If two-thirds of the voters who are taxpayers', just who is considered a taxpayer in this instance? "

I

DOES SECTION 9197 REQUIRE A VOTE
EACH YEAR FOR TRANSPORTING PUPILS?

Section 9197, Revised Statutes Missouri 1929, reads,

in part, as follows:

"Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, * * * for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such district;"

The above section requires voters who are district taxpayers to vote for the transportation of the pupils in their district. The bringing of the question to the attention of such voters may be by the board itself or upon a petition, and said question to be presented at either an annual meeting or special meeting. The said voters determine the question of transporting the pupils for a definite period of time; to-wit, "for the whole or for part of the school year." Section 9197, supra, provides further that when two-thirds of the "voters" favor transporting the pupils, that then the duty is vested in the board of directors to arrange and provide for transportation. The Board of directors are empowered to make all needful rules and regulations and to pay for the expense of such out of the incidental fund of the district. It is therefore seen from a reading of Section 9197 that funds of the district will be expended for free transportation of pupils of such district, and, therefore, a safeguard has been prescribed by the Legislature, so that the voters who are district taxpayers must vote the power to the board of directors in order to pay money for the transportation.

It follows that the limitation in Section 9197, that the question voted upon at the annual or special meeting must be for the free transportation of pupils "for the whole or for part of the school year" means that it is necessary to vote transportation each year, in our opinion.

II

WHO ARE ELIGIBLE TO VOTE UPON THE PROPOSITION OF FURNISHING FREE TRANSPORTATION AS PROVIDED FOR IN SECTION 9197?

Section 9197 provides that "said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, * * * * Provided, * * * * If two-thirds of the voters, who are taxpayers, voting at such election, * * *," and which limits those eligible to vote upon the question of free transportation to qualified voters who are district taxpayers. In other words, a person may be a qualified voter and yet not be a district taxpayer; consequently such person could not vote. It thus takes a combination of a qualified voter and a district taxpayer to be eligible to vote. A qualified voter is defined by Section 9287, Revised Statutes Missouri 1929, as follows:

"A qualified voter within the meaning of this chapter shall be any person who, under the general laws of this State, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

However, in order to vote on the transportation question, one must be also a district taxpayer. A person will be a district taxpayer if he pays taxes in the district in which he votes. In other words, he may be

Mr. G. Frank Smith

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February 21, 1938

qualified to vote upon state and county officer and a taxpayer in some other district, but in order to vote upon the transportation question he must be a taxpayer in the district which votes transportation, as Section 9197 provides: "who are taxpayers in such districts."

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

JLH LC

MILITIA - Same individual can be Adjutant General and Commander of the National Guard, but there is no salary provided for commanding the National Guard.

February 23, 1938

Honorable Forrest Smith
State Auditor
Jefferson City, Mo.



Dear Sir:

This is to acknowledge your request for an opinion dated February 12, 1938, which reads as follows:

"I would like an opinion from your office as to whether the same individual can serve in the two capacities of Adjutant General of Missouri and Commanding General of Missouri National Guard and if so, is he entitled to draw the salary of both Adjutant General of Missouri and Commanding General of the Missouri National Guard."

Article V, Section 7, of the Missouri Constitution provides:

"The Governor shall be commander-in-chief of the militia of this State, except when they shall be called into the service of the United States, and may call out the same to execute the laws, suppress insurrection and repel invasion; but he need not command in person unless directed so to do by a resolution of the General Assembly."

Pursuant to the above constitutional provision, the Governor of Missouri is commander-in-chief of the Missouri National Guard, but need not command in person unless directed to do so by resolution of the General Assembly.

Article XIII, Section 6, Missouri Constitution provides:

"The Governor shall appoint the Adjutant-General, Quartermaster-General and his other staff officers. He shall also, with the advice and consent of the Senate, appoint all Major Generals and Brigadier Generals."

Laws of Mo., 1935, page 293, Section 13834, provides in part:

"Officers, how appointed, who elected -- election, where held, how conducted. A Major General, to be Commanding General of the Thirty-Fifth Division, National Guard of the United States, when occasion for such appointment arises, the commanding general of the national guard and all general officers shall be appointed by the governor, by and with the advice and consent of the senate, and such officers shall, at the time of their appointment, be either active general or field officers in the national guard or shall have served for at least two years as a general officer or a field officer of the line in the national guard of Missouri immediately prior to August 5, 1917. ** "

Section 13844, R. S. Mo. 1929, provides as follows:

"There shall be a commanding general of the national guard with the rank of brigadier-general who shall command the same and who shall be responsible only to the governor for its drill, equipment, instruction, inspection, service, movements, operations and general efficiency. His office shall be the office of administration and

his headquarters the headquarters of the national guard. The governor shall exercise command through such officer, who may cause those under his command to perform any lawful military duty he may require and shall have full authority to issue all orders necessary in the premises. All other commanding officers shall be responsible to the commanding general for the equipment, drill, instruction and efficiency of their respective commands. Every commissioned officer and enlisted man shall be responsible to the officer under whose immediate command he serves for prompt and unhesitating obedience, and the preservation, care and proper use of public property in his care. When the commanding general is absent from the state, the governor may designate the senior line officer on duty with the military forces of the state to perform his duties, and when so designated such officer shall have all the power and authority vested by law in the commanding general."

Thus we see that the Governor of Missouri, as commander-in-chief of the National Guard, has the constitutional and statutory power to appoint an Adjutant General for Missouri, and with the advice and consent of the Senate, he has also the power to appoint a Brigadier General and delegate to him the ex-officio command of the Missouri National Guard as commanding General thereof.

Since the Missouri Governor has appointed the Honorable Lewis M. Means as Adjutant General for Missouri, and also has delegated to him, he being Brigadier General, the command of the Missouri National Guard, as its commanding General, you ask first if it be legal for him to serve in these two capacities. There are no specific

limitations in the Constitution or statutes prohibiting the same individual from serving in these two official capacities.

Article IX, Section 18, Missouri Constitution, expressly excepts officers of the Missouri National Guard from its limitations and reads:

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

The exception found in the above constitutional provision shows that two militia offices in one person can rather be expected in Missouri. We look to the common law to find the rule applicable where one individual be appointed to serve in two offices.

46 C. J., page 941, Section 46, reads as follows:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible.** "

Any Brigadier General appointed to act as commanding General of the National Guard in Missouri also performs duties in the "military council" as provided in Section 13824, R. S. Mo. 1929, which reads:

"There shall be a military council, to consist of the commanding general of the national guard, the adjutant-general of the state, the colonels commanding regiments of the national guard and the colonels of organized regiments of the reserve military forces of the state. The commanding general shall be the president of the council, which council, except as herein otherwise provided, shall sustain the same relation to the military forces of the state and the governor as the general staff of the army sustains to the United States army and the president. The military council shall formulate plans for the organization, instruction, equipment and maintenance of the military forces of the state, provide for encampment and all other field and armory instruction and make allotments of funds and supplies appropriated or furnished for the support, equipment and maintenance of the military forces of the state. All appropriations made for military purposes shall be apportioned and expended by the council. Vouchers and accounts covering the expenditure of funds and appropriations for the support of such forces shall be audited and paid only when fully itemized, certified and approved by the executive officer of the council. Such council shall meet quarterly at such time and place as the members shall designate. Special meetings may be called by the governor or the president of the council. A majority of the members of the council on duty within the state shall constitute a quorum for the transaction of its business. The council shall elect an executive of-

ficer, who shall keep full and detailed records of its proceedings, allotments and expenditures, and a statement of vouchers and accounts audited and approved shall be furnished each member quarterly. The salary of the executive officer shall be fixed by the council, to be paid from funds appropriated for the support of the military forces of the state, and such salary shall be in addition to any other compensation received by such officer from either the state or federal government."

The Adjutant General for the State of Missouri has no constitutional duties prescribed, but his statutory duties are set out in Section 13823, R. S. Mo. 1929, which provides:

"There shall be an adjutant-general of the state, to be appointed by the governor by and with the advice and consent of the senate, who shall, at the time of his appointment, be either an active officer in the national guard of Missouri or otherwise qualified for his duties by two years' continuous service as a commissioned officer in the national guard of Missouri immediately prior to August 5, 1917. His appointment as adjutant-general shall not vacate his commission in the national guard. He shall sustain the relation to the governor of military secretary. Before entering upon the duties of his office, the adjutant-general shall file in the office of the state auditor, to be approved by him, a bond for twenty thousand dollars, conditioned for the faithful performance of his duties."

He shall receive as compensation for his services as adjutant-general the sum of three thousand five hundred dollars per annum, payable monthly out of the state treasury. The adjutant-general shall keep on file in his office a complete record of the enlistment, commission and service of all officers and enlisted men in the military service of the state, of all property issued and in the hands of the same, and generally be the custodian of all books, records and documents required to be kept by such department. He shall have a chief clerk to be appointed by him from the officers of the national guard. The adjutant-general shall, if required by the governor, be the custodian of all property purchased for, allotted or issued to the military forces of this state and keep a correct account of the same. He shall have a property officer to be appointed by him from the officers of the national guard. The salary of such property officer shall be fixed by the adjutant-general at such sum as he may deem proper, not to exceed eighteen hundred dollars per annum, to be paid monthly out of the state treasury. There shall be a division of pensions and war records in the office of the adjutant-general, and in such division shall be kept the records of all members of the national guard called into service of the United States, the volunteer troops of the state who served in the war of 1812, the Mexican war, the Seminole war, the Civil war, the Spanish-American war, the war with Germany and all other Missouri war records. In such division shall likewise be kept the colors, standards, and battle flags of such troops. There shall be a commissioner of

pensions, war claims and records to be appointed by the adjutant-general, and such commissioner shall receive an annual salary of eighteen hundred dollars payable monthly out of the state treasury. The duty of such commissioner shall be to keep such records, to furnish certified copies of the same when required and to furnish all data and information required by any soldier who volunteered, enlisted or was drafted from this state in prosecuting any claim for pension, bounty or other allowance to which he may be entitled or for any other purpose: Provided, that no such person shall be appointed such commissioner of pensions, war claims and records unless he shall have served as a soldier from this state as a member of the national guard or as a volunteer or drafted man in one of the wars above mentioned."

The duties of one individual serving as both Adjutant General for Missouri and as commanding General of the Missouri National Guard, are in their essence similar, identical and overlapping, yet neither office carries with it statutory power to exercise supervisory control over the other.

As provided in Section 13823, supra, the Adjutant General sustains "the relation to the governor of military secretary." As provided in Section 13844, supra, the commanding General is the office of administration and his headquarters the headquarters of the National Guard.

46 C. J., page 937, Section 32, reads in part:

"There is a presumption in favor of eligibility of one who has been elected or appointed to public office."

Answering your first question, we are of the opinion that in Missouri the same individual can serve in the two capacities of Adjutant General of Missouri and commanding General of the Missouri National Guard.

We now proceed to answer your second question, -- is the Honorable Lewis M. Means now entitled to draw the salary as Adjutant General of Missouri and commanding General of the Missouri National Guard?

In State ex rel. Bybee vs. Hackmann, 276 Mo. 110, 1.c. 116; 207 S. W. 64, the court laid down the rule to be followed by the State Auditor when they said:

"For it is fundamental that no officer in this State can pay out the money of the State except pursuant to statutory authority authorizing and warranting such payment."

40 C. J., page 677, Section 40 has this to say about the pay and allowance of militia officers:

"An officer is not entitled to pay and allowance where no provision therefor is made by law. Some statutes provide for the payment of officers in certain cases, as where they are in active or actual service, in aid of the civil authorities, or during encampments, maneuvers, or other exercises. *** "

46 C. J. page 1014, Section 233 reads in part:

"Public officers have no claim for official services rendered, except where and to the extent that compensation is provided by law, and, when no compensation is so provided, the rendition of such service is deemed to be gratuitous .

February 23, 1938

As to your second question, although we have cited you the Constitution and statutes showing the creation of the office of commanding General of the Missouri National Guard, we have not been able to discover any statutory salary connected with said office, as such, and consequently we are of the opinion that the commanding General is entitled to no salary for serving as commanding General of the National Guard.

We respectfully call your attention to the provisions of Section 13824, supra, which places the commanding General on the "military council", and contains provisions authorizing that body to elect an "executive officer" and fixes the salary of said executive officer "to be paid from funds appropriated for the support of the military forces of the state". Said section further provides, "such salary shall be in addition to any other compensation received by such officer from either the State or Federal government". We are informed that all commanding Generals since this enactment have held the office of "executive officer" and have received a salary as "executive officer" under the provisions of this statute, and that they made no claims for salaries as Commanding Generals.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOS:FE

PENAL INSTITUTIONS:
PRISONERS:
BARBERS:

Prisoners may do barber work for guards and other employees of penal institutions if the commissioners of the department of penal institutions permit it.

February 28, 1938

3/3

Mr. J.H. Skaggs, Treasurer
Barbers' State Board of Examiners
for State of Missouri,
705 Federal Commerce Trust Bldg.,
208 N. Broadway,
St. Louis, Missouri.



Dear Sir:

This is to acknowledge receipt of yours of February 24, 1938, requesting an official opinion from this department which is as follows:

"I have received numerous complaints from the licensed barbers in Jefferson City to the effect that the prison barbers in the Penitentiary are doing the barber work for the Guards, Attendants and various other state Employees working at the Penitentiary and receiving State Salaries.

I have also received a complaint from the Barbers Union at Jefferson City wherein they state that they can see no objection to the prison barbers doing work for the prisoners in the institution but they do not feel that they should be permitted to do barber work for the various State employees working there. This work they feel should go to the licensed barbers in Jefferson City.

Therefore, I would appreciate an opinion from you as to whether or not it is lawful for prisoners who are unlicensed barbers to practice the occupation of barber on the persons of various State Employees who are working at the penitentiary and receiving State Salaries.

Hoping to receive this opinion from you in regards to this matter at your earliest possible convenience, I am, "

The commissioners of the department of penal institutions manage and control the State Penitentiary at Jefferson City, Missouri.

Section 8328 R.S. Mo. 1929 provides as follows:

"With reference to the said state penitentiary and prison located at Jefferson City the commissioners of the department of penal institutions shall have and exercise all the rights and powers, and perform all the duties and functions, heretofore exercised and performed by the state prison board as set forth and defined in article 5, of this chapter, and such other powers and duties with reference thereto as may be authorized by law."

By this section the commissioners have the powers and duties which the state prison board had prior to its passage. Section 8338 R.S. Mo. 1929 provides as follows:

"The state prison board shall, subject to law, have the exclusive government, regulation and control of the Missouri state penitentiary, the Missouri reformatory, the industrial home for girls, the industrial home for negro girls and of all other penal or reformatory institutions hereafter created and of all persons who now are or who hereafter shall be legally sentenced to either of the institutions hereinabove mentioned or referred to and who shall be committed to the custody of said board, and said board shall make and enforce such by-laws, rules and regulations as they from time to time deem necessary and proper in the management of all institutions or persons now or hereafter legally committed to said board, and shall be vested with and possessed of all other powers and duties necessary and proper to enable it to carry out fully and effectually all the purposes of this article. Said board shall employ and at all times control a warden, deputy warden, superintendent of industries, superintendents, matrons, physicians, chaplains, trade foremen, turnkeys and guards, and all other officers and employes as the board may, under law, from time to time deem necessary and proper for the efficient administration of said board."

And Section 8341 R.S. Mo. 1929 provides as follows:

"The state prison board shall at all times and under all circumstances mentioned or authorized under this article reserve the supervision of all prisoners under sentence and committed to said board."

Chapter 103 R.S. Mo. 1929 contains the laws of this state relating to barbering and the State Board of Barber Examiners. Section 13533 R.S. Mo. 1929 which is a part of the aforesaid chapter defines the term "barber" as follows:

"Any person who is engaged in the capacity so as to shave the beard or cut and dress the hair, for the general public, shall be construed as practicing the occupation of barber, and the said barber or barbers shall be required to fulfill all requirements within the meaning of this chapter."

Only the person who barbers for the "general public" is within the act and subject to the regulation prescribed by the aforesaid chapter.

From our research on this question, we do not think that the prisoners who do barbering for guards and employees of the prison would come within the classification of the barber as defined by the statutes because they are not holding themselves out to do such work for the general public.

We do not find any statutory provisions relating to convicts which prohibit them from performing this work in the prison, providing the prison officials permit it, nor we do not find any law prohibiting the guards or employees of these institutions from having such services performed by the prisoners if they so choose.

By Section 8338, supra, this regulation is entirely within the powers of the commissioners of the department of penal institutions. The legislature has not delegated to any other person or body the supervision and regulation of the conduct or the prisoners at the penitentiary.

CONCLUSION

It is, therefore, the opinion of this department that the convicts who do barber work for guards and employees at the state

Mr. J. H. Skaggs

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February 28, 1938

prison and for prisoners thereat, do not come within the provisions of chapter 103, R.S. Mo. 1929 entitled "Barbering--State Board of Barber Examiners", and that as they do not engage in barbering for general public, they are not barbers as defined by Section 13533.

We are further of the opinion that the commissioners of the department of penal institutions only have authority to permit or prohibit the convicts from doing this work for guards and other employees of said institution.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SCHOOLS: The School Board of the Rural District has the right to pay for the nine months term without the vote of the inhabitants.

April 6, 1938

4-17✓



Hon. Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Slankard:

This department is in receipt of your letter of March 24th wherein you request an opinion based on the following facts:

"I would like your opinion on the following:

A rural school district in this County having an average daily attendance of less than fifteen pupils, was required by the State Superintendant to transport the pupils of such district to another district. The pupils in this instance were transported to Stella School District and have been attending there since the beginning of the school year. A contract was made with the Board of the Stella School District by the Board of the rural school district to pay \$3.50 per pupil, per month for transportation and tuition. The Stella school term is for nine months. The rural school term has been in the past, eight months. Does the school board of the rural district have the right to pay for the nine months term in the Stella School without a vote of the inhabitants of the rural school district at the annual meeting of such district.

It is very necessary that I have this opinion prior to April 5th, if it is possible for you to furnish the same, as that is the date on which the annual school meeting will be held. If you are unable to supply the opinion by that date will you please let me know."

There are a number of sections dealing with the question of transportation. Section 9197 R. S. Mo. 1929, is as follows:

"Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district: Provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in section 9228. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education

shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district."

It appears that this section refers to districts as it uses the term "any school district". Therefore, it would include rural school districts.

Section 9354, the pertinent part, is as follows:

"The question of transportation of pupils may be voted upon at the special meeting above provided for, if notice is given that such a vote will be taken. If transportation is not provided for in any school district formed under the provisions of sections 9351 to 9358, inclusive, it shall then be the duty of the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district:"

which refers to transportation in consolidated school districts as it mentions Section 9351 to 9358 inclusive. Therefore, even though it presents an apparent conflict with the provisions of 9397 heretofore quoted, yet it does not relate to rural school districts. Section 9270-v relates to transportation when there are less than fifteen pupils in the district:

"If any district in this state shall have an average daily attendance of less than 15 pupils as shown by the records of the last previous school year, the state superintendent shall,

April 6, 1938

in lieu of such state aid, after investigation that convinces him that it would be to the best interests of all concerned, require the board to provide for the transportation of the pupils of such district to other public school or schools, provided that the total expense, including transportation and tuition paid by the state, shall not exceed the amount that the state would have otherwise paid to such district."

This Section appears to be applicable to the point under discussion.

CONCLUSION

By the provisions of Section 9197 it does not appear that it is necessary that the patrons of the district must vote on the question of transportation, but that the board may, of its own discretion, provide for transportation of the pupils of such school district. By the terms of 9270-q, it does not appear that it is necessary for the patrons to vote upon the question, as the State Superintendent requires the Board to provide for the transportation of the pupils.

Therefore, we are of the opinion that the school board of the rural school district has the right to pay for the nine months terms in the Stella School without the vote of the inhabitants. In this connection we are enclosing an opinion rendered by this department, March 23, 1935, to Honorable G. R. Breidenstein, wherein the effect of Section 9197 discussed and even though it has no direct bearing on the question involved, we enclose the same for your information.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

OWN:LB

APPROPRIATIONS: Persons who care for graves must furnish
receipts for expense items over \$1.00.

May 4, 1938



Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for
an opinion which reads as follows:

"Section 69, p. 126 Laws of Mo. 1937
provides for an appropriation of
\$5,000 to be spent in the "care of
monument in France and care of burial
places in Europe.

"We have a copy of an opinion ren-
dered by your office holding that the
Governor has power to appoint three
persons to carry out the provisions
of Sec. 69.

"I would like to have a written opinion
from your office as to whether the ex-
penditure of this money under Sec. 69
falls within Chapter 72 of Revised
Statutes of Mo. under Sec. 11405, which
section provides that all sums in ex-
cess of \$1.00 must be supported by re-
ceipts or supporting data that the money
has been paid out by the person claiming
reimbursement."

This department, in an opinion rendered to the
Honorable Lloyd C. Stark on April 6, 1938, held that the
traveling expenses of persons chosen by the Governor to care
for monuments and burial places for Missouri's dead in
France could be paid out of money appropriated by Section 69,
page 126, Laws of Missouri, 1937.

May 4, 1938

Section 11405, R.S. Missouri, 1929, provides regulations for expense accounts of persons traveling on business for the state, and provides in part as follows:

"If any item of expense exceeds one dollar (\$1.00), it shall be supported by a sub-voucher or receipt signed by the person to whom payment was made by the official, employe or person traveling at the public expense as herein provided and such sub-voucher or receipt shall show in detail the information required by this section. Also the place and date."

It will be noted that the above statute provides that any "person traveling at the public expense" must have a signed receipt if any item of expense exceeds one dollar (\$1.00), such receipt to be signed by the person to whom payment is made.

The language of the statute is plain and unambiguous, and in such a case, "there is no occasion for construction". 59 C.J. 953; Cummins v. Kansas City Public Service Company, 66 S.W. 2nd 920.

As was said in State ex rel. Cobb v. Thompson, 5 S.W. 2nd 57; 319 Mo. 492, "courts are not permitted to search for meanings beyond the statute where the language is unambiguous".

Since the meaning of Section 11405, supra, is plain and the persons who are to care for the monuments and graves in France clearly come within its purview, such persons must meet the requirements of said statute.

CONCLUSION

It is, therefore, the opinion of this department that those persons who are to care for the monuments and graves in France, under the provisions of Section 69, page

Hon. Forrest Smith

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May 4, 1938

26, Laws of Missouri, 1937, must obtain signed receipts for every item of expense which exceeds one dollar (\$1.00) in compliance with Section 11405, R.S. Missouri, 1929.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

AO'K:VAL

SCHOOLS:

Rural school district may condemn property adjacent to a school for playground purposes.

May 16, 1938 5.7



Mr. Wayne V. Slankard,
Prosecuting Attorney,
Newton County,
Neosho, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated May 12, 1938 for an official opinion which request is as follows:

"I would like your opinion on the following:

The rural school district in this County has only one-half acre of ground in their school house site. As I understand it from them, before their school will be State approved, they must have at least an acre for play ground purposes.

They are unable to agree with the owner, as to the price to be paid for such additional ground. Desire to know whether or not such district is empowered to condemn such additional play grounds."

Section 9215, R.S. Mo. 1929 reads as follows:

"Whenever any district shall select, at the annual or any special meeting, one or more sites for one or more schoolhouses, or the board of education in city, town or con-

solidated school district, under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices and public parks and playgrounds, or additional grounds adjacent to schoolhouse site or sites, and cannot agree with the owner thereof as to the price to be paid for the same, or for any other cause cannot secure a title thereto, the board of directors, or board of education aforesaid may proceed to condemn the same in the same manner as provided for condemnation of right of way in article 2, chapter 7, R.S. 1929, and upon such condemnation and the payment of the appraisement, as therein provided, the title of said lot or land shall vest in the board of directors or board of education aforesaid for use in trust for the district and the purposes for which the same was so selected and located. All laws or parts of laws in conflict with this law are hereby repealed."

This section is applicable to all classes of schools and applies especially to rural school districts. Under this section you will notice that any district shall select, at the annual or special meeting, additional grounds adjacent to schoolhouse site or sites. Also this section provides for condemnation under eminent domain as described in condemnation of right of way in article 2, chapter 7 of the Revised Statutes of 1929. This article was amended in the Session Laws of 1931, at page 171 only to the effect of interlining "telephone" and "street railway", and in no way affect the procedure of the condemnation.

This section was upheld in the case of Gladney et al. v. Gibson and School District of Elsberry, Missouri, 208 Mo. App. 70.

Mr. Wayne V. Slankard

-3-

May 16, 1938

If the condemnation of the additional ground as set out in your letter provides for an increase of the tax levy, it would be advisable to read Section 9226, R. S. Mo. 1929. The procedure of the condemnation is too lengthy to set out in this opinion but should follow all of article 2, chapter 7, Revised Statutes of Missouri 1929, and Session Laws of 1931, page 171.

CONCLUSION

In view of the above section which applies to all classes of schools, it is the opinion of this office that the rural school district in your county is empowered to condemn such additional land adjacent to schoolhouse thereon situated.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

SALARIES AND FEES:
COUNTY JUDGES:

Jasper County Judges shall receive five dollars per day as salary as judge of the county court and twelve hundred dollars each per annum as members of the board of road overseers.

May 24, 1938

5-76



Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This is in reply to yours of May 18, requesting an official opinion from this department based upon the following letter:

"Will you kindly advise me the proper basis of compensation for the members of the County Court of Jasper County for the years 1935-1935 and 1937."

Section 2092, page 204, Laws of Missouri, 1933, provides in part as follows:

"In all counties of this state now or hereafter having seventy-five thousand inhabitants and less than ninety thousand inhabitants, the judges of the county court shall receive an annual salary of twenty-five hundred dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, under the provisions of section 7892, R.S. 1929.*****
*****"

In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, provided that such mileage shall be charged only once for each regular term, and no mileage shall be paid for any special or adjourned term."

Section 7892, R. S. Mo. 1929 provides as follows:

"The judges of the county courts in all counties in this state which now have, or may hereafter have, a population of not less than 50,000 nor more than 200,000 inhabitants, and which now have, or may hereafter have, more than two hundred miles of macadamized or rock public roads, and which now have, or may hereafter have, a total taxable wealth of over twenty-five million dollars and not containing a city of the first class shall be and constitute a board of road overseers for such counties for the purpose of seeing that the fund provided for by

subdivision two of section 9874 shall be expended as provided in said second subdivision of said section 9874, and for the purpose of seeing that the roads contemplated by said subdivision of said section are each and every one kept in good repair, and for the purpose of personally viewing new road and bridge sites which are the subject of petitions for improvement, and for the purpose, through personal supervision, of seeing that all road improvements are completed in a good and workmanlike manner, and that all work of every kind done on the county roads is done in a proper workmanlike manner. Each member of said board shall, as compensation, solely for his services as such road overseer receive a salary of twelve hundred dollars per annum to be paid by the county, monthly, in equal monthly installments out of the fund mentioned in said subdivision two of section 9874. The time, place and manner of holding meetings of said board and the rules and regulations for the performance of the duties shall be fixed by said board."

From a research on your question, we find the population of Jasper County at the last decennial census was seventy three thousand eight hundred and ten (73,810), therefore, the salary of the county judges of that county would come within the classification of counties of seventy-five thousand or less which would make the salary of each county judge five dollars per day.

We also find the valuation of Jasper County is in excess of twenty-five million dollars (\$25,000,000.00); that it does not contain a city of the first class, however, we do not find upon our research that this county now has two hundred miles or more of macadamized or rock roads.

We do find that they did have this number of miles of rock road at the time of the case of State v. Lee hereinafter referred to, and if it has that much mileage of such roads at this time, then the county court judges may draw the salary as members of the board of road overseers as provided in said Section 7892, supra. In the case of State ex rel. Moseley et al. v. Lee et al, 5 S.W. (2d) 83, in which the question of whether or not the judges of the County Court of Jasper County are entitled to the salary of the board of road overseers as provided by Section 7892, supra, the court, at l.c. 94, said:

"It follows that the board of road overseers of Jasper county was not legally abolished by said series of acts of 1923, and the defendants and appellants were each entitled to perform the services, and to receive the annual salary of \$1,200 prescribed by section 10684, Revised Statutes of 1919."

Section 10684, R.S. Mo. 1919 is the same as Section 7892, R.S. Mo. 1929

CONCLUSION

From the foregoing, it is the opinion of this department that salaries of the judges of the County Court of Jasper County are fixed by the provisions of Section 2092, page 204, Laws of Missouri, 1933, which is five dollars (\$5.00) per day for each day necessarily engaged in the holding of the court, and five cents (5¢) per mile for each mile necessarily traveled in going to and returning from the place of holding county court, which mileage may be charged once for each regular term and not otherwise. Said county having a population of less than seventy-five thousand (75,000) inhabitants as shown by the last decennial census and providing said county now contains two hundred miles or more of macadamized or rock roads, the county court as members of the board of road overseers of said county are entitled to twelve

Hon. Forrest Smith

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May 24, 1938

hundred dollars (\$1200.00) each per annum.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SCHOOLS:

Rural school districts may condemn property adjacent to a school for playground purposes.

June 6, 1938

6-13



Mr. Wayne V. Slankard,
Prosecuting Attorney,
Newton County,
Neosho, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated May 18, 1938 for an official opinion from this department which is as follows:

"Does a common school district have the right to condemn, 'additional grounds adjacent to the schoolhouse site or sites.' The reason I ask for this, particularly, is that it has occurred to me that the part of Section 9215 R.S. Mo. 1929, which reads as follows: 'or the board of education in city, town or consolidated school districts under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices and public parks and playgrounds, or additional grounds adjacent to schoolhouse site or sites,' applies only to city, town and consolidated school districts and that the only rights to condemn, granted by this section to common school districts, is the right to condemn for an original site or sites or a new site or sites but not for additional land for playground

purposes even though it might be adjacent to the present site.

As further grounds for this thought, Section 9422 grants to city, town and consolidated districts, or rather to the board of education of such districts, the right to purchase, 'sites for schoolhouses, libraries, school offices and public parks and playgrounds adjacent to the schoolhouse site or elsewhere in said district;' but I have been unable to find any authority for a common school district to purchase lands in addition to the site or adjacent to the site for playground purposes unless the word 'site' as used in Section 9215 is construed to mean not only the original tract of ground where a schoolhouse is located but also any additional land which in the opinion of the district, expressed by their vote, may be necessary for playground purposes. It strikes me that unless this broad meaning is given to the word 'site', that a common school district would have no right to either purchase or condemn land except for an original school site or sites or a new site or sites and if this is true, this situation might arise: Suppose a new district were given a half acre of land for a school site and a deed was made to the board of directors, as Trustees to hold the same, and the district desired an acre of land for the school site. In this case the district already owns a site and yet it needs and desires a half acre additional for playground purposes. Unless the word 'site' is construed in its broad sense in this situation the board would have no right, as I see it, to condemn this additional land.

I have been unable to find any Missouri case touching on the point I have attempted to explain, however, in 'Words and Phrases,' third series, I found the following, taken from Board of Education v. Forrest, 130 S. E. 621, 190 N. C. 753: 'Where the board of education selected certain lots for a school site at the same time, but could not purchase one of them at the time the others were purchased, held that under C. S. Section 5416, and C. S. Supp. 1924, Section 5469, authorizing the board to acquire title to suitable 'sites' it could thereafter condemn the lot which it could not purchase, for purposes of playground, since in such matters the board is acting in exercise of a discretion with which Courts seldom interfere; the word 'site' within Section 6459 being broad enough to embrace such land not exceeding statutory limit as may reasonably be required for suitable and convenient use of a particular building, and land taken for playground in conjunction with the school may be as essential as land taken for the school house itself.'

On May 16th this department rendered you an opinion in acknowledgment of your request dated May 12, 1938, for an opinion regarding the condemnation of additional sites for schoolhouses. In answer to your second request in regard to this matter dated May 18, 1938, this department still believes the opinion dated May 16, 1938 covers the matter of the question in your letter of May 12, 1938. Section 9215, R.S. Mo. 1929 reads as follows:

"Whenever any district shall select at the annual or any special meeting, one or more sites for one or more schoolhouses, or the board of education in city, town or consolidated school district, under the provisions of the

statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices and public parks and playgrounds, or additional grounds adjacent to schoolhouse site or sites, and cannot agree with the owner thereof as to the price to be paid for the same, or for any other cause cannot secure a title thereto, the board of directors, or board of education aforesaid may proceed to condemn the same in the same manner as provided for condemnation of right of way in article 2, chapter 7, R.S. 1929, and upon such condemnation and the payment of the appraisement, as therein provided, the title of said lot or land shall vest in the board of directors or board of education aforesaid for use in trust for the district and the purposes for which the same was so selected and located. All laws or parts of laws in conflict with this law are hereby repealed."

This section is not ambiguous and really needs no construction. All that is necessary is to give the ordinary meaning to each word or expression in the statute. According to the rules of construction where a statute is susceptible of two or more meanings, the court will adopt that interpretation most in accord with the manifest purpose of the statute as gathered from the context. This was so held in *O'Malley v. Continental Life Insurance Company*, 75 S.W. (2d) 835, 1.c. 839, where the court said:

"The legislative intent in the enactment of the law is to be sought and effectuated. This is the rule of first importance in statutory interpretation. To ascertain such intent we invoke as aids such of the auxiliary rules of interpretation as may seem to bear with incidence as direct as may be upon the matter in hand. Briefly

stated, these in substance recognize and require that the language of the act be considered (25 R. C. L., Section 216, p. 961); that each word be accorded its ordinary meaning, generally speaking; and that in construing a word or expression of a statute susceptible of two or more meanings the court will adopt that interpretation most in accord with the manifest purpose of the statute as gathered from the context."

Section 9215 was Section 11143 in the Revised Statutes of 1919. That provision provided that "any school district", if it needed additional grounds for school purposes or for public parks and playgrounds, could, upon a vote of a majority of the qualified voters, condemn land adjacent to the schoolhouse site. The clause "or additional ground adjacent to schoolhouse site or sites" found in the 1929 statutes was not in the 1919 provision. In State ex rel. v. School District, 310 Mo. 258, 274 S.W. 1073, the court reiterated its holding of School District v. Oellien, 209 Mo. 464, in which it was held that the majority mentioned in the 1919 provision meant the majority of all the qualified voters in the district and not just those who vote. The Legislature, realizing the oppressive consequences of such a statute, eliminated the provision as to the vote on the question of whether adjacent land could be acquired or not, and placed such right in the Board of Directors by inserting the phrase "or additional grounds adjacent to schoolhouse site or sites".

The clause last quoted was to take the place of the part that was eliminated and was to apply to "any school district". Therefore, that clause, as found in Section 9215, applies to the first part thereof, that is, "when-ever any district shall select at the annual or any special meeting one or more sites for one or more school districts", as well as to the latter clause.

This Section 9215, supra, which may be said to be indefinite is very clear and unambiguous if the clauses

and words are taken and used in their natural meaning.
This section reads:

"When any district shall select, at the annual or any special meeting one or more sites for one or more schoolhouses,"* * * * *

is a phrase in the section which sets out the place and time of the meeting for the purpose of obtaining sites for one or more schoolhouses, the section further goes on to say:

"* * * * or the board of education in city, town or consolidated school district, under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices and public parks and playgrounds,"* * * * *

is a phrase which sets out the time and place and procedure under which they shall locate, direct and authorize the purchase of sites for a schoolhouse. The two phrases above set out merely describe the two different places and times of the two different forms of school districts that shall authorize the following: selection by any school district of one or more sites or additional grounds adjacent to schoolhouse site or sites or the board of education of any city, town or consolidated school district shall locate, direct and authorize the purchase of sites, or additional grounds adjacent to schoolhouse site or sites.

In other words, the Section 9215, supra, as construed means first, who, and it describes the two distinct forms of school districts, one being any district at the annual or special meeting; the other being school districts, such as, boards of education in cities, towns or consolidated school districts: "shall select, locate and authorize the purchase of additional grounds adjacent to schoolhouse site or sites."

Mr. Wayne V. Slankard

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June 6, 1938

CONCLUSION

In view of the above authorities and the authorities as set out in the official opinion from this office in reference to the same matter requested by you on May 12, 1938, will say that it is the opinion of this department that Section 9215, R.S. Mo. 1929, authorizes any district at the annual or special meeting of said district to purchase additional grounds adjacent to schoolhouse site or sites and if unable to agree with the owner the board of directors or board of education aforesaid may proceed to condemn the same in the same manner as provided for condemnation of right of ways in Article II, chapter 7, R.S. Mo. 1929.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

ARMORIES: County Courts' authority to furnish sites to the State for armories.

County Courts may give or convey lands of the County to the State for armories.

August 4, 1938

Honorable Wayne V. Slankard
Prosecuting Attorney
Neosho, Missouri



Dear Sir:

This is in reply to yours of July 26, 1938, requesting an official opinion from this department based upon the following letter:

"The County Court of this County has requested that I secure your opinion on the following:

"After the construction of the new jail, the old jail building and lot are no longer needed by the County and the location is particularly suited for an Armory.

"The National Guard locally has secured a grant for the purpose of the construction of a new Armory and desire this lot for this purpose. Does the County Court have a right to give this property to the State for an Armory site and if not, could it be sold to the State for a nominal sum."

Your request involves the question of the right of a County Court to dispose of county properties.

August 4, 1938

Section 2078, R. S. Mo. 1929, provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Counties and other political subdivisions of the State are restricted in disposing of public funds and county properties by Section 46, Article IV, of the Constitution of Missouri, which provides as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

However, the provisions of the above section do not apply to grants of public moneys or property to the State.

Section 7 of Article XIII of the Missouri Constitution provides as follows:

"The General Assembly shall provide for the safe-keeping of the public arms, military records, banners and relics of the State."

August 4, 1938

Pursuant to this section, the Legislature enacted Sections 7213 and 7214, R. S. Mo. 1929, which are as follows:

"Sec. 7213. All cities, towns, villages and counties in this state are hereby given power and authority to build or acquire, by purchase, lease, gift or otherwise, suitable armories, drill halls and headquarters, and the land necessary therefor, for such organizations of the national guard of Missouri as may be stationed or located therein, and to provide for the maintenance and repair of the same."

"Sec. 7214. In case any organization of the national guard of Missouri now or hereafter occupies any armory, drill hall or headquarters not owned or leased by the city, town, village or county wherein it is located, such city, town, village or county is hereby given power and authority to provide for the maintenance and repair of such armory, drill hall or headquarters."

By these sections and by authority of the foregoing provisions of the Constitution, the Legislature has authorized the counties, cities or villages to build or acquire by purchase or lease, gift or otherwise, armories, etc. The county courts, by virtue of said authority, may purchase sites for armories or may rent such sites.

In the case of State ex rel. v. Turner, 93 Ohio State 379, 113 N. E. 327, the court held:

"A municipality may deed land to the state for an armory, reserving the right to use the armory for purposes of drill by its police and fire departments."

August 4, 1938

As to the manner in which the title to such armory may be taken by the State, I am enclosing a copy of an official opinion dated January 4, 1938, to Honorable Lewis M. Means, Adjutant General, written by Mr. W. J. Burke, Assistant Attorney General, which covers that question.

CONCLUSION.

From the foregoing authorities, it is the opinion of this department that the county court of a county may give a site for an armory to the State, and that the State may take title thereto as is provided by Laws of 1933 at page 251.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

CIRCUIT CLERKS: Must hold money paid to them not satisfied
of awards for damages in condemnation cases
subject to the orders of the circuit court.

August 16, 1938

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your inquiry of
recent date which reads as follows:

"In some of our audits we find in
the Circuit Clerk's office an un-
claimed and therefore undistributed
balance from condemnation awards
paid by the Highway Department.

We would like for you to advise us
concerning the recommendation to be
made for the disposition of these
unclaimed amounts."

A survey of the method by which the money in question
gets into the hands of circuit clerks will help in deter-
mining your inquiry.

Section 21, Article II, Constitution of Missouri,
reads in part as follows:

"That private property shall not be
taken or damaged for public use without
just compensation. Such compensation
shall be ascertained by a jury or board
of commissioners of not less than three
freeholders, in such manner as may be
prescribed by law; and until the same
shall be paid to the owner, or into
court for the owner, the property shall
not be disturbed or the proprietary
rights of the owner therein divested."



Section 1342, R.S. Missouri, 1929, after outlining the method of appointing commissioners to assess damages and providing for the filing with the circuit clerk of their report showing damages assessed, provides: "and thereupon such company shall pay to the said clerk the amount thus assessed, for the party in whose favor such damages have been assessed;".

The State Highway Commission is given power by Section 8111, R.S. Missouri, 1929, to condemn land for certain highway purposes in accordance with the provisions of Article 2, Chapter 7, R.S. Missouri, 1929, of which Section 1342, supra, is a part.

In the early case of State v. Lubke, 15 Mo. App. 152, the court in discussing sections of the Constitution and statutes corresponding to those quoted, supra, said: (l.c. 161).

"The payment here provided is an unconditional payment to the clerk for the land-owner, and satisfies the requirements of the constitution."

And again in said opinion at l.c. 162, it is said:

"If the deposit satisfies the requirements of the constitution, the making of it exonerates the railway company; for they have done all that the law requires them to do as a condition precedent to the taking. Thenceforth the money lies in court, not at their risk, but at the risk of the land-owner. The law affords no provision for investing it so that it will yield him any profit."

From all of the above, it will be seen that when the award of damages in a condemnation case is deposited by the condemnor with the circuit clerk, such money is deposited with the court for the land owner, and from the time of such deposit by the condemnor the money is the property of the land owner. The clerk as an officer of the court holds the money subject to the order of the court, directing payment to the person or persons entitled

August 16, 1938

thereto. The person claiming such money or any part thereof should make application to the court by motion or other appropriate proceeding to have same paid to him.

In 20 C.J., page 1074, in a discussion of the right to compensation awards, it is said:

"When deposited, it belongs immediately to the owner and should be paid to him upon his application for an order to that effect, although the deposit is accompanied by a protest."

Your query is, what shall the circuit clerk do with the money paid for damages if no one applies to the court for it and no order is made by the court for him to pay it to anyone? We have searched diligently for an answer to this question. There is no express provision in the statutes as to what the clerk shall do under such circumstances. By Section 11676, R.S. Missouri, 1929, the clerk is required to "keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same". Money paid to the clerk in satisfaction of an award for damages is money paid into his hands by virtue of his office. (State ex rel. v. Scott, 216 Mo. App. 114). Various statutes expressly require the circuit clerk to pay over other moneys collected or received by him at certain times and to certain persons. Section 11814, page 447, Laws of 1937, requires him to pay into the county treasury monthly all fees collected by virtue of his office. Section 668, R.S. Missouri, 1929, requires him to remit to the Secretary of State the amount received from the sale of session acts. Section 11827, R.S. Missouri, 1929, requires the clerk to turn over to his successor all books and fees charged therein and not paid out.

However, we find no statute expressly directing the circuit clerk to turn over to his successor the money paid to him in satisfaction of an award for damages in a condemnation case. Likewise, there is no statute directing such clerk to turn over to his successor money in his hands by reason of tenders or interpleaders made in litigation. We think the reason for this is that money paid to the clerk in satisfaction of an award for damages and by way of tenders and interpleaders in litigation is money paid into the court and is subject to the orders of the court as to its disposition, whereas the money paid to the clerk by way of fees, etc., is money paid to the clerk and governed by statute

August 16, 1938

as to its distribution. In the cases of money paid into the court, the clerk must handle it and pay it out in accordance with the orders of the court. When the court orders the money paid out, the clerk must pay it out, but until such time as the court makes an order touching the distribution of such money, the clerk has no duty to perform other than to hold the money.

Since the money representing damages in condemnation cases is money in the hands of the court and is subject to the orders of the court, and since the court is a continuous institution regardless of who the clerk happens to be, such money should remain in the registry of the court. Therefore, to accomplish this situation, each clerk would have to turn over to his successor all such money in his custody at the end of his term. Such successor would be subject to the orders of the court as to the disposition of such money. Therefore, answering your question directly and legally, we would say that the circuit clerk can only hold the money in question subject to the orders of the court, each clerk turning over to his successor any such money remaining undisposed of. However, as a practical proposition, we would suggest that the clerk should notify the prosecuting attorney of the county as to any such money which has been uncalled for for any considerable time so that such officer can ascertain whether such money could, by proper proceeding, be escheated to the state. For instance, if it be found that the owner had died, the public administrator could be directed to open the administration upon his estate. Upon final settlement of said estate it may be found that the conditions exist as set out in Section 620, R.S. Missouri, 1929, which would make said money subject to being escheated to the state.

CONCLUSION

It is, therefore, the opinion of this office that circuit clerks should hold money paid to them in satisfaction of awards for damages in condemnation cases subject to the orders of the circuit court, and that such clerk should turn over to his successor any such money left in his hands undisposed of at the end of his term.

Respectfully submitted,

APPROVED By:

HARRY H. KAY
Assistant Attorney General

J.E. Taylor
(Acting) Attorney General

TAXATION:

CEMETERIES:

Only lands used for a cemetery or burial grounds are exempt from taxation, and real estate owned by a cemetery association and used for farming and residential purposes is not exempt.

August 23, 1938

Mr. John B. Smoot
Prosecuting Attorney
Scotland County
Memphis, Missouri



Dear Sir:

This is in reply to yours of August 19th requesting an official opinion from this department, which is as follows:

"May I have an opinion from your office relative to the application of Section 6 of Article 10 of the Constitution of Missouri and of the interpretation given to that section by the Supreme Court of Missouri in State ex rel. versus Casey, 210 Missouri Reports 235, to the following facts, to-wit:

"In 1931, one James D. Bondurant desiring to make a gift to the Middle Fabius Camp Ground Cemetery Association of Scotland County, Missouri, purchased a 50 acre tract of land near the site of the burial grounds of said cemetery association and had the land conveyed directly to the cemetery association. It is recited in the deed that James D. Bondurant shall have the right to manage said lands during his lifetime for the use and benefit of the cemetery association. This farm is used by the sexton employed by the cemetery association and is furnished to him rent free.

"Immediately after the acquisition of this land by the Middle Fabius Camp Ground Cemetery Association, the land was stricken from the tax rolls of Scotland County and remained off the tax rolls as exempt property until 1934, at which time the land was again placed upon the tax rolls and no notice served upon the association or any officer thereof of the fact until four years delinquent taxes had accrued against the land.

"It is the contention of the Cemetery Association that in so much as the land is used by the sexton and is furnished rent free, that the burial grounds is the beneficiary of the land; and for the further reason that at some future time this land will be used as a part of the burial grounds."

On the question of exemption from taxation of cemeteries, we find that Section 6 of Article X of the Constitution of Missouri provides as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

A cemetery is defined as a place where human bodies are buried; a graveyard. *Smallwood v. Middlefield Oil Co.*, 89 S. W. (2d) 1086 (Tex.). In the same case the court said, l. c. 1090:

"The setting apart and appropriation of land as a burial ground effects in law an abandonment of its use and possession for all other purposes."

In the case of *Mt. Pleasant Cemetery Association v. City of Newark*, 98 Atl. 448, 89 N. J. L. 255, the court held:

"The term 'cemetery' does not include and render exempt from taxation tracts of land belonging to a cemetery company acquired by separate deed, and lying between high water mark and dock line of title river, separated from other cemetery property by railroad, when only small portion of tract is used for interments or is likely to be so used in the near future."

In the case of *State v. Lange*, 16 Mo. App. l. c. 470, the court said:

"The corporation owns two tracts of land divided and separated by a public highway, one consisting of lot 14, in James B. Clay's subdivision, and the other of lots 139, 140, 141, 142, and 143 of North Cote Brillante subdivision, having acquired both tracts in 1867, about two years after its incorporation. Both tracts together do not exceed forty acres.

"On the larger of these two tracts, it has laid out a cemetery, and has subdivided part of it into lots which it has sold for purposes of interment. This tract never was assessed for taxation, it

being conceded that it is exempt under the terms of relator's charter. The smaller tract the corporation rents out to its sexton, who occupies it as a residence, and uses it for market and ornamental gardening, and who pays to the corporation for such use an annual rent of one hundred and fifty dollars. This smaller tract has been thus used ever since the corporation acquired it, and such use as far as the evidence shows may be continued for all time. It is this smaller tract which relator claims is also exempt from taxation on the ground that it is used for cemetery purposes. This use relator is endeavoring to establish by testimony tending to show that the money paid by the sexton is not by way of rent, but by way of a bonus for holding the position of sexton; that while the sexton raises vegetables on the land, and cultivates about one-half thereof for that purpose, which vegetables he sells in the open market, he also raises flowers and ornamental shrubs, which he sells to owners of lots in the cemetery across the way for the decoration of graves, and that many years ago some trees were planted on this lot with a view of using it as a cemetery at some future time. Also testimony tending to show that water from the well at the sexton's house is used by him for watering the graves on the other tract, for which service presumably he is likewise paid by owners of the lots, though the evidence is silent on that subject.

"It will be seen from the foregoing that we could arrive at the conclusion that this smaller lot is also a cemetery, only by artificial reasoning, and that we would have to refine to a considerable extent to bring it within the terms of the exemption granted.

This under the rules of construction applicable to such grants we are precluded from doing.

"We do not decide that the corporation has forfeited its right to hold this smaller tract exempt from taxation, we simply hold that the exemption never attached thereto, because whatever the purposes were for which it may have acquired it, it has never been and it is not now a cemetery."

As stated in State ex rel. v. Casey, 210 Mo. 235,

"Laws exempting property from taxation are to be strictly construed, and the right of exemption must be established beyond a reasonable doubt."

In the same case, the court held:

"Section 6 of article 10 of the constitution, ordaining that 'the property, real and personal, of the State, county and other municipalities, and cemeteries shall be exempt from taxation' does not exempt the personal property of cemetery companies from taxation. The words 'property, real and personal,' in that section, are separated from, and have no connection with, the word 'cemeteries.' The exemption extends only to cemeteries as such."

From your letter it appears that the 50 acre tract of land which was conveyed to the cemetery is held by the cemetery subject to the rights of the grantor to manage said lands during his lifetime and for the use and benefit of the cemetery association. It also appears that the sexton of the cemetery association uses this farm and does not pay any rent for it. Under the rule in the Casey case, supra, it appears that this farm comes within the class of property of the cemetery association, but it is not the cemetery. As stated in the Casey case, supra, the property of the cemetery association is not exempt from taxation.

August 23, 1938

It is only the cemetery which is exempt. If and when this 50 acre tract is used as a cemetery, then it will be in the class which is exempted by the provisions of said Section 6 of Article X of the Constitution.

CONCLUSION

From the foregoing, it is the opinion of this department that real estate owned by a cemetery association is exempted from taxation only when such property is used as a cemetery, in other words, when such real estate is used only as a burial ground. As the land to which you refer is not used as a burial ground, but for a farm and a place for the sexton to live, it does not come within the exempted class of cemeteries for taxation purposes.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

LOTTERY - Automobile drawing scheme.

August 24, 1938



Honorable W. Randall Smart, Member
House of Representatives
501 Commerce Building
Kansas City, Missouri

Dear Sir:

We have your request of August 20, 1938
for an opinion as follows:

"Will you please advise and without
preparing a lengthy opinion,
whether or not the following facts,
if put into effect would be in
violation of any of our statutes:

"An automobile dealer, in or-
der to promote his business,
on each car that is sold to a
customer the serial number is
placed in a box and at the end
of each week a drawing is made
and the party whose number is
drawn, his money is returned
to him."

The above facts, if put into operation, would
be a violation of the lottery statute, Section 4314, R. S.
Mo. 1929, since the scheme would include prize, chance
and consideration, the three essential elements of lottery.

State vs. Emerson, 1 S. W. (2d) 109;
State ex rel. vs. Hughes, 299 Mo. 529;
253 S. W. 229; 28 A.L.R. 1305;
State vs. Becker, 248 Mo. 555, 154 S. W. 769.

Hon. W. Randall Smart

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August 24, 1938

It is, therefore, the opinion of this office
that the above plan as outlined is a lottery.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE

APPELLATE COURTS:
CLERKS:

Must comply with provisions of
Section 1, Laws Mo. 1933, page 415.

August 30, 1938

Honorable Forrest Smith
State Auditor
Jefferson City, Mo.



Dear Sir:

I wish to acknowledge receipt of your request for an opinion dated August 17, 1938, as follows:

"Section 1 of S.B. 124 found on page 415 of Mo. Laws 1933 provides:

'All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government, shall be deposited in the State Treasury.'

"This section is in conflict with Sections 11657 and 11658, R. S. Mo. 1929 with reference to clerks of Courts of Record. The Kansas City, Springfield and St. Louis Courts of Appeal do not deposit all their fees in the State Treasury as provided for in S.B. 124 of the 1933 Laws, but follow Sections 11657 and 11658; or, in other words, they retain the fees in their possession, pay salaries from these fees and each quarter file a report with my office showing the amount they have collected and the amount expended and at the end of the year, pay into the State Treasury the balance, if any, in that fund.

"I would like an opinion from your department as to whether the three courts named

above come under the provisions of S.B. 124 of the 1933 Laws or whether they follow the statutes as set out in Chapter 77 of the R. S. Mo. 1929."

Section 11657, R. S. Mo. 1929 provides that the clerk of the Court of each of the Court of Appeals should make a quarterly statement as to the amount of fees received and after deducting the amount paid for clerical assistance during the quarter, pay same to the State Treasurer, as follows:

"The clerk of each of the court of appeals shall keep a true and accurate account of all fees earned in his office, in a suitable book provided for that purpose, and at the end of each quarter of a year he shall make out a statement, verified by his affidavit, showing the amount of each fee received by him during the then past quarter of a year, from whom received and on what account; said statement shall include all fees for services of whatever character done in his official capacity, including all fees paid by the state for copying appellate court decisions, or for other work; and shall likewise include the name of each clerical assistant, if any; the length of time such assistants have been employed, and the amount paid to each; which statement, so verified, shall be filed with the state auditor. The auditor shall carefully examine the record of fees kept by said clerk or any person as to the correctness thereof, and after deducting from the aggregate of such statement the total amount, if any, paid by said clerk for additional clerical assistants, or other help, during said quarter, shall order the balance, if any, to be paid into the state treasury."

Section 11658, R. S. Mo. 1929 provides that said clerks must pay the amount within ten days after the

quarterly statement is filed, as follows:

"It shall be the duty of said clerk, within ten days after such quarterly statement is filed, to pay into the state treasury the amount so ordered, and take duplicate receipts therefor, one of which he shall immediately file with the auditor, who shall charge the treasurer therewith."

Section 1 of the Laws Mo. 1933, page 415, provides that all fees from whatsoever source received by any agency of the State Government by virtue of any law or rule or regulation made in accordance with any law shall, at stated intervals, be placed in the State Treasury, as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this

section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

A reading of the latter statute discloses a clear conflict with the provisions of the two preceding sections. There is, however, a rule of statutory construction that conflicting provisions must be reconciled if possible. The rule is set out in the case of *State ex rel. St. Louis Public Service Co. vs. Public Service Commission*, 34 S. W. (2d) 486, 1.c. 488, 326 Mo. 1169, as follows:

"We are therefore obliged to interpret the law as it reads and reconcile its in-harmonious provisions if possible."

The statutes, as they appear in the 1929 provisions, indicate a duty on the part of the clerk to make quarterly payments of fees to the State Treasurer. The 1933 Act provides for payment of fees at "stated intervals" to the State Treasurer. There is no attempt to define a "stated interval", but considering all of the statutes together, we are of the opinion that same may be harmonized by requiring the continuation of quarterly payments by the clerk to the State Treasurer. An examination, however, of the other provisions in the above quoted statutes reveals an irreconcilable conflict.

Hon. Forrest Smith

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August 30, 1938

Sections 11657 and 11658, supra, require only the payment to the Treasurer of those fees remaining "after deducting from the aggregate of such statement the total amount, if any, paid by said clerk for additional clerical assistants or other help", whereas the 1933 Act requires that "all fees" be paid to the State Treasurer.

In the case of City of Westport ex rel. vs. Jackson, 69 Mo. App. 148, l.c. 153, the court said:

"It must be conceded that if there is an irreconcilable conflict between these provisions of the section, that the last would stand and the others, which can not stand with them, go to the ground."

The 1933 Act having been passed at a later date and being in irreconcilable conflict with Sections 11657 and 11658, R. S. Mo. 1929, with the exception of the intervals in which payment is to be made to the State Treasurer, the 1933 Act prevails.

We are, therefore, of the opinion that the clerks of the Kansas City, Springfield and St. Louis Courts of Appeals must comply with the provisions of Section 1, Laws Mo. 1933, page 415.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:FE

CRIMINAL COSTS: The State is only liable for the costs in juvenile trials on conviction before a jury, plea of guilty, acquittal, or dismissal under the general criminal law, where the punishment is solely imprisonment in the state penitentiary.

September 2, 1938

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of August 9, 1938, requesting an opinion from this department, which is as follows:

"We are often presented with cost bills for payment of items relating to juvenile cases, that is, in cases where the defendant is under the age of seventeen. We receive these bills both from counties of less than 50,000 population, and from counties of 50,000 or more population. In many instances, on account of the age of the defendant and the manner in which the case is handled, it is extremely difficult for us to determine whether or not the state is liable for payment of costs.

"In this connection we are mindful of the fact that Section 3826, R. S. Mo. 1929, provides that 'in all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, work house or reform school because such person is under the age of 18 years, the State shall pay the costs,

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if the defendant shall be unable to pay them, except costs incurred on behalf of the defendant * * *. Also that Section 3828 R. S. Mo. 1929 provides that 'In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state. * * *'.

"However, in many of these cases the Prosecuting Attorney files an information directly in Circuit Court charging the child with some crime which is punishable solely by imprisonment in the penitentiary, such as burglary and larceny under Section 4056 R. S. Mo. 1929. The child is then taken before the Circuit Judge. No jury trial is held, but various sentences and judgments are pronounced. In some cases the record will show that the 'defendant is found guilty as charged and ordered committed to the Boys' Training School at Boonville for a term of two years'. In others, that the 'defendant is found to be delinquent and guilty as charged and ordered committed to the Boys' Training School at Boonville for a term of two years'. In some cases the defendants are merely 'found guilty of delinquency and ordered committed to the Boys' Training School at Boonville'. In other cases the defendant is 'placed in charge of the Probation Officer'. It is seldom that the juvenile defendant is acquitted or the case against him dismissed.

"We call your attention to Sections 14159 to 14181, inclusive, R. S. Mo. 1929 (juvenile laws in counties of less than 50,000 population), and Sections 14136 to 14158, inclusive, R. S. Mo. 1929 (juvenile laws in counties of 50,000 or more population). Does the fact that the Prosecuting Attorney files a charge which is punishable solely by imprisonment in the penitentiary make the state liable for costs when judgments and sentences are

are rendered as heretofore cited? Would it be necessary for the court records to show that the defendant was being tried under the general criminal statutes instead of as a delinquent in order for the state to be liable for costs? Would a jury trial be necessary under the general criminal statutes or could the trial judge sentence the defendant on evidence submitted?

"We would appreciate your opinion advising us fully in regard to the state's liability for costs in Juvenile Cases. We are enclosing some cost bills in Juvenile Cases for use in preparing your opinion."

In answering your request for this opinion, it will be necessary to divide the subject into three sections. The first section will apply to the juvenile laws in counties of 50,000 or more population, which are set out in Sections 14136 to 14158, inclusive, R. S. Mo. 1929, and the different Session Laws. The second section of this opinion will apply to counties of 50,000 population or less and will be governed by Sections 14159 to 14181, R. S. Mo. 1929, and the separate Session Laws. The third section of this opinion will be governed by the separate sections of the statutes applying to both counties of more than 50,000 population and counties of less than 50,000 population.

I.

AUTHORITIES APPLYING TO THE JUVENILE LAWS IN COUNTIES OF OVER 50,000 POPULATION.

Section 14136, R. S. Mo. 1929, applying to delinquency of children under the age of seventeen years of age, reads as follows:

" * * * Provided, that when jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue, for the purpose of this article, until the child shall have attained its majority; but nothing in this article shall prevent the juvenile court from inflicting a punishment which shall extend beyond the age of majority in cases where the delinquent shall be convicted of a crime, the punishment of which under the statutes of this state, when committed by persons over the age of eighteen years, is death or imprisonment in the penitentiary for a term of not less than ten years.
* * *."

Section 14137, R. S. Mo. 1929, applying to counties of a population of 50,000 or over, as to the jurisdiction of the different courts, reads as follows:

"The circuit courts exercising jurisdiction in counties now or hereafter having a population of fifty thousand (50,000) inhabitants or more shall have original jurisdiction of all cases coming within the terms of this article: Provided, that in counties containing a city of the first class the criminal court shall have such original jurisdiction. For the purpose of this article, the city of St. Louis shall be considered a county within the meaning of this article. In counties where there are or may be more than one circuit judge, the judges of the circuit court in such counties shall designate one of their number, whose duty it shall be to hear and determine all cases coming under this article until there be another judge so designated: Provided, that in case of the absence or inability of the judge designated to hold said court, any one of said judges may perform that duty, and: Provided, that in counties in which

the criminal court has jurisdiction, the judge of the criminal court may, in case of his absence from the county or of sickness, call in any circuit judge of the judicial circuit in which such county is located and if the judge so called in, consent to act, said circuit judge shall during such absence or sickness have the same powers and perform the same duties as are imposed upon the judge of the criminal court under this article. * * *

The clerk of the circuit court in such county shall act as the clerk of the juvenile court. The practice and procedure prescribed by law for the conduct of criminal cases shall govern in all proceedings under this article in which the child stands charged with the violation of the criminal statutes of the state and in such proceedings the child, his parent, or any person standing in loco parentis to him may on his behalf demand a trial by jury. In all other cases the trial shall be before the court without a jury, and the practice and procedure customary in proceedings in equity shall govern except where otherwise provided by this article."

When a person is charged with a criminal offense, the prosecutor must file an information or indictment, and the provisions of Section 22, Article II, of the Constitution of Missouri are applicable. This was so held in the case of *State ex rel. v. Tincher*, 258 Mo. 1, 166 S. W. 1028. This case also holds that a criminal prosecution under the Juvenile Act should comply with the general criminal laws of the state such as juries and the filing of an information.

Section 14139, R. S. Mo. 1929, in providing for the payment of the costs in the hearing of the delinquency of a child, reads as follows:

" * * * On the return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear the case in a summary manner, and if it shall determine that the child is a 'neglected child' within the definition

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thereof contained herein, shall enter its order or judgment accordingly under the provisions of this article; and the cost of the proceedings may, in the discretion of the court, be adjudged against the petitioner, or any person or persons summoned, or appearing as the case may be, and collected as provided by the law in civil cases. All costs not so collected shall be paid by the county. * * *."

Section 14138, R. S. Mo. 1929, reads as follows:

"Any reputable person, being a resident of the county, having knowledge or information of a child, who appears to be a neglected child, may file with the clerk of the juvenile court a petition, in writing, setting forth the facts, verified by affidavit. It shall be sufficient that the affidavit be on information and belief.

Section 14138, supra, applies to counties of over 50,000 population and is duplicated by Section 14164, R. S. Mo. 1929, which applies to counties under 50,000 population.

Section 14141, R. S. Mo. 1929, in regard to the trial of a child under the age of seventeen years in the juvenile court, reads as follows:

"When in any such county a child under the age of seventeen (17) years is arrested with or without warrant, such child shall, instead of being taken for trial before a justice of the peace, or police magistrate, or judge of any other court now or hereafter having jurisdiction of the offense charged, be taken directly before such juvenile court; or if the child shall have been taken before a justice of the peace or a police magistrate or judge of such other court, it shall be the duty of said justice or police magistrate or judge to transfer the case to such juvenile court,

and of the officer having the child in charge to take such child before said court, and the said court shall proceed to hear the case in accordance with the law for the trials of such offenses."

Under Section 14141, supra, and under the holding in the case of State v. Rutledge, 13 S. W. (2d) 1061, 1. c. 1066, in counties over 50,000 population, only the juvenile court can try juveniles. In that case the court said:

"When a delinquent child is brought before a juvenile court charged with the violation of a criminal statute, the judge of that court must determine in the first instance whether such child shall be proceeded against as a delinquent, or prosecuted under the criminal law. If the child is then under 17 years of age, the further proceeding, whichever it may be, must be had in his court; if the child is then 17 years of age or over, the judge may, if he determines that the child should be prosecuted under the general law, either direct the trial to proceed in his own court, or order the cause transferred to a court having general criminal jurisdiction. When a child who has passed his seventeenth birthday is brought before a court of general criminal jurisdiction, charged with having committed a criminal offense while under 17 years of age, that court may determine whether he should be dealt with as a delinquent, or prosecuted under the general law, and, if it decides that he should be proceeded against as a delinquent, order the cause transferred to the juvenile court. But a court of general criminal jurisdiction is wholly without jurisdiction in cases in which a child under 17 years of age is charged with the violation of criminal law; without jurisdiction to even determine which course should be pursued with respect to such child."

Section 14151, R. S. Mo. 1929, which gives the juvenile court the authority to commit delinquents to certain institutions, reads as follows:

"In the case of a delinquent child, the court may suspend the sentence or execution thereof from time to time, and may in the meantime commit the child to the care and control of a probation officer duly appointed by the court, and may allow such child to remain in its home subject to the visitation and control of the probation officer, such child to report to the probation officer as often as may be required, and to be subject to be returned to the court for further proceedings whenever such action may appear to the court to be necessary; * * * the court may commit the child, if a boy, to the Missouri training school for boys, or, if a girl, to the state industrial school for girls; or the court may commit the child to any institution within the county, incorporated under the laws of this state, that may care for children, or to any institution which now or hereafter may be established by the state or county for the care of boys or girls, or to any special truant or parental school which now or hereafter may be established by the board of education of said county."

Under this Section 14151, and in the case of State v. Buckner, 254 S. W. 179, it was held that the charge and conviction on a charge of delinquency is not a criminal proceeding.

II.

AUTHORITIES APPLYING TO THE JUVENILE LAWS
IN COUNTIES UNDER 50,000 POPULATION.

Section 8357, R. S. Mo. 1929, applies to counties under 50,000 population. This section, with reference to the commitment to a reformatory and the cost of the proceedings and the delivery of such person to the reformatory, reads as follows:

"In all cases of conviction of felony, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the county in which the conviction is had."

Section 14161, R. S. Mo. 1929, reads as follows:

"This article shall apply to children under the age of seventeen years, in counties of less than 50,000 population, who are not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children. When jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue, for the purpose of this article, until the child shall have attained the age of 21 years. * * *"

Section 14162, R. S. Mo. 1929, reads as follows:

"The Cape Girardeau court of common pleas and all circuit courts in counties less

then 50,000 population shall have original jurisdiction of all cases coming within the terms of this article. The proceedings of the court in such cases shall be entered in a book or books kept for that purpose, and known as the juvenile records, and the court shall be known as the Cape Girardeau court of common pleas and the circuit court, and may for convenience be called the juvenile court. The clerk of the Cape Girardeau court of common pleas and the clerk of the circuit court in such counties, shall act as the clerk of the juvenile court. In cases of the absence or inability of the circuit judge to hold said court, he may call in any other circuit judge to perform that duty. In cases arising under this article, the hearing shall be before the court without a jury, and the practice and procedure customary in proceedings in equity shall govern: Provided, that the child shall be given a trial by jury, as now provided in the juvenile court act pertaining to counties of over 50,000 inhabitants, when demanded by the child, its parents or guardian. In the discretion of the judge of the Cape Girardeau court of common pleas and of the circuit court any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general law when, in the judgment of such judge, such child is not a proper subject to be dealt with under the reformatory provisions of this article."

Section 14164, R. S. Mo. 1929, which applies to counties under 50,000 population, is the same section as Section 14138, supra, which applies to counties over the population of 50,000.

Under Section 14166, as amended and set out in Session Laws, 1931, page 168, the county is liable for the costs of a hearing on a delinquency charge, and not the state. This section, in part, reads as follows:

"Upon the return of the summons, or at the time set for the hearing, the court shall proceed to hear the case in a summary manner and may conduct the examination of the witnesses without the assistance of counsel, and may take testimony and inquire into the habits, surroundings, condition and tendencies of said child, to enable the court to render such order of judgment as shall best conserve the welfare of said child and carry out the objects of this article and the court, if satisfied that the child is in need of the care or discipline and protection of the state, may so adjudicate, and may in addition find said child to be delinquent or neglected, or in need of more suitable guardianship, as the case may be. * * * * The cost of the proceedings may in the discretion of the court be adjudged against the petitioner, or any person or persons summoned or appearing, as the case may be, and collected, as provided by law. All costs not so collected shall be paid by the county. * * * *"

Section 14168, R. S. Mo. 1929, reads as follows:

"When in any such county a child under the age of seventeen years is arrested with or without warrant, such child shall, instead of being taken for trial before a justice of the peace, or police magistrate, or judge of any other court now or hereafter having jurisdiction of the offense charged, be taken direct before the circuit court; or if the child shall have been taken before a justice of the peace or a police magistrate or judge of such other court, it shall be the duty of said justice or police magistrate or judge to transfer the case to the circuit court, and of the officer having the child in charge to take such child before said court, and the said court shall proceed to hear the case. Nothing in this article contained shall be construed as depriving any court or

magistrate of such counties of the powers now given them by the law to file complaints and issue warrants, but all subsequent proceedings shall be had in the circuit court. The circuit court shall proceed to hear and dispose of such cases in the same manner as if the proceedings had been instituted in said circuit court upon petition, as hereinbefore provided."

Section 14178, R. S. Mo. 1929, reads as follows:

"Nothing in this article shall be construed to repeal any portion of the law relating to the state industrial home for girls or the Missouri reformatory; and in all commitments to either of said institutions the law in reference to said institutions shall govern the same."

This section, being a part of Article 9, Chapter 125, R. S. Mo. 1929, does not repeal the law relating to the industrial school for girls or the Missouri reformatory.

In any county, in the discretion of the judge, any petition of delinquency may be dismissed and the child prosecuted under the general law. This authority is granted under Section 14163, R. S. Mo. 1929, which reads as follows:

"In the discretion of the judge of any court having jurisdiction of delinquent children under the provisions of articles 8 or 9, chapter 125, R. S. 1929, any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general law, and any motion, petition or application, made to any court or judge having general jurisdiction of criminal causes, to transfer the case of or charge against any delinquent child to a court having jurisdiction of delinquent children under the provisions of said articles 8 and 9, may be denied in the

discretion of the judge, when in the judgment of the judge such child is not a proper subject to be dealt with under the reformatory provisions of either said article 8 or said article 9."

This section is upheld in the case of *Ex Parte Bass*, 40 S. W. (2d) 457, 1. c. 458, where the court said:

"2. All hearings by the court after the entry of the order and direction that the proceedings be had under the general criminal laws of the state were without jurisdiction and null and void because no indictment was ever returned under article 2, section 12 of the Constitution and the general criminal laws of the State of Missouri, to clothe said Juvenile Court with further jurisdiction as to the subject matter and the person of the defendant and no information was filed by the prosecuting attorney of Greene County, Missouri, in compliance with article 2, section 12 of the Constitution and the general criminal laws of the State of Missouri, and the information signed and verified by J. Will Webb, Chief Probation Officer, filed in the Juvenile Court and thereafter dismissed by said court is void for the reason that it does not comply with article 2, section 12 of the Constitution and with the general criminal laws of the State of Missouri, and under the procedure of the general criminal laws of the State of Missouri, is wholly void and fails to clothe the court with jurisdiction over the subject matter and the person of the defendant to hear and try said cause."

* * * * *

"However, under our later controlling decision in *State ex rel. v. Walker*, 34 S. W. (2d) 124, a juvenile court's jurisdiction in such a case ceases upon its determination and direction that the de-

fendant shall be proceeded against, not as a delinquent, but under the general criminal law. It follows that the commitment issued in this case by the juvenile court of Greene county, by virtue and authority of which the warden of the state penitentiary holds petitioner, is void."

Section 8350, as amended and set out in Session Laws, 1933, page 331, reads as follows:

"Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary or committed to the Missouri Training School for Boys; and any boy under the age of seventeen years convicted of any other felony, either upon plea of guilty or upon trial, may be committed to the Missouri Training School for Boys. * * *"

Section 14163, supra, is not in conflict with Section 8350, Session Laws, 1933, page 331, and it was so held in the case of State ex rel. v. Rutledge, 13 S. W. (2d) 1061, which decided as follows:

"This section, applying to all counties, harmonizes the two juvenile court laws as to the matter of the discretion of the judge in transferring cases from the circuit to the juvenile court, which distinction was noted in State v. Gregori, 318 Mo. 998, 2 S. W. (2d) 747.

"Sec. 8350 is not in conflict with this section, but both can stand. The juvenile

court has exclusive jurisdiction to try children under 17 years of age and may try other minors, who have passed that age since the commission of the offense. Discretion of the judge of a court of general criminal jurisdiction to refuse to transfer a criminal charge against a minor to juvenile court, is limited to proceedings commenced against children after they have reached the age of 17 years. If the child, when brought into juvenile court, is under 17 years of age, the judge must determine whether such child be proceeded against as a delinquent, or prosecuted under the criminal law. In such cases, all further proceedings must be in that court. If the child is then 17 years of age or over, the judge may direct the trial to proceed in his court or transfer it to a court having general criminal jurisdiction. When a minor who has passed his 17th birthday is brought before a court having general criminal jurisdiction, charged with an offense committed while under 17 years of age, that court may determine whether he should be dealt with as a delinquent or prosecuted under the general law and if he decides that such minor should be proceeded against as a delinquent, order the cause transferred to the juvenile court. If such child be under 17 years of age, the judge of the general criminal court is without jurisdiction to do anything further than transfer the cause to the juvenile court. The discretion conferred by the section can be exercised only once and the decision of the judge first having to pass on the question is final. This discretion does not deny equal protection of the law, nor make an arbitrary classification in violation of the constitution. *State ex rel. v. Rutledge*, 13 S. W. (2d) 1061."

III.

AUTHORITIES APPLYING TO THE JUVENILE LAWS
IN BOTH COUNTIES OVER AND UNDER 50,000
POPULATION.

Section 3844, R. S. Mo. 1929, which refers to the certification of fee bills to the State Auditor, reads as follows:

"When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be; * * *."

Section 3826, R. S. Mo. 1929, which provides when the state shall pay the costs in all criminal cases, reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. * * *"

Section 3828, R. S. Mo. 1929, which provides for the costs in case of acquittal, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; * * *

Under this Section 3828, a dismissal has been held the same as an acquittal.

In your request you ask if it is compulsory to try a juvenile, under the criminal law, in the juvenile court or the circuit court. Section 3662, R. S. Mo. 1929, in reference to that question, reads as follows:

"All issues of fact in any criminal cause shall be tried by a jury to be selected, summoned and returned in a manner prescribed by law."

And can only be waived as set out in Section 3663, R. S. Mo. 1929, which applies to misdemeanors only.

In the case of State v. Talken, 316 Mo. 596, 292 S. W. 32, 1. c. 33, the court said:

"So much of section 28, article 2, of the Missouri Constitution, as is germane to the question involved, is as follows:

"'The right of trial by jury, as heretofore enjoyed, shall remain inviolate.'

"Section 4005, R. S. Mo. 1919, reads:

"'All issues of fact in any criminal cause shall be tried by a jury, to be selected, summoned and returned in a manner prescribed by law.'

"Section 4006, R. S. 1919, reads:

"'But the defendant and prosecuting attorney, with the assent of the court, may

submit the trial of misdemeanors to the court, whose finding in all such offenses shall have the force and effect of the verdict of a jury.'

"Conceding, as we later find, that the offense of which defendant stands convicted is a felony, the waiver of a jury constitutes a violation of defendant's rights to which he may not assent. The right to be tried by jury in felony cases is a sacred right, heretofore enjoyed and guaranteed by the Constitution, to the waiving of which he may not give assent, for the reason found, among others, in *State v. Mansfield*, 41 Mo. 470, loc. cit. 478, 'the prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him.' The waiver of the jury and the trial of the cause before the court sitting as a jury constitute error. *Neales v. State*, 10 Mo. 498; *State v. Moody*, 24 Mo. 560; *State v. Meyers*, 68 Mo. 266; *State v. Sanders* (Mo. Sup.) 243 S. W. 771."

Sections 4005 and 4006, R. S. Mo. 1919, as mentioned in the above case, are now Sections 3662 and 3663, respectively, of the Revised Statutes of Missouri, 1929.

In view of the holding in the above case, it goes without saying that a conviction as certified in the fee bill by the judge and prosecuting attorney to the state auditor, in compliance with Section 3844, supra, is that the defendant was convicted by a jury.

Under Section 3844, supra, the certificate must show "that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally," and further states "that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary."

This Section 3844 must be strictly construed, and the certification must show a conviction, plea of guilty, or acquittal in order that the state be liable for the costs. It was said in *Ring v. Paint and Glass Co.*, 46 Mo. App. 1. c. 377:

"It may be stated that the entire subject of costs in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other person claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation."

And also in the case of State ex rel. v. Wilder, 197 Mo. 1. c. 32, the court said:

"For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows. Shed v. Railroad, 67 Mo. 687; Williams v. Chariton, 85 Mo. 646."

CONCLUSION

Under the above authorities, it is the opinion of this department that where a juvenile is tried for delinquency, the costs must be paid by the county. In the case of a trial of a juvenile under the general criminal law for an offense punishable solely by imprisonment in the penitentiary, or punishable as a capital offense, the juvenile must be tried by a jury and the costs must be paid by the state. It is further the opinion of this department that, under the above authorities, the state would be liable for the costs where the juvenile pleads guilty, or the charge is dismissed by the state, when the offense charged is punishable as a capital case or solely by imprisonment in the penitentiary. Under the above authorities, the court may commute the sentence, after conviction by a verdict of imprisonment in the penitentiary, to either the Intermediate Reformatory, under the limitations prescribed in that Act, or he may commute the sentence by ordering the juvenile sent to the Industrial School for Girls or the Boys' Reformatory. This commutation of sentence does not affect the payment of the costs by the state for the reason that, as far as the state is concerned, the case against the

Sept. 2, 1938

juvenile is disposed of at the time of the conviction and sentence under the terms of the verdict brought in by the jury.

It is further the opinion of this department that in order to receive payment of the fee bills in cases as above described, the fee bill should affirmatively show that the cause was tried under the general criminal laws either by a jury, a plea of guilty, acquittal, or dismissal. A dismissal is the same as an acquittal.

It is further the opinion of this department that under Section 14141, supra, applying to counties over 50,000, and Section 14163, supra, applying to counties under 50,000, the judge may dismiss the petition of delinquency and try the juvenile under the criminal law. This dismissal of the petition on a charge of delinquency is the same as an acquittal on that charge, and the county, up to the time of the dismissal, would be liable for the costs under Section 14166, Session Laws of Missouri, 1931, page 168, supra. If the criminal charge was originally filed in the circuit court either by way of a preliminary or a grand jury indictment, and it was later ascertained that the defendant was a juvenile and should be tried under the delinquency act and not under the general criminal laws, then the state would be liable for the costs up until the time the cause was transferred to the juvenile court for the trial of the juvenile on delinquency. After the case is transferred the county would be liable for the further costs accrued in the trial on delinquency, in accordance with Section 14166, Session Laws of Missouri, 1931, page 168, supra.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

LIQUOR BONDS: Sureties on liquor bonds not liable for
SALES TAX: payment of sales tax.

October 21, 1938

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

We have received your letter of September 26
which reads as follows:

"As I understand the law, each applicant when he receives a license to sell intoxicating liquor in the State of Missouri is required to post a bond with the State Department of Liquor Control.

"In the collection of Sales Tax, I am finding that a number of taverns and persons licensed to sell liquor are going out of business and owe the state large sums on Sales Tax.

"I would like an opinion from your department as to whether I can bring suit on the bond which they filed with the State Department of Liquor Control, for the amount of delinquent sales tax due the State of Missouri."

Section 19 of the Liquor Control Act, Laws of Missouri, Extra Session 1933-34, p. 83 requires that each

applicant for a liquor license shall give a bond to the State of Missouri. The statute sets out the terms, requirements and conditions which each bond shall contain. The pertinent part of this section reads as follows:

"Before any application for license shall be approved the Supervisor of Liquor Control shall require of the applicant a bond, to be given to the state, in the sum of Two Thousand Dollars, with sufficient surety, such bond to be approved by the Supervisor of Liquor Control, conditioned that the person obtaining such license shall keep at all times an orderly house, and that he will not sell, give away or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquor in any quantity to any minor, and conditioned that he will not violate any of the provisions of this act and that he will pay all taxes, inspection and license fees provided for herein, together with all fines, penalties and forfeitures which may be adjudged against him under the provisions of this act."

Referring particularly to the matter of taxes the above statute provides that the bonds shall be conditioned to the effect that any such licensee shall not violate any of the provisions of "this act," that he shall pay all taxes, inspection and license fees "provided for herein," together with fines, penalties and forfeitures which may be adjudged against him "under the provisions of this act." This section very apparently refers solely to the violation of the Liquor Laws only and to the taxes, inspection and license fees provided for in those laws. The language used in the statute cannot, in our opinion, be construed to refer, nor was it ever apparently intended that the same should apply to the payment of taxes or penalties other than those

specifically provided for in the Liquor Control Act.

In this connection it is sufficient to say that the laws authorizing the levying and collection of the sales tax are not a part of the Act governing the manufacturing, sale and distribution of intoxicating liquors and the supervision of same by the Supervisor of Liquor Control as set forth in the Liquor Laws.

Section 13a Laws of Missouri, Extra Session 1933-34, p. 82 also refers to surety bonds. This section provides in part as follows:

"In each instance, (that is in the sale of intoxicating liquor at retail in cities authorizing the sale of the same), a bond in the sum of two thousand (\$2,000.00) dollars, with sufficient surety, to be approved by the Supervisor of Liquor Control, must be given for the faithful performance of all duties imposed by law upon the licensee, and for the faithful performance of all the requirements of this act, and any violation of such conditions, duties or requirements shall be a breach of said bond and shall automatically cancel and forfeit the license granted hereunder." (Parenthesis ours.)

In other words, this section requires the faithful performance of all the duties "imposed by law upon the licensee" and the faithful performance of all the "requirements of this act." The only duties imposed by law "upon the licensee" as such are those contained in the Liquor Control Act. To say otherwise would lead to absurd results. For instance, the Missouri Statutes provide that it shall be the duty of the owner of a dog to kill such dog or have it immunized when it has been bitten by or exposed to any other dog with the rabies. The statutes also require each owner of a motor vehicle which shall be operated or driven upon the highways of this state to file by mail or otherwise in

the office of the commissioner an application for registration of such motor vehicle on a blank furnished by the commissioner for that purpose. The laws also provide that it is the duty of persons to assist the sheriff in making arrests if he shall request a person to do so. The law also makes it the duty of a person to serve as a juror if he is summoned for that purpose and has not been excused by the court. The laws also prohibit persons from speeding in certain incorporated areas. Other laws prohibit persons from spitting on the streets. Many other similar examples could be given.

We do not think it can be said that the bond required by the Liquor Laws was ever intended to be conditioned upon the faithful performance of all of the above duties by each licensee. We do not think it can be said that the conditions of the bond would consequently be violated if any of the above mentioned duties were not fulfilled. As the Supreme Court of Missouri said in the case of *State v. Irvine*, 72 S. W. (2d) 96:

"The courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation."

We think the Legislature intended the expression "duties imposed by law upon the licensee" to mean only those duties required of a licensee by the Liquor Control Act. Contrary interpretation would lead to absurd results and would include all the duties and restrictions imposed upon the entire citizenry of this state by all the law in the State of Missouri. The Legislature, in our opinion, did not intend that the conditions in the bonds should be so far reaching and inclusive. Therefore, the language used in section 13a was never intended to include the duty of collecting and paying over the sales tax or any other duty or obligation imposed by law other than those contained in the Liquor Control Act.

The conditions in the bonds which the Supervisor of Liquor Control has required of applicants are worded in

practically the same language as the statutes. The pertinent part of these bonds reads as follows:

"NOW, THEREFORE, The Condition of This Obligation is Such, That, if the said Principal does not violate any of the provisions of Committee Substitute for Senate Bills Nos. 6, 21, 22, 23, 24 and 25, passed by the 57th General Assembly in Extra Session, and any acts amendatory thereto, or any rule or regulation of the Supervisor of Liquor Control; and if said Principal shall at all times keep an orderly house and does not sell, give away, or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquor in any quantity to any minor; and if said Principal shall pay all taxes, inspection and license fees provided for by law, together with all fines, penalties and forfeitures which may be adjudged against the Principal under the Liquor Control Act and amendatory acts thereto; and if said Principal shall faithfully perform all requirements of said Act while said license is in effect, then this obligation shall be null and void; otherwise to remain in full force and effect."

The language used and the conditions contained in the bond, it will be noted, are the same as are required by the statutes. Therefore the bond is a statutory bond. As said in 9 C. J. 24:

"A bond to be good as a statutory bond should in general comply in respect to its conditions and execution with the requirements of the act under which it is given, * * * but if a bond is in the precise language of the statute, it is valid* *."

October 21, 1938

A statutory bond is also defined in 9 C. J. 35 as follows:

"Generally a statutory bond is one required by some statute."

As we observed above, the conditions in the bonds made necessary by the statutes do not contain a provision to the effect that the sales tax or any other tax other than those provided for in the Liquor Control Act must be paid or satisfied. And apparently if the bonds did definitely so provide as to the sales tax or if the language used in the bonds could be so construed, the extra condition not imposed or authorized by statute could not be enforced. The general rule as to statutory bonds is thus stated in 9 C. J. 26:

"Where a bond contains the conditions prescribed by statute, and also contains conditions in excess of those so required, if the excess can be separated from the authorized portion without destroying the latter it may be rejected as surplusage and the rest of the bond held valid, in the absence of a statutory provision expressly or by implication making it void, * * *."

In the case of Rubelman Hardware Company v. Greve, 18 Mo. App. 6, the court was called upon to enforce a condition in a statutory bond which was not imposed by statute. In refusing to enforce such provision the court said:

"It is exceptional in the fact that, while the bond sued on is legitimately statutory, and has affected its statutory purpose, it is not here proposed to enforce a statutory condition. All the cases show that the interpolation of extra-statutory conditions will not modify the force of a statutory bond, or impair the efficacy

of its statutory stipulations. But that an extra-statutory stipulation in such a bond may be enforced alone, is quite another proposition. The statute offered to the obligor a restraining order upon certain conditions, and subject to certain consequences in specified contingencies. The terms of the present bond subject him to a condition not imposed by the statute, and this action seeks to fix upon him consequences which were not suggested in the statutory proposal, and which curtail its benefits in a way not warranted by the law. Such a condition is contrary to the manifest policy of the law, and is therefore void. If the obligor has realized the benefits for which the bond was given, he has, in the statutory undertakings, supplied the whole consideration for them which the law exacted.* * * The extra-statutory undertaking is without any consideration which the law will recognize. Precedent and authority are not wanting for these conclusions. 'When a bond is taken under a statute, it ought to conform in substance to the requisitions of the law; and if it goes beyond the law it is void, so far as it exceeds those requisitions.' *Armstrong v. U. S.*, 1 Peters C. C. 46. 'Where a statute requires an official bond, and prescribes substantially the terms of it, it must conform to the requisitions of the statute; and if it goes beyond them it is void, so far at least as it exceeds those requisitions.' *U.S. v. Howell*, 4 Washington 620.'* * * But where the statute only directs the condition of the bond, and does not avoid it, if it should not conform to the directions, and something more than that condition is added to it, the bond may be allowed to cover the authorized part of the condition, and so much may be recovered under it, and no more.' *U. S. v. Brown, Gilpin* 179. 'A bond may, by mutual mistake or accident, and wholly without

design, be taken in a form not prescribed by the act * * *. Where the act speaks out, it would be our duty to follow it; where it is silent, it is a sufficient compliance with the policy of the act, to declare the bond void, as to any conditions which are imposed upon a party beyond what the law requires. This is not only the dictate of the common law, but of common sense. We think, then, that the present bond, so far as it is in conformity to the act * * * is good; and for any excess beyond that act * * * it is void, pro tanto." U. S. v. Bradley, 35 U. S. 384."

In the case of Woods v. State of Missouri, 10 Mo. 698, the court said:

"The objection is not that the bond sued upon does not contain every stipulation set forth in the statute above referred to, but that it contains more than the statute requires. * * * The stipulations in the bond not required by the statute may be rejected as surplusage, and the bond still be regarded as a statutory bond, and sued upon as such. See the case of Grant & Finney v. Brotherton, 7 Mo. R. 458."

Conclusion

Sections 13a and 19 of the Liquor Control Act require bonds to be filed by each liquor licensee and set out the conditions such bond shall contain. The statutes

Honorable Forrest Smith -9- October 21, 1938

however, do not provide that such bonds shall contain a provision to the effect that the sales tax shall be paid before the surety is discharged. Consequently, such bonds, being required by statute and therefore strictly statutory bonds, are not subject to an action for the collection of sales tax and the sureties thereon are not liable therefor.

Yours very truly

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA/w

COUNTY BUDGET LAW - Surpluses may be transferred to take care of deficiencies in other classes at close of fiscal year, or if it can be definitely determined that sufficient funds will remain to take care of all outstanding and future obligations, transfer may be made before the close of the year.

November 21, 1938

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri



Dear Sir:

This department is in receipt of your letter of November 18, 1938, wherein you make the following inquiry:

"The funds set aside by the County Court in this County under the budget laws, for the roads and bridges or Class (3) have been exhausted and I would like your opinion as to whether or not other funds in other classes may be used for the payment of Class (3)."

The County Budget Act, Laws Mo. 1933, page 340, was amended slightly by the General Assembly of 1937, Laws Mo. 1937, page 422, etc.

Your attention is called to Class 5, page 423, which is as follows:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, the county court may transfer any surplus funds from classes 1, 2, 3, 4 to class 5 to be used as contingent and emergency expenses. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether

salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Formerly, this Class was confined to one-fifth of the anticipated revenue. This provision is omitted, and permits a transfer of funds from the other Classes to Class 5. The main purpose of the County Budget Act was to create five Classes with rigid provisions for keeping within the anticipated revenue and sacredly preserving the priorities of each Class over each succeeding Class.

On January 28, 1936, this department rendered an opinion to the Honorable C. W. McKim, County Clerk of Worth County, Grant City, Missouri, in which it was held that at the close of a fiscal year, the county court may transfer any surplus funds from any Class and pay the deficits in other Classes.

It may be possible that you can await the close of the fiscal year and follow the procedure in the enclosed opinion. As a further suggestion, it may be possible that the finances of your county at the present time under the budget show a decided surplus in Classes 4 and 5. We think any surplus from Classes 4 and 5 may be transferred at the present time, provided that it can be ascertained with certainty that after the transfer is made, sufficient funds will remain in said Classes to carry out the terms of the Budget Act. In other words, we think transfers may be made from the Classes, if they do not jeopardize the priority of payments.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:FE
Enc.

STATE AUDITOR:

Sales tax returns filed with the State Auditor are privileged communications.

November 21, 1938

11-23



Honorable B. Hugh Smith
City Attorney
Cape Girardeau, Missouri

Dear Sir:

We have received your letter of November 5th,
a part of which reads as follows:

"Therefore, I write to ask your interpretation of Section 34 on page 566 of the 1937 Sales Tax Law, and to ask if in your opinion we can require the State Auditor to produce in our Court the sales tax records of this Defendant in order that I may be able to produce the same at Court and prove the total gross receipts of this Defendant from his business for the preceding year.

"In other words will this provision for the Sales Tax Act relative to the records in the State Auditor's office override and render ineffectual Sections 1657 and 1660 of the 1929 revised statutes of Missouri."

Section 34 of the Laws of Missouri, 1937, page 566,
reads as follows:

"It shall be unlawful for any person, persons, or officers to divulge, give out or impart to any other person or persons any information relative to, or the contents of, any return filed under this Act, or to permit any other person or persons not connected with his office to see, inspect or

examine the same; and it shall be unlawful for any person or officer to use any return filed under this Act in any manner whatever in connection with or for the purpose of assessing property tax or determining the amount of property assessment of any person or corporation, or to use the same in any way in making up any property assessment roll. It shall be unlawful for the Auditor, or his deputy, agent or clerk to in any way permit the inspection of any such return or to use the same in any way in making assessments other than the assessment of the tax provided for in this Act, and any person violating the provisions of this Section shall be deemed guilty of a misdemeanor; Provided, however, that this Section shall not prohibit the Auditor nor any agent, clerk or inspector from giving evidence in Court in any proceeding brought to collect any tax due hereunder, or to punish any person for the making of false or fraudulent returns."

Neither the above statute nor any similar one has ever been passed upon or construed by any appellate court in the State of Missouri in connection with the question you present, as far as we have been able to determine. However, in the case of *In re Valecia Condensed Milk Co.*, 240 Fed. 310, a quite similar Wisconsin statute was involved. In the bankruptcy proceedings of the Valecia Condensed Milk Company the Secretary of the Wisconsin Tax Commission was served with a subpoena to appear before the Referee to testify, and there to produce all reports, correspondence, certificates and documents in possession of the Commission relating to the bankrupt. He appeared and testified that the only papers of the kind mentioned in the subpoena in the possession of the Commission were the income tax returns of the bankrupt which were made and returned to the State Tax Commission in pursuance of the statute of the state, and that the statute prohibited him from permitting such income tax returns to be examined by any person, and he refused to produce them. The Wisconsin statute in this connection read as follows:

"1. No commissioner, assessor of incomes, deputy, member of a county board of review, or any other officer, agent, clerk or employe shall divulge or make known to any person in any manner except as provided by law any information whatsoever obtained directly or indirectly by him in the discharge of his duties or permit any income return or copy thereof or any paper or book so obtained to be seen or examined by any person except as provided by law.

"2. Any officer, agent, clerk or employe violating any of the provisions of this section shall upon conviction thereof be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by imprisonment in the state prison for not more than two years, at the discretion of the court.

"3. Such officer, agent, clerk or employe upon such conviction shall also forfeit his office or employment and shall be incapable of holding any public office in this state for a period of three years thereafter."

In holding that the income tax returns were privileged communications and that the Secretary of the Wisconsin Tax Commission could not be forced to reveal their contents because of the statute, the court said:

Without in any degree trenching upon the essential and full power of courts to compel the production of papers, we must recognize also the generally declared public policy against revealing such returns--made, as they are, under compulsion of law, for the particular purpose of taxation; a public policy repeatedly recognized by the courts. With

an enactment such as the one in question, directed against the production of these returns, it is not lightly to be presumed that the public policy manifested by such statute was intended to be practically neutralized by the excepting words."

Also in the case of *In re Reid*, 155 Fed. 933, it appeared that the president of the board of assessors of the City of Detroit was called as a witness and was asked to produce a certain tax statement filed by the bankrupt. He refused on the ground that the statutes of Michigan provided that no such statement shall be used for any other purpose, except the making of the assessment for taxes. The bankrupt gave his consent to the production. The question of the right to compel the production was certified to the District Court, which, deciding against the right to compel the production, said:

"The purpose of the provisions of section 3846 is plainly to promote the collection from each taxpayer of his just share of state, county, and municipal taxes, and to that end to require from each property owner the full disclosure of all his taxable property under the state's pledge that the statement shall be kept inviolate, save to the officials for whose information and guidance it was made. To permit that information to become public would defeat the plain purpose of the statute by deterring the taxpayer from revealing what frequently could not be learned from any other source. * * * To sanction the violation of that pledge by denying the taxpayer the protection of the statute would invite refusals to obey the law, evasions, and perjury, often injuriously affect the interests of the taxpayer, would obstruct the collection of taxes, and diminish the revenues of the state. The power of the Legislature to prevent these consequences is unquestionable. The wisdom and policy of the act must be con-

Nov. 21, 1938

clusively assumed. Its meaning is unequivocal, and needs no construction."

Section 34, supra, appears to be as broad in its application as were the statutes in the above two cited cases. It makes it unlawful for any person, persons or officers to give out any information or to permit anyone not connected with the Auditor's office to inspect or examine any return filed by anyone under the terms of the Sales Tax Act. The Auditor and his employees are prohibited from using such returns for any purpose other than "the assessment of the tax provided for in this Act," which is the State Sales Tax Act. Further, anyone violating such provisions shall be deemed guilty of a misdemeanor. The legislative purpose undoubtedly was that no one connected with the Auditor's office should ever divulge any of the contents of the Sales tax returns to anyone for any purpose other than in the enforcement of the sales tax laws; that except for the one purpose the returns are privileged. The proviso recites that the section should not prohibit the Auditor or his employees from giving evidence in any court in any proceeding brought to collect the state sales tax. By specifically exempting court proceedings for the collection of the sales tax from the effect of the section, it is evident that the Legislature did not intend that such returns should ever be used in any other type of court action.

You mention Sections 1657 and 1660, R. S. Mo. 1929, as possibly having a bearing on the question. Section 1657 provides that copies of all papers on file in the office of the State Auditor or of any matter recorded therein shall be evidence in all courts of this state when the same are certified under the seal of the State Auditor. Section 1660 is a similar enactment and provides that copies of all papers and documents lawfully deposited in the office of the State Auditor shall be received in evidence in the same manner and with like effect as the original when the same are certified by the Auditor and authenticated by the seal of his office. These two statutes, of course, can refer only to such documents as are public records and which the Legislature has not designated as privileged communications. These two sections mean that if the sales tax returns

Nov. 21, 1938

were not privileged, then copies thereof properly certified and authenticated would be evidence in the courts of this state. If the State Auditor or his employees can not testify in the courts of this state as to the contents of sales tax returns, the Auditor can not, through the use of certified and authenticated copies of such records, thereby produce or divulge the same information. We can only conclude that Sections 1657 and 1660 refer to documents on file in the Auditor's office which are not privileged.

CONCLUSION

Sales tax returns filed with the State Auditor pursuant to the terms of the Sales Tax Act are made privileged communications by Section 34, Laws of Missouri, 1937, page 566. Consequently, the State Auditor can not voluntarily give in any form, nor can he be forced by subpoena duces tecum or otherwise to divulge the contents of such returns in any court proceeding other than in an action brought to collect a tax due under the terms of the State Sales Tax Law.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA:HR

SHERIFFS:

Entitled to ten cents per mile for serving commitment to jail on a preliminary where the justice court is more than 5 miles from the county jail

November 30, 1938



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of October 24, 1938 requesting an opinion from this department which reads as follows:

"There have been opinions rendered from the Attorney General's office from time to time relating to mileage of sheriffs in committing a prisoner to jail for preliminary hearings.

Some of these opinions hold that the word "commitment" as used in Section 11791 R. S. Mo. 1929 means the "receiving of the prisoner into jail", for which the sheriff is entitled to a fee of \$1.00, but that the mileage for "taking a prisoner to jail" is a constable's fee only (Section 11777 R. S. Mo. 1929), and that if a sheriff performs this service he is entitled to no fee for mileage. Another opinion holds that where a conviction is had in justice court, the sheriff is entitled to a fee for mileage in serving the commitment.

We would like for you to advise us concerning the mileage of sheriffs

in preliminary hearings; i.e., that if a commitment to jail is issued by the justice of the peace in a preliminary hearing in a criminal case, and the same is handed to the sheriff and the sheriff takes the prisoner to jail, acting under the authority of said commitment, is he entitled to a fee for mileage for this service?"

Section 11518 Revised Statutes of Mo. 1929 partly reads as follows:

"Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by justices of the peace * * * *"

Either a sheriff or any constable may execute a commitment of a prisoner to jail. Section 3443 R. S. Mo. 1929 sets out the form of commitment after judgment of imprisonment and names the sheriff or "any constable".

Section 11791 R. S. Mo. 1929 in granting fees to sheriffs, marshalls, or other officers designates the fee for committing to jail as \$1.00. In the case of Thomas vs. County 61 Mo. 547 l.c. 548 the Supreme Court said:

"The words 'committing any person to jail', relates to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions."

Under the holding of this case, committing a prisoner to jail means the serving or execution of the commitment as made out by the justice of the peace in the preliminary hearing. Section 11777 R. S. Mo. 1929 only applies to fees of constables and allows a fee of \$1.00 for "taking a criminal to jail".

Section 11792 R. S. Mo. 1929 reads as follows:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: Provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."
(R. S. 1919, Section 11000.)

In the case of Carter vs. Exposition Co. 124 Mo. Appeals 1.c. 538, the court said:

"The definition of a rule or order, which are synonymous terms, includes commands to lower courts or court officials, to do a ministerial act."

Under the above case the sheriff in serving a commitment to jail is only performing a ministerial act under a legal order of court.

42 Corpus Juris, page 464, Section 2 states the law as follows:

"The usual statutory definition is

in words or substance that every direction of a court or judge made or entered in writing and not included in a judgment is an order, but under some statutes an order may be unwritten. In the practice of courts the term 'order' means a decision made during the progress of the case, either prior or subsequent to final judgment, settling some point or practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment.

* * * *

CONCLUSION

In view of the above authorities, it is the opinion of this department that either a constable or sheriff may serve an order of commitment from a justice court in a preliminary hearing and that under Section 11777 R. S. Mo. 1929, the constable is entitled to \$1.00 for taking a criminal to jail and under Section 11792 R. S. Mo. 1929, a constable is entitled to ten cents per mile for each mile actually traveled in serving an order of court, which in this case would be the commitment to jail, where the justice court is more than five miles from the county jail.

It is further the opinion of this department that a sheriff in serving an order of court which in this case is a commitment to jail under a preliminary hearing, is entitled to \$1.00 for committing to jail and in addition, entitled to ten cents per mile for each mile actually traveled in serving said order of court, where the justice court is more than five

Honorable Forrest Smith

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November 30, 1938

miles from the county jail.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

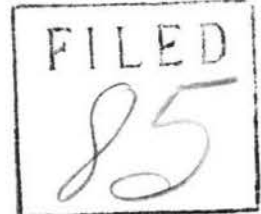
J. E. TAYLOR
(Acting) Attorney General

WJB:WW

INTOXICATING LIQUOR: The operation of a disorderly house constitutes a public nuisance, and the proper procedure to abate a public nuisance is by injunction in a court of equity.

January 3, 1938.

Honorable Roy W. Starling,
Prosecuting Attorney,
Eldon, Missouri.



Dear Sir:

This will acknowledge receipt of your letter of November 22nd requesting an opinion from this department, which reads as follows:

"I have a place in this county which is licensed for the sale of intoxicating beer (5%), by the drink and which has become very disorderly. I wish to inquire if, in your opinion, assuming that we are only able to prove that the place is disorderly, if under the provisions of Secs. 44-a-9 and 44-a-10 I would be authorized to apply for an injunction as a nuisance.

"It occurs to me that under the definition of a nuisance (Sec. 44-a-9) it applies to only specific violations and that under Sec. 26 the fact that a place is not run in an orderly manner is grounds for revocation of a license by the Supervisor of Liquor Control and not a specific violation of the provisions of the act and I do not find any offense listed on pages 32, 33 and 34 of the interpretation of the liquor control act which would fit this case.

"I should like to have, if you have such forms, forms for bill of injunction, notice and form of writ, which could be used in, if in your opinion I can maintain such, an action."

As stated in your letter, Sections 44-a-9 and 44-a-10 of the Liquor Control Act apply to specific violations. However, the Supreme Court of this state has held that such provisions regarding nuisances do not undertake to cover all nuisances and in the absence of any statutory provision covering a nuisance, the common law remains in force. In *State of Missouri vs. Mathew Boll*, 59 Mo. 321, 1. c. 323, the court said:

"As to the other point, the provisions of the statute in regard to nuisances do not undertake to cover all cases of public nuisance, and as to those not provided for by statute, the common law remains in force. This principle is recognized as to other common law offenses, belonging to a general class, in regard to some of which provision has been made by statute, in the case of the *State vs. Appling*, (25 Mo. 315) and the *State vs. Rose* (32 Mo. 560). The case at bar does not come within any of the statutory provisions cited above, but the facts charged constitute an offense at common law."

See, also, *State ex rel. v. Lamb*, 237 Mo. 437.

At common law the operation of a disorderly house constituted a nuisance. *Joyce on Law of Nuisances*, Sec. 400, page 577, in classifying a disorderly house as a public nuisance, said:

"A public and disorderly liquor and store house in a town in and about which dissolute persons are permitted, for lucre, to remain at night and in the day time, drinking, tippling, carousing, swearing, hallooing, etc., to the damage, disturbance, etc., is a public nuisance by common law and the keeper of it is indictable. And if a person licensed to retail spirituous liquors causes and procures, for lucre, evil-disposed persons to congregate in and about the house in which the liquors are sold, and permits them to remain there

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drinking, cursing, blackguarding, fighting, etc., the house is a public nuisance, and the keeper of it is indictable."

See, also, *Sopher v. State*, 14 L.R.A. (N.S.) 172, 1. c. 176, 177.

The proper procedure to abate a public nuisance is by injunction in a court of equity. In *State ex rel. v. Lamb*, 237 Mo. 437, 1. c. 456, the court said:

"There is no question as to the jurisdiction of the circuit court to enjoin a public nuisance."

Furthermore, the fact that a public nuisance may also be a crime will not prevent a court of equity from enjoining it. In *State ex rel. v. Canty*, 207 Mo. 439, 1. c. 459, the court said:

"The contention of respondents that a court of equity has no jurisdiction to abate a public nuisance where the offenders are amenable to the criminal laws of the State is not tenable, as is fully shown by the following authorities:"
(Cases.)

See, also, *State ex rel. v. Lamb*, supra, 1. c. 457.

Therefore, it is the opinion of this department that if said licensee is operating a disorderly house, even though such action does not constitute a public nuisance under Sections 44-a-9 and 44-a-10, Laws of Missouri, 1937, it was considered a public nuisance at common law. It is, therefore, still considered a public nuisance and a court of equity has jurisdiction to abate such a nuisance by injunction.

In compliance with your request, we are enclosing forms prepared by this department for a temporary writ of injunction, bill for injunction, notice, search warrant, etc.

Yours very truly,

AUBREY R. HAMNETT, Jr.,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

ARH:HR

COUNTY OFFICERS:--Need not devote all of their time to office unless necessary to fully discharge duties. Forfeits office by appointing relative to render service to the State.

January 4, 1938



Honorable Lloyd C. Stark
Governor of Missouri
Jefferson City, Missouri

Dear Governor Stark:

We wish to acknowledge your request for an opinion under date of December 30, 1937, as follows:

"Will you please give me your opinion on the following questions:

1. Is a County Treasurer, or any other elective county officer, required by law to devote all of his or her time in the performance of the duties of the office?
2. Am I correct in my belief that a county officer forfeits the office if he or she appoints a relative within the fourth degree, either by consanguinity or affinity, to render service to the State in his or her office?"

We have examined the statutes with respect to all elective county officers and fail to find any provision requiring that they devote all of their time to the performance of the duties of their office.

In 46 Corpus Juris, Section 307, page 1037, we find the following statement with reference to officers engaging in other occupations.

"Officers need not, in the absence of a provision of law to that effect, devote all their time to the performance of their official duties, but may engage in other occupations."

In the case of State vs. Hinshaw, 197 Iowa 1265, 1. c. 1272, 198 N.W. 634, 1. c. 637, the Court in holding that a public officer is not required to give every instant of his time to public service said:

"There is no contention here that appellee neglected any of his official duties whatever, nor is there any claim that he misappropriated any of the property of the state. A public officer is not required to give every instant of his time to the public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source. His first and paramount duty is to perform all of the requirements of his office, but he is not barred because he holds public office from investing his funds in a legitimate business enterprise, nor prohibited from receiving profits from an independent business in which he may have an interest."

In the case of Fairly vs. Western Union Tel. Company, 73 Mississippi 6, 18 So. 796, 1. c. 797, the Court in holding that a constitutional provision that no person shall hold an office of profit "without personally devoting his time to the performance of the duties thereof", must be given a reasonable construction, and did not prohibit a physician who was Superintendent of a State Hospital from leaving the same on his own private business when he could do so without neglect of official duty, said:

"Section 267 of the constitution is in these words: 'No person elected or appointed to any office or employment of profit under the laws of this state, or by virtue of any ordinance of any municipality of the state,

shall hold such office or employment without personally devoting his time to the performance of the duties thereof.' It requires neither philological research and definition, nor legal interpretation, to properly interpret this language and ascertain its meaning. It forbids not only the farming out of a public office, but it requires that the official shall give his own time and personal services to the performance of the duties of his office. Having been elected or appointed to a public office because of his supposed fitness for the proper performance of the duties of his place, the official himself shall be required to give his time, his attention, and his services to the discharge of his official duties. This is eminently wise and just, and it involves no hardship upon the official who seeks and accepts public station. But will the voluntary absence of an officer for two or three days from his place of official residence or business, when his sole public duty consists in the general care of the public property, over which he has the superintendence, violate either the letter or spirit of the constitutional provision we are considering? Must the superintendents of all our charitable institutions never leave their official residences or offices? Must the nearly four score sheriffs of the state, who are charged with the care of the various courthouses, never depart from their several county seats, either when the public service seems to require such absence, or when a brief absence may be had without any detriment to the public good? Shall the secretary of state never leave the capitol building and grounds, of which he is the keeper by law? These questions must have reasonable answers.

If the public duties of an office require all the time of the public servant, then the whole time must be given. If all the time of the officer be not required for the complete and faithful execution of his trust, then he shall give such time and devote such service as shall suffice for the full and faithful discharge of the duties of his office."

Our State Constitution, Article II, Section 18, contains a provision similar to the one in the instant case, as follows:

"That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

In Section 11202, R. S. Missouri 1929, we find a provision for the removal of county officers who fail to personally devote their time to the performance of the duties of their office:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

In the case of *The State ex rel. Tilley vs. Slover*, 113 Mo. 202, 1. c. 206, 207, the Court in holding that the failure of an official stenographer to devote his personal attention to the duties of his office was a proper cause for his removal from office, said:

"The grave abuses that could, and did creep into the public service under that law, by which the honors and emoluments of an office could be accepted by one person and the performance of its duties 'farmed out' to another, for convenience or profit, furnished a cogent and sufficient reason for this constitutional enactment. The wholesome doctrine that 'public office is a public trust' was fortified by its provision, declaring it also a personal trust, and that no person should thereafter hold office in this state who did not personally devote his time to the performance of his official duties. That he may have deputies, who, under his supervision and control, may assist him in the performance of his official functions, does not dispense with, nor in any way lessen his obligation to personally devote his time to their performance. That this wise and salutary provision of the constitution may be enforced through the provisions of the statute under consideration as to this particular class of officers, we have no doubt."

In the case of *State vs. Yager*, 250 Mo. 388, 1. c. 404, the Court in holding that the fact that the deputies of the sheriff properly performed the duties of his office will not excuse his absence from the County while the Circuit Court was in session, said:

"As we have said, it was no excuse for his dereliction that certain deputies appointed by him may have done the work for which he was elected. There are certain elements of personal selection and personal responsibility imputed as dominating the minds of the voters in the election of officers who shall perform the statutory duties in the several counties. To take the view of defendant would be tantamount to saying that the selection of the voters is transferable and delegable on the part and at the unrestricted will of the elected, a thing which the Constitution itself specifically negatives, by providing generally that officers shall devote their time personally to the duties of the several offices to which they have been elected. (Constitution of 1875, art. 2, sec. 18)."

From the foregoing, we are of the opinion that the elective officers of the County must personally devote their time to the duties of their office but need not devote all of their time to the office unless it is necessary to fully discharge their duties.

II

Section 13 of Article XIV of the Constitution of Missouri, commonly called the Nepotism law, provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or

employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

In the case of State v. Ellis, 28 S. W. (2d) 363, 325 Mo. 154, the Court, in construing the above amendment, said:

"Section 13 provides that any official violating its provisions '***** shall thereby forfeit his ***** office or employment.'

"He forfeits by the act forbidden, and therefore his act results in a status. See, also, State ex rel. v. Sheppard, 192 Mo. 1. c. 511, 91 S.W. 477."

In the case of State ex inf. McKittrick v. Whittle, 63 S.W. (2d) 100, 1. c. 101, the Court points out the reasons for the passage of the above amendment, declaring that for a long time prior to its passage many officials had made it a practice to appoint their relatives to official positions, many of them being inefficient and rendering no service to the public.

The Court, in its opinion, further points out that

"The amendment is directed against officials who shall have (at the time of the selection) 'the right

to name or appoint' a person to office."

And in defining a public officer the Court further states, l. c. 102:

"The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer. State ex rel. v. Bus, 135 Mo. 325, loc. cit. 331, 332, 36 S.W. 636, 637, 33 L. R. A. 616. To the same effect, State ex rel. Zevely v. Hackmann, 300 Mo. 59, loc. cit. 66, 67, 254 S. W. 53; Hasting v. Jasper County, 314 Mo. 144, loc. cit. 149, 150, 282 S.W. 700."

Persons holding county offices receive their authority from the law and discharge functions of government. They are, therefore, clearly, public officers.

Under the rule laid down in 12 Corpus Juris, 511, there are two methods of computing the degrees of relationship, as follows:

"One by the canon law, which has been adopted into the common law of descents in England and the other by the civil law which is followed both there and here in determining who is entitled as

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next of kin to administer personality of a decedent. The computation by the canon law . . . is as follows: 'We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related. By the civil law, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, both ascending and descending."

We do not find that the courts of this State have laid down any rule as to how the relationship under the anti-nepotism provision of the statute or constitution shall be computed. In other states where anti-nepotism provisions are in force the courts have generally applied the civil rule. We believe that the courts of this State, when the matter is presented for a consideration, will adopt the civil rule and we have consequently applied that rule in computing the degree of relationship prohibited under the Constitution.

From the foregoing, we are of the opinion that county officers being public officers they would, under the above constitutional provision, forfeit their offices if, by virtue of said office, they had at the time of selection the power to and did name or appoint a relative within the fourth degree, either by consanguinity or affinity, to render service to the State.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

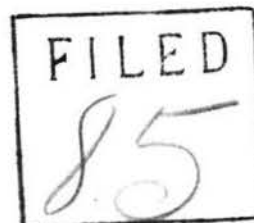
APPROVED:

ROY McKITTRICK
Attorney General

CONSERVATION OF NATURAL RESOURCES: Board of Curators of the University of Missouri, through Agricultural Extension Service, to cooperate with Federal Government in connection with conservation of natural resources

January 7, 1938

Honorable Lloyd C. Stark
The Governor of Missouri
Jefferson City, Missouri



Dear Governor Stark:

This will acknowledge receipt of your letter of December 9, 1937, in which you passed on to this office the inquiry of Congressman Phil Ferguson as to what board, bureau or elective offices this State has legally created to deal with the Federal Government in matters pertaining to soil conservation, flood control, reclamation, power developments, and the general conservation of natural resources.

Your attention is directed to S. B. 41, approved June 24, 1937, and found at pages 175-177, Laws of Missouri, 1937.

Section 1 of said act provides:

"In order to cooperate with the Federal Government in bringing to the farm people of Missouri the full benefits of an Act by the Congress of the United States, approved February 29, 1936, and generally known as the Soil Conservation and Domestic Allotment Act the policy and purposes of which are set forth in Section 7 (a) of the Act as follows: '(1) Preservation and improvement of soil fertility; (2) promotion of the economic use and conservation of land; (3) diminution of exploitation and wasteful and unscientific use of national soil

resources; (4) the protection of rivers and harbors against the results of soil erosion in aid of maintaining the navigability of waters and water courses and in aid of flood control; * * * * * the State of Missouri through its Legislature hereby accepts the provisions and requirements of said Act."

Section 2 of said act reads as follows:

"The Curators of the University of Missouri (hereinafter referred to as the Curators) acting by and through the Agricultural Extension Service by it carried on in connection with the College of Agriculture of the University of Missouri, are hereby designated as the agency of the State of Missouri to administer any plans authorized by this Federal Act which shall be approved by the Secretary of Agriculture of the United States (hereinafter referred to as the Secretary of Agriculture) for the State of Missouri pursuant to provisions of said Soil Conservation and Domestic Allotment Act."

Sections 3, 4 and 5 of said act set out in detail the powers and duties of the Curators of the University in carrying out the purposes of the act. In addition to the foregoing agency directed by law to cooperate with the Federal Government in connection with some of the subjects inquired about, we find that Section 13702, Revised Statutes Missouri 1929, provides as follows:

"The board of managers of the bureau of geology and mines is hereby directed to make a survey

January 7, 1938

of the water resources of the state, including the determination of water power, flood prevention, area of watersheds, underground water supply, chemical composition of waters, and to show locations where power can be generated, and the amount and character of lands that would be inundated by the erection of dams to secure water power. * * * * *

Section 13704, Revised Statutes Missouri 1929, directs the work set out in the foregoing section, 13702, to be done "in cooperation with the United States geological survey and other government and state bureaus."

The Conservation Commission created by Amendment Number Four to the Constitution, page 614, Laws of 1937, vests in that body the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the state, and said amendment also authorizes said Commission to "acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission or the exercise of any of its powers hereunder."

CONCLUSION

It is, therefore, the opinion of this office that the Curators of the University of Missouri, acting by and through the Agricultural Extension Service by it carried on in connection with the College of Agriculture of the University of Missouri, is the proper agency of this state to cooperate with the Federal Government in matters pertaining to soil conservation, flood control, reclamation, and the general conservation of

Honorable Lloyd C. Stark

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natural resources and that the Board of Managers of the Bureau of Geology and Mines may also cooperate with the Federal Government on the matter of flood control and water power and that the Conservation Commission can cooperate with the Federal Government in connection with certain natural resources.

Very respectfully

HARRY H. KAY
Assistant Attorney General

APPROVED

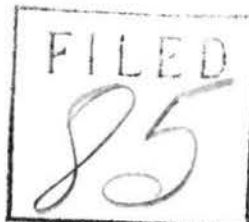
ROY McKITTRICK
Attorney General

HHK LC

MOTOR VEHICLES: Courts are not authorized to grant stay of execution on judgment suspending or revoking drivers' licenses.

January 13, 1938

Hon. V.H. Steward
Commissioner of Motor Vehicles
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your letter of December 22, 1937, enclosing a letter from F.C. Lynch, Director of the Kansas City Safety Council, requesting an opinion as follows:

"In the administration of the new drivers' license law, the law confers upon the judge, the power to suspend or revoke licenses.

"We would like to know if it is legal for the judge to issue a stay of execution after he has rendered a decision in a case. We are particularly interested in cases of drivers' license enforcement. The question is - 'the judge finds the driver guilty of reckless driving and sentences him to jail for thirty days and suspends his driver's license for 6 months; is it then legal, after having passed such sentence, for the judge to later place a stay of execution on this sentence, thereby, relieving the driver of serving the sentence and also giving him the opportunity to again drive his car.'"

At the 1937 session of the legislature, there was enacted what is commonly termed the Drivers' License Law, which appears in the Laws of 1937, page 370. Section 17 (a) of this act is as follows:

"Whenever any person is convicted of any offense for which this act makes mandatory the revocation of the operator's, registered operator's or chauffeur's license of such person by the commissioner, the Court in which such conviction is had shall require the surrender to it of all operator's, registered operator's and chauffeur's State licenses, certificates or badges then held by the person so convicted and the court shall thereupon forward the same together with a record of such conviction to the commissioner."

The offenses, a conviction of which makes it mandatory on the part of the commissioner to revoke the driver's license, appear in Section 18 of this act and are as follows:

- "1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle;
2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;
3. Any felony in the commission of which a motor vehicle is used."

Section 17 (b) of this act authorizes certain courts to revoke or suspend permits to operate motor vehicles, and is in part as follows:

"Every court having jurisdiction over offenses committed under this act or under the provisions of any statute of this State regulating the operation of motor vehicles on highways, or any felony in the commission of which a motor vehicle is used, shall forward to the commissioner a record of the conviction of any person in said court for a violation of any of said laws, and

every such court, except justice of the peace courts, and courts of criminal correction in the City of St. Louis, shall have the power of suspending or revoking the license of any licensee under this act or the certificates of registered chauffeurs or registered operators under Sections 7765 and 7766, Revised Statutes of Missouri, 1929, and amendments thereto, and shall certify to the commissioner a record of such suspension or revocation."

The balance of this section pertains to the exception made in the above section which we have underlined and is not pertinent here.

Under the above statutes, we see that upon a conviction of the holder of a driver's license of certain offenses, the court is not authorized to revoke or suspend the permit of the licensee, but must send a record of such conviction to the commissioner of motor vehicles, and the commissioner is required to "forthwith revoke the license of any operator, registered operator, or chauffeur" so convicted..

This act, however, provides in Section 17 (b) that the permits of licensees may be suspended or revoked, as the court may deem necessary, upon conviction for violation of the laws regulating the operation of motor vehicles upon the highways.

The question now before us is: May the court upon a conviction for an offense, other than one requiring mandatory revocation, sentence the licensee and suspend or revoke his license and then grant a stay of execution which will have the effect of suspending the judgment of the court as to the suspension or revocation of the driver's license.

Section 3739, R.S. Missouri, 1929, is as follows:

"In case of a conviction for any offense where the punishment has been fixed at a fine or imprisonment

in the county jail, or workhouse, or by both such fine and imprisonment, the court in which any such conviction was had, or the judge thereof in vacation, or any justice of the peace before whom such conviction was had, may, for good cause shown, by order entered of record, or in writing signed by such judge or justice, grant a stay of execution on any such judgment of conviction and sentence thereon for a definite period of time to be fixed by the court, judge or justice granting the same, not to exceed six months, upon the defendant or some person for him entering a recognizance conditioned for his surrendering himself in execution at the time and place fixed by the judgment of such conviction or sentence on a day to be named in such order."

This section authorizes the courts to grant stays of execution in the case of a conviction for any offense where the punishment has been fixed at a fine or imprisonment in the county jail, or workhouse, or by both fine and imprisonment. In other words, these are the only cases in which the court may stay execution. If the punishment fixed for the conviction is other than that which we have underlined, this section does not authorize the court to stay that execution.

It has been held in this state in the leading case *Ex parte Thorberry*, 254 S.W. 1087, 300 Mo. 661, that courts have no power to stay execution of judgments of conviction indefinitely. The section authorizing such stays limits them to six months and the person receiving the stay must enter a recognizance conditioned upon his surrender at the appointed time. A stay of execution granted without recognizance is void. *Ex parte Brown*, 297 S.W. 445. This has been the ruling in a long line of Missouri cases, the citation of which will add nothing to this opinion since the determination of the question here depends upon other grounds.

The question here depends upon the fact of whether or not any stay of execution may be granted to a licensee when his permit to operate a motor vehicle has been revoked or suspended. Section 3739, R.S. Missouri, 1929, restricts stays of execution to being given only in certain cases. This section is remedial. In *State ex rel. American Asphalt Roofing Co. v. Trimble*, 44 S.W. 2nd 1103, 1.c. 1105, it is held that:

"The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used." *Grier v. Railways Co.*, 286 Mo. 523, 534, 228 S.W. 454, 457. The courts cannot enlarge and change the scope of statutes. *State ex rel. v. Holtkamp*, 266 Mo. 347, 181 S.W. 1007. A court has no authority to write into a statute a provision not covered by its language. *Stephens v. Gordon*, 266 Mo. 206, 181 S.W. 73; *Orthwein v. Insurance Co.*, 261 Mo. 650, 170 S.W. 885. 'Although the statute may be remedial in its nature, and hence subject to liberal construction, such construction cannot extend beyond its plain terms.' *Braeuel v. Reuther*, 270 Mo. 603, 193 S.W. 283."

The letter of Section 3739, *supra*, provides a stay of execution in those cases only in which there has been a conviction and the punishment fixed at a fine or imprisonment in the county jail or workhouse, or both, and we cannot write into a statute a different punishment not covered by its language which may be stayed by the court. The words and meaning of Section 3739, *supra*, are clear and intelligibly describe in what instance a stay of execution may be granted, the length of said stay and the conditions thereof and this section cannot be construed to permit a court to do that which is not clearly authorized.

January 13, 1938

The revoking or suspending of a driver's permit to operate a motor vehicle is not the punishment which the court is authorized to suspend by a stay of execution under Section 3739, supra, and as such, may not be stayed.

CONCLUSION

Therefore, it is the opinion of this department that a stay of execution may be granted only in those cases where the punishment for the offense has been fixed at a fine or imprisonment in the county jail or workhouse, or by both such fine and imprisonment. That said stay must be for a definite period fixed by the court, not to exceed six months, upon a recognizance to be given by the person conditioned for his surrendering himself at the appointed time for the execution of the judgment. That the court is not authorized to grant a stay of execution upon a judgment revoking or suspending an operator's license or the certificates of registered operators or chauffeurs.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED by:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

SCHOOLS: It is not permissible for a school board, by a majority vote, to use the \$50.00 deduction to be added to the equalization quota to liquidate indebtedness in the building fund.

April 2, 1938

Mr. Roy W. Starling
Attorney at Law
Eldon, Missouri



Dear Mr. Starling:

This department is in receipt of your letter of March 28th, wherein you request an opinion involving two questions, the first question is as follows:

I.

"Is the County Treasurer entitled to commissions on moneys received from the state and paid out in one lump sum by the County Treasurer, by check, to the Treasurer of a City, Town or Consolidated School District, the county court having made an order allowing the County Treasurer Compensation, in addition to the salary, equal to one half of one per cent of all school moneys disbursed by him, in accordance with the provisions of Sec. 9266 R. S. 1929?"

At the outset it appears that this department on June 7, 1935 in an opinion rendered to Hon. Nat B. Rieger, prosecuting attorney of Adair County, in which it was held that under an interpretation of the statutes it was the duty of the county collector to pay direct to the treasurer of the state, town or consolidated school district all moneys which said districts were entitled. Copy of the opinion is herewith enclosed. This, in effect, would appear to dispose of the question which you present. However, we are enclosing opinions bearing on the question of the compensation or commission of the treasurer for school moneys disbursed, one to Hon. Forrest Smith, State Auditor, Jefferson City, Missouri, and the other to Hon. Thomas A. Mathews, Prosecuting Attorney at St. Francois County, copies of which is herewith enclosed.

II.

The second question is as follows:

"Is it permissible for a school board, by majority vote, to use the Fifty Dollar deduction to be added to the equalization quota of the

district by virtue of Sec. 9270-q, to liquidate indebtedness in the building fund of the district according to the last proviso of Sec. 9312 R. S. 1929? In other words, is this money paid by the State construed to be 'tuition' so far designating what money may be used in the building fund so far as the last named section is concerned?"

Section 9270-q, Laws of Missouri 1935, formerly Section 16, page 351, contains the provisions relative to the sum of \$50.00 to be added to the equalization quota. The pertinent part of said section is as follows:

"The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota; if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year; but the attendance

of such pupils shall not be counted in determining the teaching units of the school attended; and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental purposes."

In an opinion rendered by this department on September 2, 1933 was held to the effect that all state money must be placed to the credit of the teachers' fund and cannot lawfully be used for any other purpose. Likewise in an opinion on February 7, 1935 was held by this department to the effect that:

"Repairs and replacements to the building shall be paid out of the building fund, and if there is not enough money in the building fund, the sum shall be transferred out of the incidental fund."

Section 9312, referred to in your letter, is herewith quoted:

"The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from the taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers' fund'; the money derived from taxation for incidental expenses shall be credited to the 'incidental fund;'
all money derived from taxation for building purposes, from the sale of school site, schoolhouse or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the 'building fund;'
and all moneys not herein specified that now belong to any school district, or that may hereafter be received by such school district, shall be placed to the credit of the 'teachers' fund' of such school district. No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its

appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant: Provided, that the board of directors shall have the power to transfer from the incidentals to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided further, that in the event of a balance remaining in the building fund after the purpose for which said fund was levied is accomplished, the said board shall have the power to transfer such unexpended balance to the incidental fund: Provided further, that by a majority vote of the school board tuition fees may be used to liquidate indebtedness accrued in the building fund."

By the provisions of Section 9312, all moneys derived from the state shall be placed to the credit of the teachers' fund. By further provisions of the section, tuition fees may be used to liquidate indebtedness accrued in the building fund but there is no provision authorizing the Board to in anywise transfer or use the funds in the teachers' fund for any other purpose than that authorized by this section.

In the decision of Consolidated School District #6 vs. Shawhan, 273 S. W. 182, the court has said:

"That the powers of the board of directors of school district are limited to those specially delegated. Directors are personally liable for misapplication of moneys in teachers' fund for purposes other than paying the teachers; not withstanding they act in good faith and without wilfull intent."

CONCLUSION

We are, therefore, of the opinion that the money derived from the state under the equalization quota by virtue of Section 9270-q, cannot be used in the building fund.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney General.

APPROPRIATION : Traveling expenses of persons selected by
SOLDIERS MONUMENT: Governor to "care" for monument and graves
may be paid out of appropriation Laws of
1937, page 126.

April 6, 1938 4/9



Honorable Lloyd C. Stark
Governor of Missouri
Jefferson City, Missouri

Dear Governor:

This department is in receipt of your request
for an official opinion which reads as follows:

"Will you please give me your official
opinion regarding my authority under an
Act passed by the 1937 Legislature
found in the Laws of Missouri, 1937,
Section 69, page 126, which reads as
follows:

'Care of Monument in France and
care of Burial Places in Europe. -
There is hereby appropriated out
of the State Treasury, chargeable
to the State revenue fund, the
sum of Five Thousand (\$5,000.00)
Dollars for the care of the grounds
and monument erected in France in
commemoration of the brave deeds
of Missouri's heroic sons who lie
buried in the Republic of France,
and for the care of burial places
in Europe where the bodies of
sons and daughters of Missouri
who lost their lives during the
World War are buried. This expen-
diture shall be made under the
direction of the Governor.'

May I, under this Statute, appoint a
commission of three ex-service men -
one from the National Guard of Missouri,
and one from the membership of the State
Senate, and one from the membership of
the House of Representatives, to go to
France and other burial places in Europe
for the inspection of such burial places
and monuments for the purpose of making

proper provision for their care and maintenance, and may their actual expenses of carrying out these duties be paid from the above mentioned appropriation?"

In 1919 the Legislature enacted a law providing for the erection of a monument in France to the Missouri soldiers. Laws of Missouri 1919, page 77.

Laws of Missouri, 1937, Section 69, page 126, appropriates \$5,000.00 for the care of this monument and the graves.

The first question presented is whether the above appropriation is a valid one.

Article IV, Sections 46 and 47, of the Constitution of the State of Missouri provide that the General Assembly shall not make any grant of public money or thing of value to any individual, association of individuals, municipal or other corporations. However, it is well settled in Missouri that if the purpose for which the grant is made is a public one, then such appropriation is valid. *Farm Bureau v. Jasper County*, 315 Mo. 560. *State ex rel. Gilpin v. Smith*, 96 S. W. (2nd) 40. The attitude of the courts towards statutes such as this is declared by Judge Lamm in *Hale v. Stimson*, 198 Mo. 134, as follows:

"In a free State, sustained by no over-awing standing army, where its love must grow and its protection must rest, in the hearts of the people, patriotism should be nourished as a cardinal virtue of citizenship. The statutes and constitution of such a State must not be construed as ungrateful or unpatriotic."

Money appropriated for a monument to Missouri youths who died in the World War and for the care of the burial places is for a "public purpose," and is therefore a valid and legal appropriation.

The next question which presents itself is whether a committee or group may be sent over to France to inspect these graves and monument and such expense be paid out of the appropriation.

In State ex rel. Lamkin v. Hackmann, 204 S. W. 513, 275 Mo. 47, the Supreme Court of Missouri said:

"The authority to travel at the expense of the State, we concede, must be found in some statute, or arise by the most obvious implication from some statute, otherwise there is no obligation on the part of the State to pay the expenses incurred thereby."

However, as was pointed out in State ex rel. Bybee vs. Hackman, 276 Mo. 110:

"Whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such power fully efficacious or to render the performance of the duty effectual is conferred by implication."

We must, therefore look to the law itself to determine if this right is given. It will be noted that the statute provides for the "care of the grounds and monument" and for the "care of burial places."

In Emery v. Wheeler, 152 A. 624, 129 Me. 428, care is defined as:

"Responsibility, charge or oversight, watchful regard and attention."

It will be seen, therefore, when the Legislature appropriated money for the care of the monument in France and for the care of the burial places in Europe, it intended that there should be watchful regard and attention over such monument and graves. The burden of seeing that this "regard" and "care" is given the monument and graves is placed by the statute upon the governor. If therefore in order "to render the performance of the duty effectual" persons must be sent over to the situs of the monument and graves, then traveling expenses may be paid out of the appropriation.

As to the personnel and number of the group, we do not pass upon the question because as was pointed out in Commonwealth v. Gregg, 29 A 297, 161 Pa. 582, "what work there is to be done, and what clerical force

Honorable Lloyd C. Stark

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April 6, 1938

is requisite to do it, is a question of detail, as to which, much must necessarily be left to the head of each department."

CONCLUSION

It is, therefore, the opinion of this department that under Laws of Missouri, 1937, page/26, the Governor may select persons to "care" for the monument in France to Missouri's war dead and also to "care" for the graves of Missouri soldiers and traveling expenses of such persons may be paid out of moneys appropriated by such law.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

AO'K:LB

ELECTIONS; Section 10206, R. S. 1929, construed as meaning one judge of each political party to act as receiving judge and likewise one judge of each political party to act as counting judge to count all the votes of each political party. In the event two additional judges are appointed, as provided in Laws of 1937, p. 234, four judges, two from each political party are to count the votes of all parties.
July 23, 1938.



Honorable Lloyd C. Stark
Governor of Missouri
Jefferson City, Missouri

Dear Governor Stark:

In reply to your recent inquiry of this Department, namely:

Should the ballots to be cast in the coming Primary Election of August 2d, be counted by the judges of the respective parties, or should the Democratic Judges count the Democratic ballots and the Republican Judges count the Republican ballots?

Section 10206, R. S. Mo. 1929, of the general election law, provides:

"It shall be the duty of said judges to select from their number two judges who shall be designated and known as receiving judges."

The above paragraph should be considered in connection with Section 10208, which was amended in 1933 and again in 1937, found at Laws of Missouri, 1937, page 234, which provides:

"The judges of election shall designate two of their number, not of the same party, whose duty it shall be to have charge of the ballots and to furnish them to the voters. * * *"

Therefore, it is evident that the receiving judges to be designated as provided in Section 10206, supra, must be not

July 23, 1938

of the same political party. The judges, not named as receiving judges, duties are to count the votes. Section 10206, supra, further provides:

"* * after the delivery of ballot box No. 1 to the counting judges, the same shall be immediately opened by them, * *

that is, all of the counting judges, whether there be two or four counting judges (four, where at the preceding election there were more than two hundred votes cast in the precinct) shall open the ballot box and count the ballots.

Section 10206, supra, further provides:

"** and the tickets shall be taken out, one at a time, by one of the counting judges, who shall read distinctly, while the ticket remains in his hand, the name or names written or printed thereon, also the office as intended to be filled by such person voted for, and deliver the same to the other counting judge, who shall string the same on a thread or string, as provided by law. * *

Conclusion.

It is clear that it was the intention of the Legislature that the above procedure should be followed by the judges of the opposite political parties, that is, in the counting of votes cast in the Primary Election for all political parties, the Republican and the Democratic judges should count the votes of the respective parties.

Respectfully submitted,

APPROVED:

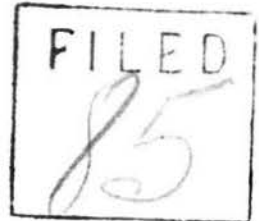
OLLIVER W. NOLEN
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General

OWN:EG

- I. ELECTIONS: Each candidate for office at primary election
CHALLENGERS: may not have challengers or witnesses within
the polls but such challengers are selected
by the committeeman and committeewoman of such
precinct.
- II. COUNTY COURT: Instruction of judges of election.
County court not required to instruct judges of
primary election.

July 25, 1938



Honorable Lloyd C. Stark,
Governor of the State of Missouri,
Jefferson City, Missouri.

Attention: Mr. R. E. Holliway

Dear Sir:

I.

The first paragraph of your request pertains to the rights of a candidate who is seeking the nomination in a primary election to have a personal representative to witness the counting of the votes at such primary election.

Section 10270, R. S. Mo. 1929 on the question of challengers at primary elections is as follows:

"The county, ward or township committeeman of each party in each county, or the ward committeeman in any city with a population of over 300,000, may appoint two party agents or representatives, with alternates for each, who may represent his party at the polling place in each precinct during the casting, canvass and return of the vote at a primary, who shall act as challengers and witnesses to the count of the vote for their respective parties, and have the power prescribed by law."

By this section a challenger for each party for each polling place in the county or city is selected by the county, ward or township committeeman.

July 25, 1938

Section 10206, R. S. Mo. 1929 sets out the manner of the selection of judges for the general election law and also the manner of counting the votes. This section provides in part as follows:

"* * * * * No person or persons shall be admitted into the room or office where such ballots are being counted, except the judges and clerks of election: Provided, that any political party may select a representative man who may be admitted as a witness of such counting. * *

* * * * *

While this section does not specifically state how the political party is to select its representative to witness the counting of the ballots, yet by reading this section with Section 10270, supra, we are of the opinion that the representative of the party mentioned in Section 10206, supra, is to be selected in the same manner that the challenger mentioned in Section 10270, supra, is selected, that is, by the county, ward or township committeeman of each party in such county or city selecting one representative to represent his party at the polling place to witness the counting of the ballots.

CONCLUSION

It is, therefore, the opinion of this department that no individual candidate who seeks nomination at a primary election may select his own challengers to voters or witnesses to the vote count to be within the polls at the time of the voting and at the time the ballots are counted, but that such witnesses and challengers must be appointed by the county, ward or township committeeman of each party in each county or the ward committeeman in any city with a population of over three hundred thousand (300,000), except in cities which may have special provisions relating to selection of challengers and watchers such as is set out in Section 43, page 261, Laws of Missouri, 1937.

II.

Your second question goes to the duty of the county court with reference to instructing election judges. Section 10209, R. S. Mo. 1929 provides as follows:

"All judges of elections, appointed under the provisions of this article shall be selected by the county court from a list of persons furnished said court in the form and manner following:
* * * * *

Section 10206, R. S. Mo. 1929 provides in part as follows:

"In all counties in this state, four judges of election shall be appointed by the county court for each election precinct in each of said counties; * *"

Section 10287, R. S. Mo. 1929 provides in part as follows:

"The judges and clerks for primary elections held under this article shall be appointed in the same manner, and possess the same qualifications and consist of the same number as judges and clerks of general elections in this state:
* * * * *

From this section it is apparent that the lawmakers intended that the judges and clerks of primary elections be selected by the county court as is provided in the general election laws which are Sections 10206 and 10209, supra. In our research on this question we find that the only duty the court has with reference to the judges of elections is to appoint the judges and as the powers and duties of the county court are statutory, such courts are limited by such statutes that confer upon them their powers and duties.

On the question of the instructions to the judges and clerks of the election we find that such judges and clerks receive their instructions as to what the law is by the following sections. Section 10212, R. S. Mo. 1929 provides as follows:

"The secretary of state shall furnish to the several county clerks, and to the register of the city of St. Louis, at least ten days before the next general election, and as often thereafter as may be necessary, a sufficient number of printed pamphlets containing the provisions of the Constitution and laws of the state, prescribing the qualifications and duties of voters and election officers, and imposing penalties upon election officers and voters, and persons attempting or offering to vote in neglect or violation of law. * * * *"

And by Section 10308, R. S. Mo. 1929 it is provided as follows:

"The clerk of the county court of each county shall cause to be printed in large type, on cards, instructions for the guidance of electors preparing their ballots. He shall furnish twelve such cards to the judges of election in each election district, at the same time and in the same manner as the printed ballots. The judges of election shall post not less than one of such cards in each place or compartment provided for the preparation of ballots, and not less than three of such cards elsewhere in and about the polling place, upon the day of election. Said cards shall be printed in large, clear type, and shall contain full instructions to the voters as to what should be done: First, to obtain ballots for voting; second, to pre-

Mr. R. E. Holliway

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July 25, 1938

pare the ballots for deposit in the ballot boxes; third, to obtain a new ballot in place of one accidentally spoiled; also a copy of sections 10252, 10330 and 10332."

Having received the laws and the instructions which are furnished them by the county clerk, the judges and clerks of election, by reading such laws and instructions, will obtain the same information that they did by instructions from the county court if the county court was even authorized to instruct such officers.

CONCLUSION

It is, therefore, the opinion of this department that the county court is not required to and has no authority to specifically instruct the judges of elections for a primary or a general election and that such election officials receive their instructions from the election laws and instructions which are furnished to them by the county clerks.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

TWB:DA

- ELECTIONS: 1. WPA officials and employees eligible to serve as judges and clerks of elections except in certain places.
2. No penalty for persons serving as judges and clerks who are disqualified by reason of employment.
3. Governor does not have control of election boards and election officials but may properly direct such election officials to execute the laws.

July 30, 1938

Hon. Lloyd C. Stark,
Governor
Jefferson City, Missouri



Dear Governor:

We are in receipt of your request of today, which request reads as follows:

"I would appreciate it if you will let me have today an opinion on the following questions.

"1. Do the Statutes of Missouri prohibit the use of WPA officials and employees as judges and clerks of Elections, including Primaries, in the State, and, if so, what penalties are provided for violations?

"2. What powers has the Governor to order Election Boards and other officials in charge of Elections to observe the Law with respect to the Primary Election on Tuesday, August 2nd."

Since your request does not state where it is proposed to use WPA officials and employees as judges and clerks of elections, we will set forth the qualifications of judges and clerks of elections in the various voting districts of the state.

Section 10287, R.S. Mo, 1929 provides in part as follows:

"The judges and clerks for primary elections held under this article shall be appointed in the same manner, and possess the same qualifications and consist of the same number as judges and clerks of general elections in this state:"

Section 10207, R.S. Mo. 1929 reads as follows:

"No person shall be qualified to act as a judge or clerk of any election unless he shall be legally entitled to vote at such election, and shall moreover be able to read and write. (R.S. 1919, Section 4777.)"

The foregoing qualifications would apply to judges and clerks in all voting precincts except those hereinafter specifically pointed out as being exceptions to the general rule.

Section 10571, R.S. Mo. 1929 sets out the qualifications for judges and clerks in elections held in cities containing 100,000 inhabitants or over. Said qualifications are therein set forth in the following language:

"Said board of election commissioners shall at least sixty days prior to the first city or state election after this article becomes a law, and at least sixty days prior to each presidential election thereafter select and choose four electors as judges of election, for each precinct in such city. They must be citizens of the United States and entitled to vote in the city at the next general election, and they must be men or women of good repute and character who can speak, read and

write the English language, and be skilled in the four fundamental rules of arithmetic, and they must be of good understanding and capable. They must either reside or be employed or have a place of business in the ward for which they are selected to act; and they must not hold any office or employment under the United States, the state of Missouri, or under the county or city in which such election is to be held, and they must not be candidates for any office at the next ensuing election. Two clerks of election for each precinct shall be selected within the same time by said board, and shall possess the same qualifications as the judges."

Section 10667, R.S. Mo. 1929 describes the qualifications for judges and clerks of elections in counties of 100,000 to 150,000 population. Said qualifications are set forth in the following language:

"Said board of election commissioners shall at least sixty days prior to the first presidential election after this article becomes a law, and at least sixty days prior to each presidential election thereafter, select and choose four electors as judges of election, for each precinct in such county. They must be citizens of the United States and entitled to vote in the county at the next primary or general election, and they must be men and women of good repute and character who can speak, read and write the English language. They must reside in the precinct for which they are selected to act; and they must not hold any office or employment under the United States, the state of Missouri, or under the county in which such election is to be held, and they must not be candidates for any office at the next ensuing election for any federal, state, or county office. Two clerks of election for each precinct shall be selected

within the same time by said board, and shall possess the same qualifications as the judges."

Section 5, p. 241, Laws of Missouri, 1937, sets forth the qualifications of judges and clerks of elections held in cities of 600,000 or over. Said qualifications are therein defined as follows:

"Said board of election commissioners shall at least sixty days prior to each presidential election thereafter select and choose four electors as judges of election, for each precinct in such city. They must be citizens of the United States and entitled to vote in the city at the next general election, and they must be men or women of good repute and character who can speak, read and write the English language, and be skilled in the four fundamental rules of arithmetic, and they must be of good understanding and capable. They must reside or be employed or have a place of business in the ward for which they are selected to act; and they must not hold any office or employment under the United States, the state of Missouri, or under the county or city in which such election is to be held, and they must not be candidates for any office at the next ensuing election. Two clerks of election for each precinct shall be selected within the same time by said board, and shall possess the same qualifications as the judges."

Section 7, p. 299, Laws of Missouri, 1937, sets forth the qualifications of judges and clerks in elections held in cities of 300,000 to 700,000 in the following language:

"Selection of judges and clerks-qualifications. Said board of election commissioners shall at least sixty days prior to the first city or state election after this article becomes a law, and at least sixty days prior to each presidential election thereafter, select and choose four electors as judges of election for each precinct in such city. They must be citizens

of the United States and entitled to vote in the city at the next general election, and they must be men or women of good repute and character who can speak, read and write the English language, and be skilled in the four fundamental rules of arithmetic, and they must be of good understanding and capable. They must either reside or be employed or have a place of business in the ward for which they are selected to act; and they must not hold any office or employment under the United States, the state of Missouri, or under the county or city in which such election is to be held, and they must not be candidates for any office at the next ensuing election. Two clerks of election for each precinct shall be selected within the same time by said board, and shall possess the same qualifications as the judges."

Section 6, p. 231, Laws of Missouri, 1935, describes the qualifications of judges and clerks of elections in counties of 200,000 to 400,000 population, in the following language:

"No person shall be qualified to act as judge or clerk of any registration or election unless he or she shall be legally entitled to register and vote at the next primary, special or general election held after the registration, and they must be men or women of good repute and character who can speak, read and write the English language. They must reside in the precinct for which they are selected to act, and they must not hold any office or employment under the United States, the State of Missouri, or under the county or city in which such election is to be held, and they must not be candidates, for any office at the next ensuing election for any federal, state, county, or township office or office in any city in said county containing more than ten thousand inhabitants. Being a notary public shall be no disqualification for judge or clerk. No person shall be appointed

July 30, 1938

nor serve as judge or clerk in any election or registration who has been convicted of any offense punishable by imprisonment in the penitentiary, or who has been convicted and confined in any county jail, workhouse, penitentiary or house of correction within five years prior to such appointment."

It will be seen from the foregoing that an elector's occupation or employment does not enter into his qualifications to serve as judge or clerk of an election except in elections of cities of a population of 100,000, or over, in counties of more than 100,000 and less than 150,000 population, in cities of a population of 600,000 or over, in cities of population of 300,000 to 700,000 and in counties of 200,000 to 400,000 population. In the foregoing excepted cases, the law requires that judges and clerks of elections "must not hold any office or employment under the United States." Whether WPA officials are employees of the United States is a question of fact, but our information is that they are employees of the United States. If that be true, which we are assuming, such officials and employees would not be eligible to serve as judges and clerks of elections in the excepted cases above noted, but would be eligible in elections held in all other places in the state.

CONCLUSION

It is, therefore, the opinion of this office that WPA officials and employees are eligible to serve as judges and clerks of elections, including primaries, in all places in this state except the following: Cities of 100,000 population or over, counties of 100,000 to 150,000 population, cities of 600,000 population or more, cities of 300,000 to 700,000 population, and counties of 200,000 to 400,000 population.

II

Your next inquiry is as to whether there are any penalties provided for violations of the prohibitions against WPA officials

July 30, 1938

and employees serving as judges and clerks of elections.

We have not found any statute which prescribes a penalty for a person who is disqualified by reason of such employment from serving as judge and clerk of an election. Neither have we found any statute which prescribes a penalty against the appointing authorities who appoint such a person judge or clerk of an election when such person is disqualified by reason of employment from serving in such capacity.

CONCLUSION

It is, therefore, the opinion of this office that there is no penalty provided by law for persons serving as election judges and clerks who are disqualified by reason of being employees of the United States Government, nor is there any penalty provided against those who appoint persons thus disqualified, unless the Governor sees fit to exercise the power of removal vested in him by Sec. 1, p.326, Laws 1933.

III

Your next inquiry is as to what powers the Governor has to order election boards or officials in charge of elections to observe the law with respect to the primary election on Tuesday, August 2.

We do not find any specific statute giving the Governor any particular power in connection with the control of election boards or other officers in charge of elections as to the performance of the duties of such officers.

However, the Governor is by the provisions of Section 6, Article V of the Constitution of Missouri, charged with the duties of seeing that all laws are faithfully executed. Election laws are a part of the laws of the state, and, therefore, the Governor is charged with the duty of seeing that such laws are enforced. There is no inhibition against the Governor calling the attention of the election officials to the election laws and directing such officials to faithfully execute same.

Hon. Lloyd C. Stark

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July 30, 1938

CONCLUSION

It is, therefore, the opinion of this office that the Governor does not have any particular power to control election boards and other election officials in the discharge of the duties of their offices, but that there is no inhibition against the Governor directing such election officials to faithfully execute election laws.

Since your request for an opinion on the above matters reached us only today, we have been compelled to make a hurried examination of the law in order to comply with your request today. However, we believe the above correctly answers your questions.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. W. BUNTINGTON
(Acting) Attorney General

HEK/w

CITIES:

Cities of fourth class can pass and enforce an ordinance requiring dogs to be licensed and immunized against rabies.

MUNICIPALITIES:

August 3, 1938

8-5

Hon. Roy W. Starling
City Attorney
Eldon, Missouri



Dear Mr. Starling:

We have received your letter of July 28, which reads as follows:

"I am enclosing herewith a copy of Ordinance No. 253 of the City of Eldon and would appreciate an opinion on whether a city of the Fourth Class has the authority to pass and enforce an ordinance of this kind and require every dog within the City to be immunized, collared, licensed and tagged regardless of whether or not the dog is running at large or is being confined within the owners own premises.

"I now have before me a complaint of the Poundmaster that a certain individual within the city has a dog on his premises which is not immunized, licensed and tagged as provided in the enclosed ordinance. I learn that it is conceded that this owner does not allow this dog off his premises but is kept thereon and not allowed to run at large over the streets.

"It appears that by Sec. 7021 cities of the fourth class are empowered to enforce ordinances regulating, taking, restraining and

prohibiting the running at large of dogs and again by Sec. 7023 the Board of Aldermen may 'make regulations to secure the general health of the City' and I wish to inquire if by authority of this and other statutory authority a city of the fourth class may require that every dog within the City be immunized against rabies as a prerequisite to the securing a license or if such a city can only make such requirements of dogs running at large. "

Section 7021 R. S. Mo. 1929 dealing with the powers of the board of aldermen of cities in the fourth class provides in part that:

"The board of aldermen may also tax, regulate and restrain and prohibit the running at large of dogs, and provide for their destruction when at large contrary to ordinance, and impose penalties on the owners or keepers thereof." (R.S. 1919, Section 8472.)

Practically this same wording was contained in the charter of the City of Carthage which provided that the city should have power

"to tax, regulate, restrain and prohibit the running at large of dogs or cats and provide for the impounding or destruction of either or both and all of them when found running at large contrary to ordinance."

In the case of the City of Carthage v. Rhodes, 101 Mo. 175, from which the above quotation was taken, the Supreme Court determined that the right was thereby given to the city to impose a per capita tax upon dogs by way of a license. In this case the court said:

"By section 11, article 5, of the charter of the city of Carthage (Sess. Acts, 1875, p. 169) it is provided that the city shall have power 'to tax, regulate, restrain and prohibit the running at large of dogs or cats and provide for the impounding or destruction of either or both and all of them when found running at large contrary to ordinance.' The power granted in this section is to tax dogs, and regulate dogs, and is not limited simply to the power to restrain and prohibit dogs from running at large, and the question is, can the city exercise the power to tax or regulate dogs by requiring the owner or keeper of a dog to pay a specific sum for a license to keep such dog within the city limits, or in other words by imposing a tax per capita upon dogs, by way of a license. There being an express grant of power to regulate, there can be no question as to the power in the city to regulate by way of a license for which a specific sum may be charged, unless the exercise of the power is precluded by the constitutional provision requiring all property to be taxed in proportion to its value. Const., art. 10, sec. 4.

"Taxation may be for the purpose of raising revenue, or for the purpose of regulation; where for the purpose of regulation it is an exercise of the police power of the state. They are both distinct, co-existent powers in the state and either or both may be exercised through a municipal corporation. In this case, by the terms of the charter, both powers are granted to the city of Carthage as to the dogs of that city. The dog-license tax required by its ordinances is easily referable to the exercise of the police power granted. While, in a sense, dogs are property, and the owner may invoke the aid of the law for their protection as property by civil action, and by statute they have been made the subject of larceny, yet, they are a base sort of property, having no market or assessable value, do not enter into the estimate of the appreciable wealth of the state, and never have been considered proper subjects of taxation for revenue. On the other hand

their almost utter worthlessness in a crowded city for any purpose except to please the whim or caprice of their owners, the half savage nature and predatory disposition of so many of them, rendering them destructive of animals of real value, and their liability to the fatal malady of hydrophobia which in so many instances has sent them abroad as messengers of death to man and beast, point them out as subjects peculiarly fit for police regulation.

"The ordinances in question being an exercise of the police power granted by the state are not obnoxious to the constitutional provision quoted, which is not a limitation upon the police power, but upon the taxing power of the state. Without discussing the question further it is sufficient to say that the foregoing propositions are sustained by the great weight of authority, from which we cite the following." (Citing cases.)

We must conclude, therefore, that under the wording of said Section 7021 as construed by the Supreme Court in the above case, cities of the fourth class have the authority to pass and enforce ordinances requiring that every dog within such city shall be collared, licensed and tagged regardless of whether any such dog is running at large or is being confined entirely on the owner's own premises. The Carthage case undoubtedly gives the power to license dogs within the city whether they are running at large or not.

We now approach the question as to whether or not a city of the fourth class can enforce that part of the ordinance which requires all dogs to be immunized against rabies. Section 4 of the ordinance which you enclosed reads as follows:

"At the time of the application of the license aforesaid the owner or keeper shall furnish satisfactory proof, in writing, to the City Collector that the dog sought to be licensed has been immunized from rabies by administration of Anti-Rabic Virus within thirty-(30) days of the date of the application and

the City Collector shall issue no license until such proof is furnished."

As said in the Carthage case, "The power granted in this section is to tax dogs, and regulate dogs and is not limited simply to the power to restrain and prohibit dogs from running at large * * *." We do not find that the precise question as to whether or not cities have the right to require all dogs to be immunized against rabies has ever been passed upon by any court. We quote, however, the following general statement found in 19 R.C.L. 822 which reads as follows:

"The keeping of dogs in thickly settled municipalities is subject to rigid police regulations without much regard to rights of the owners in such animals as property. Beasts which have been thoroughly tamed, and are used for burden or husbandry, or for food, such as horses, cattle and sheep, are as truly property of intrinsic value, and entitled to the same protection, as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild nature and destructive instincts, and are kept either for uses which depend on retaining and calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner; and therefore, although a man might have such a right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he was held, in the phrase of the books, to have 'no absolute and valuable property' therein and consequently is not entitled to the same constitutional protection as in the case of other animals. A municipality may accordingly require all dogs kept or found within its limits to be muzzled, and provide that all dogs found running at large unmuzzled shall be summarily killed and such an ordinance is not objectionable because it is in terms in force only upon proclamation by the mayor of the existence of danger of hydrophobia. So also it is within the power of a municipality to require all persons keeping dogs within

the city limits to register and procure badges for the same. Such an ordinance may be enforced by a civil action to recover a penalty, brought by the municipality against the offender or by the summary killing of an unlicensed dog, even upon the premises of his owner."

In a recent case decided by the Supreme Court of South Carolina entitled *Ward v. Town of Darlington*, 190 S.E. 826, the town council passed an ordinance to confine the keeping of cows within the limits of the town. One of the requirements of the ordinance reads as follows:

"All cows must be tuberculin tested at least every three (3) years and all cows must also be kept free from bangs disease."

The court in holding that the city had the power by ordinance to make such requirements and that the same were reasonable said:

"We need not stop to consider whether the town council had power to pass an ordinance to regulate the keeping of cows within the limits of the Town of Darlington.

"Section 7233, vol. 3, Code, 1932, gives the authority in these words:

"Power to Enact Rules or Ordinances for Police Government.-The city councils and town councils of the cities and towns of the State shall, in addition to the powers conferred by their respective charters, have power and authority to make, ordain and establish all such rules, by-laws, regulations and ordinances respecting the roads, streets, markets, police, health and order of said cities and towns, or respecting any subject as shall appear to them necessary and proper for the security, welfare and convenience of such cities and towns, or

for preserving health, peace, order and good government within the same.'

"It was for long the established rule in this jurisdiction that the reasonableness of a municipal ordinance, which on its face declared it to be reasonable, could not be inquired into by the courts." (Citing cases.)

"That rule has been superseded in this jurisdiction, and others, by the more logical rule that the courts may inquire into the action of the municipality to determine whether it has exercised its power in accordance with the constitutional and statute laws of the United States, and the several states, and may determine whether its ordinance is reasonable."

"* * * We hold that the ordinance is not unconstitutional on any of the grounds urged by plaintiffs. It is not arbitrary, nor discriminatory. It is a legitimate exercise of the police power vested in the Town Council."

It is also the rule in Missouri as it is in practically all of the states that cities can, under their police power, pass any reasonable ordinances for the protection of its inhabitants. If the provisions of any such ordinance in question are not unreasonable, it will stand. On this question the Supreme Court of Missouri in the case of Bellerive Inv. Co. v. Kansas City, 13 S.W. (2d) 628 said:

"In other words, the reasonableness or unreasonableness of an ordinance is to be determined from the whole and entire terms and provisions of the ordinance in the light of the evils, dangers, or hazards at which it is aimed and directed. As is said in 43 C.J. 308: 'The courts will have regard to all the circumstances and subjects sought to be attained, and the necessity which exists for the regulation.'

"Furthermore, the presumption is always in favor of the reasonableness of a municipal ordinance or regulation, and every intendment is to be made in favor of the reasonableness of the exercise of municipal power to make regulations pursuant to, and in promotion of, its police powers; and the burden of proof to show the unreasonableness of a municipal ordinance or regulation rests upon the person asserting it, unless, of course, its unreasonableness is apparent upon its face. 43 C.J. 310, 311. As is aptly said in *Harrigan & Reid v. Burton*, 224 Mich. 564, 569, 195 N.W. 60, 62 (33 A.L.R. 142): 'The generally accepted rule is that a presumption prevails in favor of the reasonableness and validity in all particulars of a municipal ordinance unless the contrary is shown by competent evidence, or appears on the face of the enactment.' It is said by our own court, in *St. Louis v. Theatre Co.*, 202 Mo. 690, 699, 100 S.W. 627, 629: 'It is true that a court can declare an ordinance unreasonable upon its face, by a mere inspection of the ordinance, if the ordinance upon its face chances to be of that character. (*City of Hannibal v. M. & K. Tel. Co.*, 31 Mo. App. loc. cit. 32, and cases cited.) But courts move cautiously in such cases. (*Commonwealth v. Robertson*, 5 Cush. (Mass.) 438.) And it is further true that the courts can and will declare ordinances unreasonable, upon the showing of a state of facts which makes them unreasonable. (Citing cases.) * * * Unless the unreasonableness of the ordinance is apparent upon the face thereof, the burden is upon the person asserting it to be unreasonable to so show by the facts. These facts have not been developed in this case.* * * To our mind the party attacking the validity of an ordinance upon the ground of its unreasonableness, must clearly show the facts, before the courts can act.'"

We do not think that it can possibly be said that an ordinance requiring dogs to be immunized against rabies is an unreasonable requirement on the part of any city. Such an ordinance

is obviously designed to protect the health and welfare and the lives of the inhabitants. Even though a particular dog is generally confined in the premises of the owner, it is not beyond all possibility that such a dog might occasionally break loose and escape. Delivery boys, postmen, neighbors and visitors go on the premises and are all thereby endangered. The owner of such a dog himself could be harmed. The purpose of the ordinance very apparently is designed to protect the citizens, of which the owner is one, and any ordinance designed to accomplish such a purpose cannot in our opinion be called unreasonable.

We conclude, therefore, that a city of the fourth class has the authority to pass and enforce an ordinance requiring dogs to be periodically immunized against rabies.

CONCLUSION

Our conclusion is that Section 7021, R.S. Mo. 1929 authorizes cities of the fourth class to pass and enforce ordinances requiring every dog within any such city to be licensed and immunized against rabies whether such dog is confined entirely to the premises of the owner or not.

Respectfully submitted

J. F. ALLERACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA/w

STATE HIGHWAY COMMISSION: Not liable for maintenance of
abandoned roads not part of state
highway system.

August 27, 1938

Honorable William E. Stewart
Prosecuting Attorney
Knox County
Edina, Missouri



Dear Sir:

This Department is in receipt of your letter of
August 12, 1938, wherein you state as follows:

"The Knox County Court and several
citizens from the town of Baring
have requested me to write you for
an opinion in regard to state highway
No. 15. Highway 15 did run through
the town of Baring but the Highway
Department changed the highway and
it now runs South and West of Baring.
Highway "K" runs through the town
of Baring and Highway 15 connects
with Highway "K" west of Baring. There
is a mile or mile and a half of old
15 that runs from the present highway
15 north and intersects with Highway
"K". That part of old Highway 15 is
in a run down condition now and the
Court and the Baring people want to
know whose place it is to keep this
road in condition? Can the highway
Department be compelled to keep this
road up?"

The facts as set out in your letter are very meager
so we took the liberty of inquiring further from the State
Highway Department, and received the following letter from
Honorable Louis V. Stigall, Chief Counsel of the Department,
the same being dated August 20, 1938:

August 27, 1938

"In compliance with your request, we are submitting the following facts regarding the location of Route 15, Knox County through Baring.

The statutes designated this route "through" Baring, and the final location as determined by the Commission and as constructed is through Baring or within the corporate limits of this municipality.

Years ago a short section of road was constructed, under state supervision, under the old Morgan-McCullough Law, which was succeeded by the Centennial Law, Article 12, Chapter 42, R.S. Mo. 1929. Under the old law the State had very few funds invested in these Morgan-McCullough projects and in State ex rel. Reynolds County vs. State Highway Commission, 328 Mo. 859, 42 S.W. 193, the Supreme Court held that these old projects would not automatically become parts of the Centennial system.

As in hundreds of other cases in the state, after the enactment of the Centennial Law, the Commission designated and numbered Route 15 through Baring over existing county and city roads. Pending final location and construction of this route by the Commission this temporary route was maintained by the State. When the final location was determined and the route constructed through Baring in compliance with the statute, the old temporary route, in our opinion, reverted to the governmental subdivision which had constructed it and had maintained it prior to the time the Commission took over its maintenance as a temporary state route.

It would be, of course, within the power of the County Highway Commission and the State Highway Commission to agree that the old temporary route through its entire length be included as a supplementary state highway under the 1928 road amendment. Absent such agreement, however, the Commission has no power or authority to maintain the old route as it has not been finally included in the state highway system."

Section 8120 R.S. Missouri 1929, "created and established a state wide connected system of hard surfaced public roads extending into each county of the state, which shall be located, acquired, constructed, reconstructed, and improved and ever after maintained as public roads, and the necessary grading, hard surfacing, bridges and culverts therefor shall be constructed by the state of Missouri." This is known and referred to as the Centennial Law. It was further provided in said section that in Knox County the road was to be "through Baring".

The case of State ex rel. Reynolds County vs. State Highway Commission, 328 Mo. 859, 42 S.W. (2d) 193, was an original proceeding in mandamus in which Reynolds County, as relator, sought to compel the State Highway Commission, as respondent, to refund moneys expended by said county in the construction of certain road and bridge projects therein.

It is pointed out in said case that prior to the adoption of the Centennial Law state road work was done under the Hawes Law and construction continued under the Morgan-McCullough Law (l. c. 194).

After the passage of the Centennial Law the Commission took over and maintained various roads and birdges pending final location. However, as stated by the court (l. c. 195):

"This does not tend to show that these projects have been permanently taken into the state highway system. It does tend to show that they have been temporarily taken over and maintained pending the completion of the state highway system."

We assume that the portion of the road you refer to as being "that part of old Highway 15 is in a run down condition" is one of the short sections of improved road abandoned after the Commission had determined upon the final location of Highway 15, and which is referred to in the Court's opinion as follows (l. c. 195):

"The Chief Engineer advised the Commission that there are a number of short sections of improved road in the state now being maintained which are not on the designated State Highway System. Short stretches of highways which were built under the McCullough-Morgan Law using Federal Aid are now being maintained by the state even though they are not a part of the State System; proper maintenance of Federal Aid sections of road heretofore built is necessary to secure Federal Aid on other new projects. He declared it is not desirable to have a large number of short sections of road to maintain that are not on the state system.

'The Chief Engineer was therefore instructed to advise the respective counties and districts that the state could not longer maintain such sections of road as it was now maintaining the state roads and if the county or district refused to maintain such roads to the satisfaction of the Government, then and then only would the state formally abandon the section of improved road and refund to the Government the money it has invested in said road.'

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This order referred only to 'short sections of improved road' not located between or connected with 'control points' designated in the Centennial Law. It also does not tend to show that these projects had been taken into the state highway system.

The opinion will not be lengthened by setting forth these minutes, letters, and resolutions. We have examined them and find no word therein tending to show that these projects have been taken into the state highway system. They do tend to show that when the Centennial Law became effective and the commission organized, maps were made of the numerous projects over the state and a policy announced to maintain these projects pending the completion of the system. In furtherance of this policy, it designated and marked these and other projects as part of the system."

And in concluding that the State Highway Commission would not be authorized to refund to the county moneys expended for abandoned roads the Court said (l. c. 196):

"Respondent is not authorized to refund for abandoned projects or parts thereof. It is only authorized to refund for projects or parts thereof taken into the system. Section 8127, R.S. 1929."

Under Section 8115 R.S. Missouri 1929, the State Highway Commission is only empowered and directed to provide for the maintenance of the state highway system in part as follows:

"The construction and maintenance of said highway system and all work incidental thereto shall be under the

August 27, 1938

general supervision and control of the state highway commission, which is hereby authorized, empowered and directed to take whatever steps may be necessary to cause said state highway system to be constructed at the earliest possible time, consistent with good business management and funds available, after this article takes effect, and also to provide for the proper maintenance of said state highway system."

From the foregoing it is the opinion of this Department that the State Highway Commission cannot be compelled to keep up "that part of old Highway 15" which is not a part of the state highway system, and which was abandoned by the Commission pending final location and construction of State Highway 15.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

TAXES - Duty of receiver to pay taxes;
RECEIVERS - Duty to pay taxes.

September 2, 1938

Honorable William E. Stewart
Prosecuting Attorney
Knox County,
Edina, Missouri



Dear Sir:

We have your request of August 31, 1938
for an opinion, which request is in part as follows:

"On August 30, 1938, the Shelby County Northwestern Railway Company was sold at Shelbyville by trustee in receivership. This railway extends into Knox County and Mr M. M. Brees, Collector of this County, and myself were present at the sale in interest of Knox County as to taxes. The road was purchased for \$43,900.00, more than enough to pay expenses and taxes to Knox and Shelby county. It is now necessary for Knox County to file an application for a preference and in discussing this matter with Judge Harry Libby of the Shelby Circuit Court and the attorneys for the trustee the question came up as to taxes for 1939.

"The railway was assessed on June 1st for the 1939 taxes and Judge Libby requested me to write you for an opinion on that. The railway, of course, will be wrecked and sold for junk and will not be in existence in the year 1939. The question is, can Knox and Shelby Counties claim taxes for the year 1939, which assessment has already been made?"

I.

DATE OF TAX LIEN.

The lien for taxes in this state attaches as of June 1st annually. We are enclosing copies of opinions of

this department dated June 19, 1935, to Honorable William H. Tandy, Title Attorney, U. S. Department of Agriculture, written by Mr. Wm. Orr Sawyers, and opinion dated February 14, 1938 written to Honorable A. W. Landis by Mr. Drake Watson.

II.

LIABILITY OF RECEIVER FOR TAXES.

It must be remembered that at common law, the crown possessed the prerogative granting it the privilege of having its debts paid in preference to other creditors. Missouri, among many states, has adopted generally the common law and equity practice of England, which was in force at the time the Anglo-Saxon courts were first established in this country.

Generally, state taxes are entitled to a preference, although the property is in the hands of a receiver. *Windsor vs. Pilgrim Shoe Machinery Co.* (1919) 105 Atl. 397 (R.I.); *Booth vs. State* (1908) 63 S. E. 502 (Ga.).

There is no difference between the state and the Federal rule. Receivers in the Federal court are likewise required to pay state taxes. *Shipe vs. Consumers' Service Company*. 28 Fed. 53; *Bright vs. State of Arkansas*, 249 Fed. 950.

The rule in Missouri is in conformity with the above line of decisions. *Greeley vs. The Provident Savings Bank*. The doctrine of the *Greeley* case, *supra*, is approved in *State ex rel. vs. Trust Company*, 209 Mo. 472, l.c. 490.

It is, therefore, the opinion of this office that it is the duty of the receiver to pay all taxes which have been assessed against the railway company in receivership. This applies to the taxes assessed as of June 1, 1938 and payable in 1939.

III.

PROCEDURE FOR COLLECTION.

Where property subject to taxes is under the control of a court in a receivership proceeding, the ordi-

nary statutory remedies for the enforcement of taxes levied on the property are suspended. It is the duty of a receiver to ask for an order of court to pay the taxes. If they are not paid, it is the duty of the taxing authority to take the initiative and make proper application to the court for the payment of taxes. *Blakistone vs. State*, 83 Atl. 151.

In *Greeley vs. the Provident Savings Bank*, 98 Mo. 458, 1.c. 460, the Supreme Court said:

"The ordinary revenue officers of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the state were paid before the estate was distributed to other creditors and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be reduced to the level of an ordinary debt, and be cut off unless presented to the court for allowance within a given time."

It is, therefore, the opinion of this office that the receiver should pay the taxes upon an order, properly applied for, by the appointing court. If the receiver fails to do this, then the revenue collecting authorities could file a motion in the court of the receiver, asking for an order directing the receiver to pay the taxes.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MOTOR VEHICLES: Motor vehicles shall display to the front and sides of such vehicles white lights. The Commissioner of Motor Vehicles is authorized to determine whether or not lights submitted by manufacturers meet the requirements of the statutes.

September 7, 1938 9/30



Hon. V. H. Steward, Commissioner
Motor Vehicle Department
Jefferson City, Missouri

Dear Mr. Steward:

This will acknowledge your request for an opinion reading as follows:

"Section 7778 of R. S. Missouri 1929 provides that it is the duty of the Commissioner of Motor Vehicles to approve the kind and type of lamps that may be sold within this State by manufacturers.

At the present time we have numerous requests for approval from various manufacturers concerning various types of signal lamps, spot lights or fog lights. Manufacturers are submitting for our approval spot lights which are used in foggy weather, which have amber colored lenses, or other colors than white.

We are familiar with the previous opinion of your office with respect to the requirement of motor vehicles using no other than white lights but such opinion does not cover the precise situation with which we are concerned.

We direct your attention to this Section 7778 regarding dirigible search lights,

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or lights commonly known as spot lights.
This part of the section reads:

'Dirigible search lights, or lights commonly known as spot lights, shall not be used on highways within the limits of municipalities except in emergencies or when headlights are inadequate owing to rain or fog, and then only: PROVIDED, the shaft of condensed light is directed downward below the level of the lamp, and at no time into the eyes of other persons, but such lights may be used at any time on public highways outside of the limits of municipalities: PROVIDED, their light is directed as hereinbefore required. No search light, or spot light, shall be equipped with a bulb stronger than twenty-one (21) candle power; such search lights and spot lights shall be so constructed and mounted that their light and direction can be fully and easily controlled from the driver's seat while the vehicle is in motion. (Laws 1921, 1st Ex. Sess. p. 76)'

May we call your particular attention to the fact that no motor vehicle is permitted to display or project to the front or sides any other than white lights but that with respect to dirigible or spot lights the legislature has made no requirements as to those kind of lights."

From a review of your request for an opinion, it is believed that you are of the opinion that the portion of the statute which you have set forth would permit the use of lights other than white since the legislature has made no requirement as to the kind of light which is to be used in search lights or spot lights. However, a careful consideration of this portion of the statute which you have set forth clearly indicates to us that search lights and spot lights

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are the kind and type of lights which must be operated so that they may "be fully and easily controlled from the driver's seat." Therefore, if a light is mounted on the front of a motor vehicle and directed downward under the head lamp, such light must be controlled from the driver's seat and be white as hereinafter pointed out.

From this observation we are lead to a consideration of the statute as a whole, as it is fundamental in the construction of the statutes that effect must be given to every word, clause, sentence and paragraph. The reason for this rule of construction is at once apparent. Unless such a construction be given to a statute, it would serve to make inoperative other portions of the statute and we can not presume that such was the intention of the legislature. State ex rel Daues 14 S. W. (2nd) 990.

Section 7778 Revised Statutes of Missouri 1929 provides in part:

"For the purpose of revealing its position and direction, a motor vehicle, while on the highway, whether in operation or at rest, during the period from one-half hour after sunset to one-half hour before sunrise, and at all times when fog or other atmospheric conditions render the operation of motor vehicles dangerous on the highway, shall carry lighted signal lamps as herein required; such lamps shall be so constructed, mounted and adjusted as to project the required kind of light so that it shall be plainly visible under normal atmospheric conditions from a distance of at least five hundred feet in the direction projected. Motor vehicles and motortricycles shall display at least two white lights mounted at the front and directed forward, and one red light mounted at the back and directed to the rear.
* * * * *. No vehicle shall

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display or project to the front or sides any other than white light, or such shades as are commonly known and recognized as white, and no vehicle shall display at the back, or project toward the rear, any other than a red light."

A reading of this portion of the statute clearly indicates that it was enacted in view of promoting the safety of persons on the highways. *Blashfield Vol. II p. 858; Berry Vol. II p. 452.* Hence, such a statute should receive a liberal construction in harmony with the purpose underlying the enactment. *Lusk vs. Public Service Commission 210 S. W. 72; State ex rel vs. Becker 233 S. W. 641.*

Your particular attention is directed to the strongly worded inhibition reading as follows, "No vehicle shall display or project to the front or sides any other than white lights, or such shades as are commonly known and recognized as white". Another portion of the same statute reads:

"Head lamps shall be equipped with lamps bulbs of such candle power as is necessary to reveal objects one hundred and fifty (150) feet ahead"

When we consider these portions of the statute together, and we consider them plain without room for construction, it obviously follows that motor vehicles must display at least two white lights or such shades as are commonly recognized as white mounted at the front and be of such intensity as to be visible under normal atmospheric conditions at least five hundred (500) feet in the direction the vehicle is traveling and be able to reveal objects one hundred fifty (150) feet ahead.

A detailed examination of this lengthy statute with respect as to the requirement of the various types of lights does not reveal any portion of the same to limit the application of the use of the white lights or lights of such shades as are commonly known and recognized as white. The only requirement in this respect relates to the intensity of the light projected. Therefore, it follows that searchlights

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or spot lights must be white or of such shades as are commonly known and recognized as white.

If manufacturers are submitting lights to you for approval which are of a color other than white and such lights are commonly known and recognized as being white and meet the requirements of the statute with respect to revealing objects and being visible within the specified distances, then such lights should be approved. On the other hand, if such lights submitted are not white or of such shades as are commonly known and recognized as white, they should be disapproved. In this respect we observe that the legislature, in the same section of the statute, said that:

"The Commissioner shall make, or cause to be made such indoor and road tests as he may deem necessary."

And further:

"In the event he shall find the lenses or device complies with the requirements of this article he shall issue to the applicant a certificate so stating and designate thereon the classification and maximum candle power of bulbs permitted for such lenses or device."

Obviously, these portions of the statute were enacted for the purpose of having the Commissioner of Motor Vehicles determine whether or not lights meet the requirements of the statute. Therefore, as to whether or not a particular color is white or of such shade of white as is commonly known and recognized as being white, is a question of fact just as is the requirement as to the efficiency of lights. Hence, this department can not pass upon questions of fact since it is limited to deciding questions of law. 6 C. J. p. 811, pp 16.

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CONCLUSION

In view of the above, it is the opinion of this department that no motor vehicle shall display or project any less than two white lights mounted at the front and directed forward, nor shall any motor vehicle display or project to the front or sides any other than white lights or such shades as are commonly known and recognized as being white.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:RT

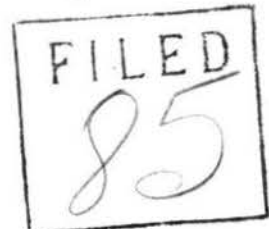
FISH AND GAME DEVICES:
UNCLAIMED FEES TO BE TURNED
INTO COUNTY TREASURER:

One or more ordinary hooks on a line may be used for catching fish provided they are only used as a lure and not for snagging or snaring fish.

October 13, 1938

10-13

Mr. Roy W. Starling
Prosecuting Attorney
Miller County
Eldon, Missouri



Dear Sir:

Under date of May 9, 1938, this department in response to your request dated May 3, 1938, rendered to you an official opinion on the question of whether or not it was a violation of the law to fish with a line with two hooks upon it. The conclusion reached by that opinion was that such was permitted in this state. When that opinion was rendered, the writer had in mind a line used with two or more ordinary hooks and baited for the purpose of luring the fish to such hook and bait.

After this opinion went out, our attention was called to the fact that some were construing this opinion to mean that a line with one or more ordinary hooks on it could be used for the purpose of snaring or snagging fish. In writing that opinion we did not have in mind fishing with a hook or hooks and line in any manner except the ordinary fishing, that is, with bait on such hooks used as a lure to the fish.

In order to clarify this question, we are withdrawing the opinion rendered to you on May 9th and rendering the following opinion in lieu thereof.

The request for that opinion was as follows:

"I am enclosing herewith a copy of a letter which I am writing the Conservation Commissioner with regard to their method of handling game law violation prosecutions in this county, which is probably self-explanatory.

October 13, 1938

"I should like to have an opinion from your department stating whether or not the constitutional amendment under which the State Conservation Commission operates gives that Commission the right to prosecute misdemeanors under the statute without information from the Prosecuting Attorney of the county where the offense was committed and what should be done with the fees which the Agent and the Justice of the Peace collected upon such prosecutions handled without information.

"I should like, further, your opinion, if your answer to the first question is that all prosecutions should be handled by the Prosecuting Attorney, whether a man who fishes with a line and has two ordinary hooks on that line is using a 'device' as defined in the statute."

This request involves three questions: First, whether or not a person can be prosecuted without an information being filed; second, in case fees are collected in a case in which no information is filed, what should be done with those fees; third, whether or not one who fishes with a line which has two ordinary hooks upon it is using such a device as is prohibited by Section 8270, R. S. Mo. 1929.

I.

As to the first question, I find that this office by an opinion written by Mr. William Orr Sawyers, Assistant Attorney General, under date of June 27, 1935, for Mr. G. R. Breidenstein, Prosecuting Attorney of Clark County, Missouri, covered the subject of your inquiry. From this opinion, a justice of the peace in a misdemeanor case has no jurisdiction to impose a fine without an information on file and filed by the Prosecuting Attorney. This is the law and I am enclosing a copy of this opinion for your information.

II.

Upon the question of the fees collected by officers, from your inquiry it appears that cases were disposed of before the justice of the peace in your county without an information having been filed. It further appears that fees were collected by the officers in these cases. Under the holding of the copy of the opinion which we are enclosing, the officers were not authorized to dispose of the charges against the defendants until an information had been filed, and under the general law no fees are due in a criminal case until the case is finally disposed of.

Section 3948, R. S. Mo. 1929, deals with the subject of officers collecting fees and exacting fees before they are due. This section is as follows:

"Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

In the case of State of Missouri v. Vassel, 47 Mo. 416, 417, the court said:

" * * * It is a mistake to suppose extortion consists alone in taking illegal fees, or more fees than are allowed by law. It is an offense to exact them before they are due. A coroner is guilty of extortion who refuses to take the view of a body until his fees are paid; and so 'if an undersheriff obtains his fees by refusing to execute process till they are paid, or takes a bond for his fees before execution is sued out.'
* * * *"

The officers who accepted the fees referred to in your letter are presumed to know the law and that the person from whom they exacted the fees had not been informed against, and that it was unlawful under the provisions of the foregoing section to collect the fees under such circumstances.

Assuming that the fees have been wrongfully collected and have not yet been disposed of, if the parties from whom such fees were exacted cannot be located and the fees returned to them, by virtue of the provisions of Sections 11822, 11823, 11824, 11825, and 11826, R. S. Mo. 1929, such fees should be finally turned into the general revenue fund of the county. Of these sections, Section 11824 provides as follows:

"It shall be the duty of each sheriff, marshal, coroner, clerk of the courts of record, and other officers, on the first day of January and the first day of July in each year, to pay over all fees in their hands belonging to others to the treasurer of the county, with the name and amount belonging to each person, date when collected and in what case, taking from the treasurer duplicate receipts therefor, one of which the officer shall file with the clerk of the county court, who shall immediately charge the treasurer with the same."

From the foregoing, this office is of the opinion that any fees which have been wrongfully collected by any official, that is, in a case in which an information has not been filed, should be returned to those from whom such fees are collected, and if the officers are not able to return such fees, then the same should be turned into the county treasurer as provided by the statutes hereinbefore cited.

III.

On the question of whether a line with two ordinary hooks upon it is one of the fishing "devices" prohibited by statute, we find that Section 8270, R. S. Mo. 1929, provides in part as follows:

"It shall be unlawful for any person or persons to take, catch, or kill, any fish in any of the waters of this state, by means of any trammel net, gill net, fish trap, firearm, rifle or gun or any other kind of net, trap, firearm, device or any other means other than by ordinary hook and line, gig, spear, trot line, artificial bait, or seine, of the kind and at the time, and in the manner permitted by law.
* * * "

This statute refers throughout to fishing articles or devices as in the singular number. Vol. 59 C. J., page 986, Sec. 586, states the rule as follows:

"When necessary to give effect to the legislative intent, words in the plural number will be construed to include the singular, and words importing the singular only will be applied to the plural of persons and things. Even though this rule has been provided for by statute it is to be applied only when necessary to carry out the obvious intent of the legislature."

In the case of Garrett v. Wiltse, 252 Mo. 699, 1. c. 711, the court said:

" * * * Now, even in construing public statutes, the rule is to include the plural in the singular number and vice versa."

Applying the foregoing rules of statutory construction to this statute, we think the law was intended to apply

to the plural as well as to the singular number; therefore, the clause "device or any other means than ordinary hook and line" would mean "device or any other means other than ordinary hook or hooks and line or lines." If this were not the rule, then a person fishing with more than one hook and line would be violating the law, or a person fishing with a throw line with a number of ordinary hooks, or a person jug fishing with a number of ordinary hooks attached to it would be violating the law. Such a construction, we think, would be almost an absurdity and we do not think the lawmakers had such in mind when this statute was enacted.

The rule of construction of such a statute is well stated in 59 C. J., page 957, in the following language:

"Where, however, the language is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court of ascertaining the true meaning. * * *

This question hinges on the word "ordinary" hook and line. We think the lawmakers used the word "ordinary" for the purpose of limiting the type of hook or hooks that may be used on the line. As we understand the word "ordinary" hook, as it applies to hook and line fishing, and as is generally used by fishermen, it is the hook with one prong on it to which various types of bait, namely, worms, dough, minnows, etc., are attached for the purpose of luring the fish. It does not include a hook or a number of such hooks fastened together or separately on a line and used without bait for the purpose of snagging or snaring fish. If such hook or hooks are so fastened together or separately attached to a line that they are used for the purpose of snagging or snaring the fish instead of luring them, then such tackle would be within the class "device or any other means" which is prohibited by said Section 8270, supra.

Mr. Roy W. Starling

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October 13, 1938

CONCLUSION

It is, therefore, the opinion of this department that one may fish with one or more ordinary hooks attached to a line so long as such hook or hooks have only one prong and are not fastened together and are baited for the purpose of luring the fish to them, but that such hook or hooks attached together or separately and fastened to an ordinary line may not be used for the purpose of snagging or snaring fish or in any other manner of catching them than by luring them to such hook or hooks.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

MOTOR VEHICLES: If reconditioned motor is placed in car with identification number on frame the symbol 'RC' should be placed before number on frame

November 18, 1938

Honorable V. H. Steward
Commissioner of Motor Vehicles
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of October 26, 1938, requesting an opinion from this department, which reads as follows:

"For a number of years the Ford Motor Company, Detroit, Michigan, has been placing the manufacturer's number of the motor vehicle on the frame of such motor vehicle rather than placing the motor vehicle number on the motor block as is customary by other motor vehicle manufacturers.

"It has been the practice of Montgomery Ward and Company, Sears Roebuck and Company, and other large merchandise companies to buy up in large quantities old Ford V-8 motors which have no numbers stamped upon them for reconditioning purposes, and thereafter sell such motors to the general public. It has been our practice to issue or assign to the owner, a number for such motor which practice we are in doubt is the proper way to handle this matter. This business has become so large in its scope that we are desirous of knowing whether this is

the proper procedure to follow in view of Section 7781, R. S. Mo. 1929, and Section 7781a, Laws of Missouri, 1935, at page 299. If not, then what procedure should we follow in this connection."

Paragraph (b) of Section 7781, R. S. Mo. 1929, reads as follows:

"No person shall sell, or offer for sale, or shall own or have the custody or possession of a motor vehicle, trailer or motor vehicle tire on which the original or manufacturer's number or other distinguishing number has been destroyed, removed, covered, altered or defaced, and no person shall sell, offer for sale, own or have the custody or possession of a motor vehicle or trailer having no manufacturer's number or other original number, or distinguishing number: Provided, however, that any person being the owner or custodian of, or having possession of a motor vehicle, trailer or motor vehicle tire at the time of taking effect of this article, the original number of which has been previously destroyed, removed, covered, altered or defaced, shall, within thirty (30) days after the taking effect of this article, apply to the commissioner, on a blank to be prepared and furnished by said commissioner, for permission to make or stamp, or cause to be made or stamped on such motor vehicle, trailer or motor vehicle

tire, a special number; the application for such permission shall contain a description of the motor vehicle, trailer or motor vehicle tire, the name and address of the applicant, the date on which he acquired the property or the possession thereof, and the name and address of the person from whom he acquired it and such other information as may be required by the commissioner."

Paragraph (c) of Section 7774, R. S. Mo. 1929, reads, in part, as follows ;

"Certificate of ownership: No certificate of registration of any motor vehicle or trailer, or number plate therefor, shall be issued by the commissioner unless the applicant therefor shall make application for and be granted a certificate of ownership of such motor vehicle or trailer, or shall present satisfactory evidence that such certificate has been previously issued to the applicant for such motor vehicle or trailer.

Application shall be made upon a blank form furnished by the commissioner and shall contain a full description of the motor vehicle or trailer, manufacturer's or other identifying number, together with a statement of the applicant's source of title and of any liens or encumbrances on the motor vehicle or trailer. The commissioner shall use reasonable

diligence in ascertaining whether the facts stated in such application are true, and, if satisfied that the applicant is the lawful owner of such motor vehicle or trailer, or otherwise entitled to have the same registered in his name, shall thereupon issue an appropriate certificate over his signature and sealed with the seal of his office, procured and used for such purpose. The certificate shall contain a description, manufacturer's or other identifying number, and other evidences of identification of the motor vehicle or trailer, as the commissioner may deem necessary, together with a statement of any liens or encumbrances which the application may show to be thereon. * * * "

It will be seen from a reading of the above statutes, noting especially the underlined parts, that the owner of a motor vehicle is required only to have a number on the motor vehicle, and nowhere is it required that the identification number must be upon the motor. The purpose of having an identification number of motor cars is to enable the owner thereof to identify his car, to discourage the theft of automobiles by making identification easy and provide a means of regulation to the State Department having control of the licensing of automobiles.

Section 7781a, Session Laws 1935, page 298, 299, reads, in part, as follows:

"Nothing in this article shall be construed to prohibit the owner of a certificate of title to a motor vehicle issued by the Secretary of State of Missouri from removing the

motor or engine from such motor vehicle and replacing same by a reconditioned motor or engine of the same make or manufacture, and giving such replaced motor or engine the same number as the removed motor or engine bore on having same installed.

"Such owner shall joint with the person removing said motor or engine and replacing the motor or engine in said vehicle in an affidavit, which affidavit shall show the number of the engine or motor removed from said motor vehicle covered by said certificate of title, the date of such removal and the reason for such removal, and shall give a description of the motor or engine replaced in said motor vehicle, which replaced engine or motor shall bear the same number as the motor or engine removed, but shall be preceded by the symbol 'RC'.
* * * * "

The evident purpose of the section quoted above is to protect the car-buying public by providing that every reconditioned motor placed in a vehicle should be marked with the identifying symbol of 'RC.' The presence of this symbol discloses to any prospective purchaser the true condition of the car, that is, that the engine is not the original engine but is one that has been reconditioned and placed in the original chassis. As stated in your request, the identification number on a Ford car is on the frame rather than on the motor. Therefore, under a strict construction of Section 7781a, supra, since the original engine or motor does not have a number, there is nothing to which the symbol 'RC' may be attached. However, in a construction of statutes, the rule, as stated by Judge Lamm in Rutter v.

Carothers, 122 S. W. 1056, 223 Mo. 631, 1. c. 642, is

"but the application of the divine injunction that the letter killeth while the spirit maketh alive. Accordingly, from the Year Books to this Year of Grace, those are recognized canons of construction which ordain that the naked letter of the law must gently and a little give way to its obvious intendment; that those who interpret the laws must not impute injustice to the lawmaker by so interpreting his language as to unnecessarily produce harsh and unreasonable results, or impute to him a disposition callous to natural justice."

In the Magdalen College Case, 11 Coke 71, Lord Coke laid down the rule as follows:

"It is well settled that laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police power, and, in the interpretation of such remedial statutes, the office of the judges, it has been said, is to make such a construction as will suppress the mischief and advance the remedy, and to defeat all evasions for the continuance of the mischief."

Since the intent and purpose of the Legislature was to place a symbol preceding the identification number so as to show the true condition of the motor, then, if such identification number is upon the

Honorable V. H. Steward

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November 18, 1938

frame, that is the number that should be placed upon the reconditioned engine with the symbol "RC" preceding it.

This interpretation is in line with the cases quoted above which state that the intent of the Legislature must be given effect and that the statutes which promote the protection and safety of the public must be construed liberally.

CONCLUSION

It is, therefore, the opinion of this department that when a reconditioned motor of a type of car which has the identification number on the frame rather than on the motor, is placed in a car, then the reconditioned motor should bear the identification number that is on the frame but preceded by the symbol "RC".

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K LC

OFFICERS: The probate judge of a county under 200,000 population may be city clerk of a city under 200,000 population at the same time.

December 9, 1938

Honorable William E. Stewart
Prosecuting Attorney
Knox County
Edina, Missouri



Dear Sir:

We have your letter of December 7, 1938, which reads as follows:

"Charles E. Normile was elected Probate Judge of Knox County at the last general election and will qualify for that office the 1st of January. Normile now is and has been for several years City Clerk, appointed to that position by the Board of Aldermen of the City of Edina. At the regular meeting of the board last Monday night Normile informed the board that he did not intend to resign and would hold the office of City Clerk and also the office of Probate Judge. They have requested me to write for an opinion on the matter and know if it is legal for Normile to hold both offices at the same time. I would appreciate it if you would give me your opinion before the first of the year."

According to the Federal Census of 1930, Knox County had a population of 9,658. The population of the city of Edina is 1,532, which designates the city as a city of the fourth class.

The holding of two offices such as city clerk and probate judge is not expressly forbidden in counties and cities under 200,000 population, as set out in Section 18, Article IX, of the Constitution of Missouri, which reads as follows:

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

In the case of Nickelson v. City of Hardin, 221 S. W. 358, 1. c. 360, the court said:

"This court once stated (State ex rel. v. Watson, 71 Mo. loc. cit. 473) that it had 'grave doubts' of the correctness of the construction which we are now asked to put on section 18 of article 9.

"The question is not free from difficulty, but we are of opinion that the proper construction of the section is that it applies only in counties and cities having more than 200,000 inhabitants. This disposes of the only question presented by the briefs."

In this case the court held that the city marshal and the township constable performed duties that were not incompatible, inconsistent or subordinate to each other. In the case of a marshal and constable a situation is more likely to occur where their duties may conflict, but the court held that their duties were not incompatible.

There is no question but that both a city clerk and a probate judge are public officers even though one acts in a judicial capacity and the other in a ministerial capacity. The rule in determining if one is a public officer is set out in *Hasting v. Jasper County*, 232 S. W. 700, 1. c. 701, where the court said:

"The individual who is invested with the authority and is required to perform the

duties is a public officer. The authorities all agree, substantially, that, if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer. State ex rel. Hamilton v. Kansas City, 259 S. W. 1045, 303 Mo. 50, loc. cit. 67; Gracey v. St. Louis, 111 S. W. 1159, 213 Mo. 384, loc. cit. 394; State ex rel. Walker v. Bus, 36 S. W. 636, 135 Mo. 325, loc. cit. 331, 33 L. R. A. 616."

Since the holding of the office of probate judge and the office of city clerk of Edina, Missouri, is not prohibited by Article IX, Section 18, of the Constitution of Missouri, one must refer back to the common law to ascertain if the duties of the office of the city clerk of Edina and those of the judge of the probate court are incompatible, conflicting or inconsistent. In reference to this matter, 46 C. J., pp. 941, 942, Sec. 46, states as follows:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

In the case of State ex rel. Walker, Attorney General v. Bus, 135 Mo. 325, 1. c. 338, the court said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

Section 6093, R. S. Mo. 1929, reads as follows:

"All cities and towns in this state containing five hundred and less than three thousand inhabitants, and all towns existing under any special law, and having less than five hundred inhabitants, which shall elect to be cities of the fourth class, shall be cities of the fourth class."

Since the population of Edina, according to the last Federal Census of 1930, is only 1,532, it should be classed as a city of the fourth class. In cities of the fourth class, Section 6968, R. S. Mo. 1929, sets out the method of the election of the city clerk and prescribes his duties as follows:

"The board of aldermen shall elect a clerk for such board, to be known as the city clerk, whose duties and term of office shall be fixed by ordinance. Among other things, the city clerk shall keep a journal of the proceedings of the board of aldermen. He shall safely and properly keep all the records and papers belonging to the city which may be entrusted to his care; he shall be the general accountant of the city; he is hereby empowered to administer official oaths and oaths to persons certifying to demands or claims against the city."

In setting out the duties of the probate judge, Sections 2046 and 2058, R. S. Mo. 1929, read as follows:

"Sec. 2046. - Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or

leasing of lands by administrators, curators and guardians, and over all matters relating to apprentices; and such judges shall have the power to solemnize marriages."

"Sec. 2058. - Probate courts, in the exercise of their jurisdiction, shall be governed by the statutes in relation to administration, to guardians and curators of minors and persons of unsound mind, to apprentices, and such laws as may be enacted defining and limiting the practice in said courts."

In reading the duties of the city clerk and the duties of the probate judge as above set out, it can be readily seen that the duties do not conflict and are not incompatible or inconsistent, and either is not a subordinate of the other.

CONCLUSION

In view of the above authorities, it is the opinion of this department that Charles E. Normile can hold the office of Probate Judge of Knox County and also can hold the office of City Clerk of the City of Edina at the same time, although there are some authorities which by innuendo and dictum claim that it is against public policy.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

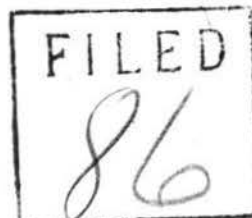
J. E. TAYLOR
(Acting) Attorney General

WJB:HR

STATE HIGHWAY PATROL: Workmen employed on construction of
radio patrol stations cannot be paid as em-
ployees of the patrol.

January 6, 1938

Hon. Louis V. Stigall, Chief Counsel
Missouri State Highway Department
Jefferson City, Missouri



Dear Mr. Stigall:

This will acknowledge receipt of your letter of
December 15, 1937, which reads as follows:

"At the request of the State
Highway Commission and the Superin-
tendent of the State Highway Patrol,
I am writing to request your advice
concerning the following matter.

"It involves the State Highway Patrol
Appropriation Act, pages 11 and 12,
1937 Session Laws. Item A covers
'Salaries and per diem of the super-
intendent, captains, members of the
patrol, radio engineers and operators,
and other necessary employees.'
(Underscoring ours). Item B. covers
'purchase of property, building material
and equipment, radio transmitting, re-
ceiving and testing equipment, and the
installation thereof.'

"After the estimates, upon which the
appropriation bill was based, were
made and after the bill was enacted,
it was ascertained that there were in-
sufficient funds under Item B to pay
for the land and buildings for six
patrol radio stations. This is due to
an unexpected increase in the cost of
the land and also the cost of the
buildings. However, the Superintendent
now finds that he will have a surplus
in the funds provided for in Item A.

"It is, therefore, the desire of Col. Casteel and the Commission, in order to utilize this Item A surplus and in order to construct the stations as originally contemplated, to employ workmen to work upon these buildings and to pay their wages out of the Item A appropriation. It is our feeling that this can be legally done so long as such workmen are legally employees of the patrol. It was our thought to insert in the contracts for the construction of these stations a special provision permitting the Commission and the Superintendent in their discretion to designate certain workmen of the contractor as Patrol employees from time to time and to pay directly to such employees their wages out of the Item A appropriation. Any such payments, of course, so made would be deducted from the lump sum payment to the contractor under the contract.

"In view of the fact that it now appears that these radio stations cannot be fully constructed unless this plan is resorted to, we will indeed appreciate your earnest consideration of this matter, and particularly of our suggestion as to the method in which we feel it might possibly be legally effected."

The powers and duties of the State Highway Patrol are set forth in the act creating the Patrol, found at pages 230-236, Laws of 1931. It will be observed from reading this act that the Patrol is not empowered to provide its own quarters nor to employ any persons other than the members of the Patrol. Section 19 of said act as amended, Laws of 1933, page 409, provides as follows:

"The commission of permanent seat of government shall provide suitable offices which shall at all times be open and in charge of the superintendent or some member of the patrol designated by him. The state highway commission shall employ and assign to the superintendent such clerical force and other subordinates and shall furnish to the patrol office equipment, stationery, postage supplies, telegraph and telephone facilities as the commission shall deem necessary and the commission shall also provide offices, equipment, stationery, postage and clerical force for the headquarters of each district of the patrol. The state radio station shall be under the control of and at the service of the superintendent for such regular and emergency bulletins and service as the superintendent may require from time to time."

It will be seen from the foregoing statute that the employees which the State Highway Commission shall assign to the Superintendent of the Patrol are "such clerical force and other subordinates as the commission shall deem necessary". It is axiomatic that in construing statutes words are to be taken in their plain and ordinary meaning. As was said in the case of *Betz v. K.C.S. Railway Co.*, 314 Mo. 390, 1.e. 411:

"And in 36 Cyc. 1114, it is furthermore said: 'In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. It is a very well-settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the court to give it force and effect.'"

Likewise, when the language of a statute is clear, there is no room for construction. As was said in *Betz v. K.C.S. Railway Co.*, supra, at l.c. 411:

"Ragland, J., speaking for this court, in banc, in *Grier v. Railway Co.*, 286 Mo. l.c. 534, reviewing the selfsame statute, recognized the well-settled rule when he said: 'The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used. All other rules are incidental and mere aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no office to fill. In such case there is no room for construction.' And, in *Clark v. Railroad Co.*, 219 Mo. l.c. 534, Lamm, P.J., speaking for this division of our court, aptly and pointedly said: 'Courts have no right, by construction, to substitute their ideas of legislative intent for that unmistakably held by the Legislature and unmistakably expressed in legislative words. Expressum facit cessare tacitum. We must not interpret where there is no need of it. (*McCluskey v. Cromwell*, 11 N.Y. l.c. 601-2).'"

By following these rules of giving words their plain and ordinary meaning and of getting the intention of the legislature from the clear wording of the statute, we are driven to the conclusion that the employees to be assigned for the use of the Superintendent of the Patrol are such employees as will assist that force in carrying out the duties imposed upon it by law. The Patrol has no duty or power to build radio Patrol station buildings. The word "clerical" is defined in Webster's New International Dictionary as follows: "of or pertaining to a clerk or copyist"; and by the same authority, "clerk" is defined as "one employed to keep records or accounts, to have charge of correspondence, or the like, with or without

administrative, executive or other authority." The same authority defines "subordinate" as "one who stands in order or rank below another". To classify workmen employed upon buildings being erected by the State Highway Commission for the use of the Patrol as part of a "clerical force or other subordinate" would be to give to the statute an entirely different meaning from that the legislature clearly had in mind.

If we are right in our conclusion as to what employees the legislature had in mind by "clerical force and other subordinates" to be assigned to the Patrol, then we must assume that the legislature had the same employees in mind when it drafted Section 1, page 11, Laws of 1937, of the appropriation act for the expenses of the Patrol. Said section provides in part as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the State Highway Department Fund, the sum of Nine Hundred Ninety-seven Thousand One Hundred Sixty Dollars (\$997,160.00) to pay the salaries and per diem of the State Highway Patrol, its officers and employees, and for the purchase, replacement and repair of property, equipment and supplies, and for the administration and operating expenses of the State Highway Patrol, as follows:

A. Personal Service

Salaries and per diem of the Superintendent, captains, members of the patrol, radio engineers and operators, and other necessary employees. . . . \$509,810.00

B. Additions:

Purchase of property, building material and equipment, radio transmitting, receiving and testing equipment, and the installation thereof. . 127,500.00."

Appropriation acts are to be construed by the same rules as other legislation. The rule has been stated in 59 C.J., para. 401, pages 262, 263, as follows:

"An appropriation law is to be construed under and by the same rules as other legislation. Where the intention of the legislature is plain and obvious, there is no room for judicial construction of an appropriation. They are to be construed without liberality towards those who claim their benefits; but are not to be construed so strictly as to defeat their manifest objects. The language is to be presumed to have been used in its natural and ordinary meaning, and not to be given a forced and unnatural construction."

If we give to the wordings, "its officers and employees" and "other necessary employees", found in the foregoing appropriation act, their plain and ordinary meaning, we must conclude that they mean the employees are those who shall assist the Patrol in carrying out its duties. Since the Patrol has no power, much less duty, to construct radio Patrol station buildings, we do not see how workmen employed in constructing such buildings could be paid out of Item A of the appropriation act, supra.

We think the foregoing conclusion is further strengthened by reference to Article X, Section 19, Constitution of Missouri, which provides, among other things, as follows:

"and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object."

January 6, 1938

Since the appropriation act under consideration has followed the foregoing constitutional mandate by distinctly specifying the objects for which Item A is to be expended and by distinctly specifying that the fund provided for in Item B may be expended to pay wages of workmen you inquired about, we do not believe any reasonable construction of this act could justify charging the wages of workmen employed as you suggest in your letter to Item A of the appropriation act.

CONCLUSION

It is, therefore, the opinion of this office that the wages of workmen employed in the construction of buildings for State Highway Patrol radio stations cannot be paid out of Item A of the State Highway Patrol appropriation act, pages 11-12, Laws of 1937.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED by:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

HIGHWAY PATROL:

Section 20 of the State Highway Patrol Act, page 235, Session Laws of 1931, does not authorize maintenance of patrol out of money appropriated to state highway ~~patrol~~ department. Article 4, Section 44a of the Constitution limits appropriation to enforcement of motor vehicle law and traffic violation.

March 14, 1938

Mr. Louis V. Stigall,
Chief Counsel
Missouri State Highway Department,
Jefferson City, Missouri.

Dear Sir:

This is to acknowledge receipt of your request dated March 9, 1938, for an official opinion which is as follows:

"I am informed by the members of the Highway Commission that they have taken up with you orally the question of the legality of paying the clerical force of the State Highway Patrol out of state highway funds appropriated by the Legislature to the State Highway Department. I have been asked to frame the inquiry in proper shape in order that it may be made as a written request of the State Highway Department.

Section 20 of the so-called State Highway Patrol Act is as follows:

'All salaries and expenses to be paid, when.
- All salaries and expenses of members of the patrol and all expenditures for vehicles, equipment, arms, ammunition, supplies and salaries of subordinates and clerical force and all other expenditures for the operation and maintenance of the patrol shall be paid monthly and shall be paid by the state treasurer out of the proceeds of state motor vehicle fees and license taxes and state taxes on the sale or use of motor vehicle fuels as provided in section 44a of article IV of the Constitution of this state as amended by a vote of the people at the general election November 6, 1928, upon warrants drawn by the state auditor based upon bills of particular and vouchers certified by the officer or employee designated

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by the Commission.' Laws of Missouri, 1931, page 235.

The appropriation act of 1937 Legislature appropriated out of the state highway funds arising out of motor vehicle fees and license taxes, the sum of \$997, 160 'to pay the salaries and per diem of the State Highway Patrol, its officers and employees, and for the purchase, replacement and repair of property, equipment and supplies, and for the administration and operating expenses of the State Highway Patrol.' Laws of Missouri, 1937, p. 11.

The 1937 Legislature appropriated also \$1,828, 290 'to maintain the salaries, wages and per diem of the State Highway Commission and the State Highway Department, the commissioners, officers and employees, for the purchase, repair and replacement, of property and equipment, and for the general administration and operating expenses of the State Highway Commission and the State Highway Department.' Laws of Missouri, 1937, p. 12. There was also \$30,000,000 appropriated for location, relocation, construction and maintenance of highways, and an additional \$125,000 for an emergency revolving fund to be expended for no other purposes except those set out in the sections appropriating the two amounts above stated.

The question propounded by the Highway Commission is as follows:

Does Section 20 of the State Patrol Act empower the Commission to pay clerks in the State Highway Patrol out of moneys appropriated to the State Highway Department by the 1937 Legislature as hereinabove set out; or is the payment of such salaries to be paid only out of the \$997,160 appropriated by such Legislature out of State Highway Funds directly to the Patrol?

The State Highway Commission is to have a meeting March 18. If your office shall have determined the matter prior to that time, the Commission

March 14, 1938

would appreciate the courtesy of your opinion, although it does not desire to interfere unduly with the other demands of your office.

Most Respectfully yours,

LOUIS V. STIGALL,
Chief Counsel.

P.S. Both where clerical appropriation to Patrol has been exhausted and where such funds still remain in the patrol.

L.S."

Article IV, Section 44a of the Constitution of Missouri which provides for a state highway system, after authorizing the state through the state legislature to issue bonds not to exceed one hundred thirty five million dollars (\$135,000,000) and not to exceed issuance of more than twenty five million dollars (\$25,000,000) in any year, further provides:

"* * * The said bonds and the interest that will accrue thereon shall be paid out of a fund to be provided by the levy and collection of a direct annual tax upon all taxable property in the State. All state motor vehicle registration fees, license taxes or taxes authorized by law on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation shall, after the issuance of any of said bonds and so long as any of said bonds herein authorized remain unpaid, be and stand appropriated without legislative action, to the payment of the principal and interest of the said bonds and for

that purpose shall be credited to the State Road Bond Interest and Sinking Fund provided by law. If in any year there should be any balance in the State Road Bond Interest and Sinking Fund beyond the requirements of the next succeeding calendar year for interest and sinking fund of the said bonds, such balance shall be transferred and credited to the State Road Fund to be administered and expended under the direction and supervision of the State Highway Commission for the following purposes:"* * * * *

Section 20 of the State Highway Patrol Act, page 236, Session Laws of Missouri, 1931, provides as follows:

"All salaries and expenses of members of the patrol and all expenditures for vehicles, equipment, arms, ammunition, supplies and salaries of subordinates and clerical force and all other expenditures for the operation and maintenance of the patrol shall be paid monthly and shall be paid by the state treasurer out of the proceeds of state motor vehicle fees and license taxes and state taxes on the sale or use of motor vehicle fuels as provided in section 44a of article IV of the Constitution of this state as amended by a vote of the people at the general election November 6, 1928 upon warrants drawn by the state auditor based upon bills of particular and vouchers certified by the officer or employee designated by the commission."

By this Act it was the intention of the legislature that the State Highway Patrol be paid out of the state highway fund as created by Article IV, Section 44a of the Constitution of Missouri and not out of the general fund. The legislature, in passing this Section 20, relied on the constitutionality of the Act by the powers and limitations granted in Article IV, Section 44a, wherein it empowered the use of the tax collected in accordance with the article on the phrase "* * less the cost of maintaining the state highway department and state highway commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation."

Constitutional provisions and especially constitutional limitations must be construed as to the intention. This Constitutional provision and limitation was set out under the amendment of the Constitution in reference to the building and maintaining of highways. The phrase as above set out which mentions enforcing any state motor vehicle law or traffic regulation was for the purpose of insuring safety upon the highways which would be constructed in accordance with the constitutional provisions of Section 44a of Article IV. This section of the Constitution provides primarily for the payment of the road bonds and interest on same as collected under the highway system provision of the constitution. The money used in maintenance of the highway commission is derived from motor vehicle registration fees, state license taxes and state tax on motor vehicle fuels, less certain expenses in the collection thereof and among which is the cost of enforcing motor vehicle laws and traffic violations.

Article 10, Section 19 of the Constitution of Missouri provides:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Under Article IV, Section 43 of the Constitution, no money can be diverted from the state treasury except by regular appropriation made by law. In the case of State ex rel. Jesse A. Tolertao, State Game and Fish Commissioner v. John P. Gordon, State Auditor, 236 Mo. 142, 1. c. 157, paragraph 1, the Court held:

"It is contended by relator that: 'Article II of Chapter 49, Revised Statutes 1909, contains the law of this State in reference to the preservation of fish and game, specifies the salary of the game warden, and provides that it shall be paid out of the game protection fund by warrant drawn by the State Auditor on said fund in the hands of the State Treasurer. When the above act became effective, August 16, 1909, it required no further appropriation by the Legislature, or any other body, to pay the salary and expenses incurred by the State Game and Fish Commissioner.'

In support of the foregoing proposition relator maintains that the provisions of the game law referred to constitute a continuing appropriation, under which respondent was authorized and it was his duty to issue warrants for such salary and expenses as were properly chargeable to the game protection fund, without any further appropriation for that purpose by the General Assembly as made in section 62 of said House Bill No. 1200.

We cannot agree to that contention. It is provided by section 43, article 4 of the Constitution of this State that: 'All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit any money to be drawn from the treasury, except in pursuance of regular appropriations made by law.' And by section 19, article 10, that: 'No moneys shall ever be paid out of the treasury of this State, or of any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify

the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such sum or object." * * *

In the case of State ex rel. St. Joseph Water Company v. Jacob Geiger et al. Constituting Board of Managers of State Hospital Number 2, 246 Mo. 74, l.c. 92, the Court held the following Article X, Section 19 and Article IV, Section 43 of the Constitution of Missouri holds that no money shall be paid out of the treasury of the state on any warrant issued by the state auditor unless in pursuance of an appropriation by law.

In the case of State ex rel. Russell et al. v. State Highway Commission, 42 S.W. (2d) 196, l.c. 203, the Court said in paragraphs 9 and 10 of its opinion, as follows:

"We cannot tell all that was in the minds of those who drew the amendment or of the voters who voted for it. We do not say any of the things we have suggested, were. But we are controlled by what the amendment says, so far as its recitals are consistent and intelligible, and it is our duty to give effect to every part if possible." * * * * *

Article IV, Section 44a of the Constitution of Missouri provides for a continuing appropriation under the Act but excepts the clause under which the State Patrol Act is functioning from the continuing appropriation. The continuing appropriation is for the payment of bonds and interest thereon issued in the amount of one hundred thirty five million dollars (\$135,000,000).

In the case of State ex rel. Kessler et al. v. Hackmann, State Auditor, 264 S.W. 367, paragraph 1, the Court said:

"* * * Relators cite the case of State ex rel. v. Wilder, 199 Mo. 470, 97 S.W. 940, where this court had under consideration funds of the insurance department, to show that the money in the insurance department was not public money in a sense that it was subject to be appropriated for any general purpose. That was a mandamus proceeding seeking to compel the state auditor to issue a warrant in payment of an account incurred by the insurance department. In that case, however, there was an appropriation by act of the Legislature.

On the other hand, this court has held that a fund, raised by an act for a special purpose, could not be paid out of the state treasury except upon an appropriation by an act of the Legislature. State ex rel. Fath et al. v. Henderson, 160 Mo. 190, loc. cit. 214, 60 S.W. 1093; State ex rel. v. Gordon, 236 Mo. 142, loc. cit. 158, 139 S.W. 403. In the case last cited the court had under consideration a fund for the support and maintenance of the game department. It was held that the creation of a special fund is not a continuing appropriation of the fund, or of any part of it, to pay accounts drawn against it. That the creation of the fund is one thing, and the appropriation of money to pay accounts against the fund is quite another thing. The language of the Constitution is unequivocal; it requires an appropriation before payment of money received by the state 'from any source whatsoever.' The money collected by the board is received by the state; it goes into the state treasury. To make it more specific, the requirement that an appropriation by the Legislature will be necessary before money can be paid out of the treasury of the state, it is applied, not only to state funds, but to 'any of the funds under its management.'

The appropriation set out at page 11, Section 1, Session Laws of 1937, appropriating money for the State Highway Patrol for the years of 1937 and 1938 reads as follows:

"Highway Patrol.--There is hereby appropriated out of the State Treasury, chargeable to the State Highway Department Fund, the sum of Nine Hundred Ninety-seven Thousand One Hundred Sixty Dollars (\$997,160.00) to pay the salaries and per diem of the State Highway Patrol, its officers and employees, and for the purchase, replacement and repair of property, equipment and supplies, and for the administration and operating expenses of the

State Highway Patrol, as follows:"

* * * * *

It appropriates nine hundred ninety-seven thousand one hundred sixty dollars (\$997,160.00) for the maintenance of the Highway Patrol. This appropriation act includes most of the items set out in Section 20, page 236 of the Highway Patrol Act of the 1931 Session Laws.

The appropriation act set out at page 12, Section 1, Session Laws of 1937, appropriating money for the administration of the Highway Commission and Highway Department for the years of 1937 and 1938 reads as follows:

"Administration Expenses, Additions and Operation.--There is hereby appropriated out of the State Treasury, chargeable to the State Highway Department Fund, the sum of One Million, Eight Hundred Twenty-Eight Thousand, Two Hundred Ninety Dollars (\$1,828,290.00) to pay the salaries, wages and per diem of the state highway commission and the state highway department, the commissioners, officers and employees, for the purchase, repair and replacement of property and equipment, and for the general administration and operating expenses of the state highway commission and the state highway department, as follows:" * * * * *

Nothing is said in this appropriation about appropriating anything in this act for the use of the State Highway Patrol. It appropriated one million, eight hundred twenty-eight thousand, two hundred ninety dollars (\$1,828,290.00) for the department. Any warrant drawn on the State Highway Appropriation Act by the state auditor and accepted by the state treasurer in favor of the State Highway Patrol would be null and void; that this appropriation act does not include maintenance for the State Highway Patrol, but appropriates for a different purpose. In the case of State ex rel. McKinley Pub. Co. v. Hackmann, State Auditor, 282 S.W. 1007, the plaintiff sought to mandamus the state auditor to compel him to pay a printing account entered into by contract with the State Highway Commission. The appropriation act of that year did not include printing, and the court in denying the peremptory writ said in paragraphs 10 and 11 of its opinion:

"It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid. And since under the provisions of section 19, article 10, of the Constitution,

no money may be paid out of the state treasury, except in pursuance of an appropriation by law, the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid pursuant to an appropriation act, where it is paid out of money specifically appropriated for a different purpose."

Since the legislature has passed a separate appropriation act appropriating money direct to the State Highway Patrol, it should be read in connection with Section 20 of the State Highway Patrol Act of the Session Laws of 1931 to ascertain the intention of the legislature in passing Section 20 of the State Highway Patrol Act of the Session Laws of 1931. If it was the intention of the legislature that the State Highway Patrol participated in the appropriation made to the Highway Commission and Highway Department, it would not have been necessary to pass a separate appropriation for the benefit of the State Highway Patrol. As to the intention of the legislature, 59 Corpus Juris, page 961, paragraph 571 states:

"In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used. A statute will not be construed to permit an act to be done by in-direction when the statute prohibits its being done directly."

March 14, 1938

CONCLUSION

In view of the above authorities, will say that it is the opinion of this office that Section 20 of the State Highway Patrol Act of the Session Laws of 1931, does not empower the State Highway Commission to pay clerks in the State Highway Patrol out of moneys appropriated to the State Highway Department and State Highway Commission by the 1937 Commission. The appropriation to the State Highway Department and State Highway Commission does not set out specifically that the State Highway Patrol should participate in that particular appropriation.

Taking into consideration that the state legislature saw fit to make a separate appropriation to the State Highway Patrol the expenses of the State Highway Patrol can only be paid by warrants drawn by the state auditor upon the state Highway Patrol appropriation. If the funds to the appropriation to the State Highway Patrol become exhausted, it would be illegal for the state auditor to draw warrants upon the appropriation to the State Highway Department for the payment of the maintenance of the State Highway Patrol.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

CLERK OF THE HANNIBAL COURT OF COMMON PLEAS:

Is entitled to added compensation as Clerk of the Juvenile Division, and such compensation should be based upon the population of Marion County

April 14, 1938

Mr. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Mr. Stillwell:

This will acknowledge receipt of your request for an opinion from this Department under date of March 31, 1938, where, in your letter, you state as follows:

"Question has arisen as to the right of the Clerk of the Hannibal Court of Common Pleas to claim added compensation for the duties performed by him as Clerk of the Juvenile Division of the Hannibal Court of Common Pleas. The provision for added compensation for such duties performed by Clerks of Circuit Courts is found in Section 11814a, Laws of Missouri, 1937, page 447. Section 14563 R. S. Mo., 1929, provides that the Clerk of the Hannibal Court of Common Pleas shall be paid an annual salary of Two Thousand Dollars (\$2,000.00). Section 656 provides that in certain instances the term 'Circuit Court' when used in any law general to the whole state, shall be construed to include Courts of Common Pleas. My Question is:

"1. Is the Clerk of the Hannibal

Court of Common Pleas entitled to the added compensation for the Juvenile duties?

"2. If this be answered in the affirmative should this salary be based upon the population of Mason and Miller Townships which comprise the territory over which this court has jurisdiction, or the County as a whole?"

Answering the above two questions, in order, we say as follows:

I

Approaching your questions we will say at the outset it seems reasonably clear that the Hannibal Court of Common Pleas being a court having general jurisdiction, within its territorial limits, in all civil and criminal actions to the same extent as are exercised by the circuit courts of the State, such courts of common pleas have jurisdiction of cases concerning the treatment and correction of delinquent minors as provided for in Article IX, Chapter 12, Revised Statutes of Missouri 1929, because by reason of the nature of such cases they are handled in the Juvenile Division of the court, or, as named in Section 14162, Revised Statutes Missouri 1929, the "Juvenile Court."

Section 656, Revised Statutes Missouri 1929, provides as follows:

"Whenever the term 'circuit court' is used in any law general to the whole state, the same shall be construed to include 'courts of common pleas,' unless such construction would be inconsistent with the

evident intent of such law, or of some law specially applicable to courts of common pleas."

The aforesaid section, 14162, makes it the duty of the clerks of the several circuit courts of the state to act as clerk of the juvenile court; by reason of the provisions of Section 656, aforesaid, the term 'court of common pleas' is synonymous with and construed to mean 'circuit court', or vice versa. In this connection the St. Louis Court of Appeals, in the case of Bell v. Walkley, 27 S. W. (2d) 456, had before it a contention that the Louisiana Court of Common Pleas had no authority or jurisdiction to hear and pass on the writ of injunction in view of the statute seemingly limiting jurisdiction in the case of injunctions to the circuit court. The Court of Appeals arrived at the conclusion that said Common Pleas Court did have jurisdiction by applying the right of interchange of the terms "circuit Court" and "courts of common pleas" under Section 7059, Revised Statutes Missouri 1919 (now Section 656, Revised Statutes Missouri 1929). The Court said, page 457, as follows:

"Section 7059, Rev. St. of Mo. 1919, provides that: 'Whenever the term "circuit court" is used in any law general to the whole state, the same shall be construed to include "courts of common pleas," unless such construction would be inconsistent with the evident intent of such law, or of some law specially applicable to courts of common pleas.'

"And since section 1947, Rev. Stat. of Mo 1919, provides that an injunction may be granted by the circuit court of judge thereof in vacation, and by the county court or any two judges thereof in vacation, it readily ap-

pears that the judge of the Louisiana court of common pleas has jurisdiction to issue the preliminary writ of injunction in vacation made returnable to the Louisiana court of common pleas. We therefore hold that the chancellor properly ruled defendant's plea to the jurisdiction."

Hence, it is the duty of the Clerk of the Hannibal Court of Common Pleas to act as, and he is, the Clerk of the Juvenile Division of the Hannibal Court of Common Pleas.

With the above outline as to jurisdiction of your court and the duty of the clerk in connection therewith, as a premise, we turn to the section you mentioned, namely, Section 11814a, Laws of Missouri 1937, as determinative of the question as to added compensation, if any, to your clerk.

We here quote the pertinent part of Section 11814a, as follows:

"For their services as Clerks of the Juvenile Courts, also known or designated as the Juvenile Division of the Circuit Court, the Clerks of the Circuit Courts in all counties containing less than fifty thousand inhabitants shall receive and be paid an annual compensation as follows:
* * * * "

It is to be noted, first, that this section names clerks of the juvenile courts; hence, if we are correct in our premise aforesaid that the Hannibal Court of Common Pleas acts as a Juvenile Court in handling cases of neglected and delinquent

minors, it follows that your clerk, acting as he does, or should, as Clerk of the Juvenile Court, comes within the plain provisions of said Section 11814a as to compensation therefor.

Furthermore, by reason of the provisions of Section 656 aforesaid, the term "Circuit Court," as and where set forth as shown in Section 11814a aforesaid, can or should be read in this instance as "Court of Common Pleas"; the clerk of your court would come within the provisions of Section 11814a and be entitled to compensation therein provided for.

In reaching the conclusion above, so far as it concerns the interchanging of the terms "circuit court" and "courts of common pleas" we are mindful of the concluding language in Section 656, to-wit:

"unless such construction would be inconsistent with the evident intent of such law, or of some law specially applicable to courts of common pleas."

The provisions of law creating the Hannibal Court of Common Pleas and duties and compensation of the clerk thereof were enacted long before the juvenile law was ever heard of, and, in fact, the duties and compensation of the clerks of the circuit courts were likewise prescribed long before the juvenile law was known. The additional compensation provided for clerks of juvenile courts and circuit courts is merely an added provision in their behalf, and is in nowise inconsistent with any prior provision of law respecting their duties or compensation as clerks of circuit or juvenile courts. It nowhere appears in Section 14563, relative to the compensation of circuit clerks and the clerk of the Hannibal Court of Common Pleas, that it was the intention of the legislators that the compensation of the Clerk of the Hannibal

Court of Common Pleas should be confined or limited to \$2,000.00 and no more, regardless of any added duties or change in conditions.

Although it is possible, of course, that a claim might be made that there is inconsistency between the several sections of the statutes hereinabove set forth, so far as said interchange of terms is concerned, we call attention to the rule of statutory construction under such circumstances as set forth in Little River Drain. Dist. v. Lassater, 325 Mo. 1. c. 500, wherein the Court said:

"It is the duty of courts, in construing two or more statutes relating to the same subject, to read them together and to harmonize them, if possible, and to give force and effect to each."

Hence, we say that in view of the circumstances and the aforesaid rule of statutory construction, there can not be found anything inconsistent in applying the provisions of Section 656 as to interchange of terms, as aforesaid, in conjunction with Section 11814a and the further statutes applicable to juvenile courts and the Hannibal Court of Common Pleas.

II

Relative to your second question, it is to be noted that the added compensation under Section 11814a is determined upon a population basis, and this is based on the population of the county and not any fractional part thereof. Consequently, the Clerk of the Hannibal Court of Common Pleas as Clerk of the Juvenile Court, or as standing in the shoes of a Clerk of the Juvenile Division of a circuit court, is entitled to have the population of

Mr. Walter G. Stillwell

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April 14, 1938

Marion County as a whole considered in arriving at the basis of the additional compensation to which he is entitled.

However, in turning to the census report for 1930 we find that the total population of Marion County was or is 33,493, whereas, the population of Hannibal alone, and without taking into consideration any additional population of Mason and Miller Townships, is 22,761.

Section 11814a provides compensation of \$500.00 to the clerk for the juvenile work in all counties having a population of 17,500 and less than 50,000. Consequently, it appears immaterial, at least from a practical standpoint, whether or not the population of the entire county, or that of Mason and Miller Townships, is taken as the basis, because in either event the same results would be arrived at.

CONCLUSION

I

The Clerk of the Hannibal Court of Common Pleas is entitled to the compensation provided for in Section 11814a, as Clerk of the Juvenile Court, or as Clerk of the Juvenile Division of the Hannibal Court of Common Pleas.

II

The compensation as such Clerk should be based upon the population of Marion County.

Respectfully submitted

J. W. BUFFINGTON
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

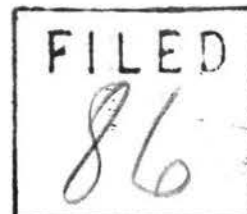
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HIGHWAYS - Motor vehicle registration fees and state gasoline taxes are dedicated to State Highway purposes.

June 7, 1938

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Honorable Louis V. Stigall
Chief Counsel
State Highway Commission
Jefferson City, Mo.



Dear Mr. Stigall:

This will acknowledge receipt of your letter of recent date, which reads as follows:

"During the past few months a number of inquiries have been made concerning the dedication to state highway purposes of state motor vehicle registration fees and state gasoline taxes. In several instances we have been requested to secure your opinion regarding this matter, and we are, therefore, asking for a ruling from you.

"Under the express provisions of Section 44a, Article IV, and Section 4, Article X, Constitution of Missouri, it seems to us quite clear that such fees and taxes are clearly dedicated to state highway purposes, not only so long as any road bonds might be outstanding, but even after the retirement of all such bonds. While the Constitution does not fix the rates of these taxes, and while the Legislature might abolish them altogether, nevertheless so long as the General Assembly provides for the collection of such taxes, all of the proceeds must be used for the various state highway purposes outlined in Section 44a.

June 7, 1938

"We are forwarding herewith a copy of a speech delivered by Mr. C. W. Brown, Chief Engineer, before the American Road Builders Association in New Orleans January 13, 1937, as it contains a historical summary of the constitutional amendments and statutes relating to dedication of these taxes to state highway purposes.

"We will indeed appreciate an opinion from you regarding this matter and advising us whether or not we are correct in the interpretation which we have made, as outlined above."

In the general election on November 2, 1920, the people of Missouri amended Article IV of the Constitution by adding a new section known as Section 44a, said amendment being found at page 707, Laws 1921, said amendment providing in part as follows:

" ** Any motor vehicle registration fees or license fees or taxes, authorized by law, except the property tax thereon, less the cost and expense of collection and the cost of maintaining any state highway department or commission, authorized by law, shall, after the issuance of such bonds, and so long as any bonds herein authorized are unpaid, be and stand appropriated without legislative action for and to the payment of the principal of the said bonds, and shall be credited to a sinking fund to be provided for by law. ** "

Said amendment (Section 44a) was amended by the people at a special election held August 2, 1921 so as to provide for payment of the interest on bonds as well as the principal of said bonds out of the motor vehicle license fees. Said latter amended section is found at page 196, Laws 1921, First Extra Session.

By the foregoing amendments, it will be seen that the motor vehicle registration fees, less the costs of their own collection, were dedicated to two purposes, viz:

(1) Defraying the cost of maintaining any State Highway Department or Commission authorized by law, and

(2) Payment of the principal and interest of bonds issued for road purposes.

In discussing the fund created by motor vehicle license fees, the Supreme Court, in the case of State ex rel. vs. Hackmann, 282 S. W. 1.c. 1011, said:

"It thus appears that not only is the fund public revenue or state money, but it is public revenue of a very extraordinary kind, levied, collected, and held by the state for two specific public uses, the major use of which is the payment and retirement of state bonds."

Prior to the general election of November 7, 1922, Section 4 of Article X of the Constitution of Missouri read as follows:

"All property subject to taxation shall be taxed in proportion to its value."

In that general election, the people amended said section by adding thereto the following proviso found at page 392, Laws 1923:

"Provided, that all motor vehicles subject to taxation in this state shall be subject to license taxes, the rate for state and municipal purposes to be fixed by the general assembly; so long as any road bonds

of the state authorized by section 44a, of article 4, of the Constitution, are outstanding a sufficient amount of such license taxes collected by the state shall be and stand appropriated without legislative action, for and to the payment of the principal and interest of such bonds, and the remainder of such funds less the cost and expenses of collection and the cost of maintaining any state highway department, or commission, shall be used in road and bridge construction and maintenance of roads in such manner as may be prescribed by law."

By the foregoing amendment to Section 4 of Article X, the people re-affirmed the dedication of motor vehicle registration fees found in the amendments of 1920 and 1921 to Article 4 of the Constitution to the payment of the principal and interest of road bonds, and went further and dedicated the remainder of such funds, less the cost of their own collection and the cost of maintaining any State Highway Department or Commission, to use in road and bridge construction and maintenance of roads. Therefore, by this latter amendment, the people dedicated the motor vehicle registration fees to the following purposes:

(1) Payment of principal and interest on road bonds issued under authority of Section 44a, Article 4 of the Constitution, (2) cost and expenses of collecting such registration fees, (3) cost of maintaining any State Highway Department or Commission, and (4) construction of roads and bridges and maintenance of roads in such manner as may be prescribed by law. By this amendment, therefore, the motor vehicle registration fees were "earmarked" for certain purposes by the people.

At the general election on November 4, 1924, the people, by adopting initiative proposition #5 found at page 282, Laws 1925, levied a tax of 2¢ per gallon on motor vehicle fuel, (hereafter referred to as the gaso-

line tax) and also increased the motor vehicle registration fees. Section 2 of said act reads as follows:

"For the purpose of providing funds to complete the construction of and for the maintenance of the State Highway System of this state as designated by law there is hereby provided a license tax equal to two cents per gallon of motor vehicle fuels as defined in this act used in motor vehicles on the public highways of the state, which license tax shall apply and become effective January 1, 1925. "

Section 15 of said act reads in part as follows:

"For the purpose of providing additional funds to complete the construction of and for the maintenance of the state highway system of this state the annual fees for the state registration of motor vehicles shall, beginning January 31, 1925, be increased by the following amounts, over the fees now fixed by law: ** "

It will be seen that the declared purpose of levying the gasoline tax and of increasing the motor vehicle registration fees was to provide funds "to complete the construction of and for the maintenance of the State Highway System of this State." This law adopted by the people recognized the previous dedication of registration fees to Highway purposes as contained in the amendment to Section 4 of Article 10, supra, and in addition it specified that the gasoline tax should be used for Highway purposes.

Section 17 of this act specifically directed the disbursement of the funds provided for by the act. This initiative proposition being a law with as much force as an act of the legislature, the expenditure of these funds, as set out in Section 17, would be carry-

ing out the provisions of the amendment to Section 4, Article 10, supra, as to the use of motor vehicle registration fees. Likewise, the people by such a law had the right to " earmark " the gasoline tax as they did, and such " earmarking " of the gasoline tax would hold, unless otherwise changed by later laws of the Legislature or by the people. Therefore, upon the adoption of the foregoing initiative proposition by the people, both motor vehicle registration fees and gasoline taxes were dedicated to Highway purposes, the former by constitutional amendments and the latter by a law adopted by the people.

Further carrying out their declared purpose of completing a State-wide road system and of dedicating motor vehicle registration fees and gasoline taxes to the payment of same, the people of Missouri, at the general election on November 6, 1928, adopted an amendment to Section 44a of Article 4 of the Constitution, said new amendment embracing much of the previous Section 44a and making enlarged provisions for Highway construction and maintenance.

Said amendment is found at page 453, Laws 1929. After providing that motor vehicle registration fees and gasoline taxes, less certain costs and expenses, shall stand appropriated to the payment of the principal and interest of road bonds so long as the same remained outstanding, said amendment provides:

"** If in any year there should be any balance in the state road bond interest and sinking fund beyond the requirements of the next succeeding calendar year for interest and sinking fund of the said bonds, such balance shall be transferred and credited to the state road fund to be administered and expended under the direction and supervision of the state highway commission for the following purposes: (Enumerating numerous highway purposes)

"After the principal and interest of all said bonds shall have been paid,

all state motor vehicle registration fees, license fees or taxes, authorized by law, on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels, authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the state highway department and the state highway commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation, shall be and stand appropriated without legislative action to the state road fund, to be administered and expended under the direction and supervision of the state highway commission for the purposes and in the manner hereinbefore set forth."

Therefore, by the foregoing amendment, it is clear that the people have definitely said that so long as road bonds are outstanding, the surplus of the registration fees and gasoline taxes remaining after retiring maturing bonds shall be used for Highway purposes, and that after all the bonds and interest have been paid, then all of such registration fees and gasoline taxes, less certain enumerated costs and expenses, shall be expended under the direction and supervision of the State Highway Commission for Highway purposes.

It is to be noted that the amendment of 1928 re-affirms the dedication of motor vehicle registration fees contained in the amendment to Section 4 of Article 10 adopted in 1922, and the dedication of the gasoline taxes contained in initiative proposition #5 adopted by the people in 1924. In all three instances, the people have spoken directly on the questions, and in their last expression they have adopted their previous declarations

contained in the first two. It would seem that the people have spoken in such plain language as to the dedication of the registration fees and gasoline tax that there can be no question as to their intention. The amendment further provides that such registration fees and gasoline taxes cannot be increased for a period of ten years after the adoption of the amendment, unless the same shall not be sufficient to produce funds requisite to pay the costs and expenses enumerated in the amendment, and the bonds and interest, and provide for the proper maintenance of State highways, in which event the Legislature may increase such rates and taxes to an amount sufficient to provide for such payments and the proper maintenance of State highways.

The amendment further provides that if the said fees and taxes should not be sufficient to pay the expenses therein authorized and make provision for the sinking fund and interest on the bonds and also for suitable and proper maintenance of State highways, then not more than \$60,000,000 of the said bond should be issued in addition to those already authorized. All of the language of the said amendment clearly indicates that the funds arising from said registration fees and gasoline taxes, after payment of bonds and interest and certain costs and expenses, should be used for constructing and maintaining the State Highway system.

CONCLUSION.

It is therefore the opinion of this office that State motor vehicle registration fees and State gasoline taxes are dedicated to the following purposes:

- (1) The expense of collection of said fees and taxes,
- (2) The cost of maintaining the State Highway Department and the State Highway Commission,
- (3) The cost of administering and enforcing any State motor vehicle law or traffic regulation,

Hon. Louis V. Stigall

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June 7, 1938

(4) Payment of principal and interest of bonds issued under authority of Section 44a of Article 4 of the Constitution, and

(5) The construction and maintenance of a State Highway road system and other Highway purposes enumerated in Section 44a, page 453, Laws 1929.

It necessarily follows that said funds could not be used for any other purposes than the foregoing.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

STATE ROAD FUND; -- Money paid to the State by the Federal Government for highway purposes must go into the State Treasury, and can be expended only upon warrants issued pursuant to appropriations.

July 1, 1938

Honorable Louis V. Stigall
Chief Counsel
Mo. State Highway Department
Jefferson City, Missouri



Dear Mr. Stigall:

We are in receipt of yours of the 17th, which reads as follows:

"In compliance with the request of the State Auditor and the State Treasurer, and in accordance with your suggestion, we are writing to request your opinion concerning the powers of the State Highway Commission, the State Auditor and the State Treasurer under the circumstances hereinafter outlined.

"The appropriation for the 1937-38 biennial period for the construction and maintenance of state highways was \$30,000,000. Section 2 of the act approved April 16, 1937, pages 12, 13, 14 and 15, Session Laws of 1937. On June 1, 1938, there remained an unexpended balance of said \$30,000,000 of \$9,527,732.

"The amount which we estimate must be paid out of this appropriation between now and December 31, 1938, is \$8,909,000. This latter sum includes the cost of maintaining the state highways and the amounts which must be paid on fixed obligations already finally incurred. This would leave available only the sum of \$618,000, which could be charged against said \$30,000,000 appropriation.

"For the federal fiscal year beginning July, 1937, certain grants were made by the Govern-

ment to the State for grade separation and forest highway purposes. All of these grants represent one hundred per cent payments by the Government and do not have to be matched with state funds. Under the rules and regulations of the Bureau of Public Roads, full payment for all such work must be made by the Commission, the State thereafter being reimbursed in full for all such payments, but only after the final completion of the particular projects. The balance of these funds available to the State is approximately \$1,400,000. The Bureau of Public Roads has ruled and is now insisting and demanding that approximately all of said \$1,400,000 be placed under contract this summer, and that as much of such work as is possible be completed before January 1, 1939.

"The Commission now finds itself in the position of being required to place under contract and pay for perhaps the full \$1,400,000 worth of such work before January 1, 1939, or lose a considerable portion of these grants. Obviously, with only \$618,000 remaining in the \$30,000,000 appropriation, such work cannot be paid for in full out of such appropriation. However, the Government owes the Commission \$652,000 reimbursement for state funds advanced in payment of the Government's share of federal aid projects. If some legal method could be devised whereby such \$652,000 and other funds hereafter paid by the Government up to January 1, 1939, would not have to be placed in the State Road Fund but could be placed in a special fund and paid out during the next five months on state highway projects, or used as a revolving fund, our present difficulty would be solved, and the State would be in no danger of losing any of these federal grants. If even amount as small as \$250,000 could be placed in such special fund and used as a revolving fund, this danger would be averted.

July 1, 1938

"We believe that it would be legal and proper under the circumstances for the Commission to request the State Auditor and the State Treasurer to receive this \$652,000, and other federal funds, place them in a special trust fund, and pay them out upon requisition by the Commission for state highway work. We are enclosing herewith a short brief outlining our position as to the law in this matter.

"The Highway Commission desires, of course, to proceed according to law, and to make no request of the State Auditor and the State Treasurer which would not have the approval of your office. Therefore, prior to taking any action whatever, we are requesting that you advise us if under the circumstances it would be proper for the Commission to request these other officers to receive these funds, place them in a special trust fund, and pay them out upon the Commission's requisition, and at the end of the biennial period, transfer the unexpended balance of the fund to the State Road Fund.

The question presented by your letter narrows down to this: Can the money which the Federal government will pay back to the State of Missouri by way of reimbursement for similar amounts paid out by the State in road construction, be placed in a separate fund from the State Road Fund and be expended upon requisitions of the Highway Commission?

Article IV, Section 43 of the Constitution of Missouri provides as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. ** "

Section 11425, R. S. Mo. 1929 reads in part as follows:

"The state treasurer shall receive and keep, as provided by law, all the moneys of the state not expressly required by law to be received and kept by some other person; disburse the public moneys upon warrants drawn on the treasury according to law, and within the time limited in the Constitution, and not otherwise; *** "

It is clear from the foregoing constitutional provision that the money under discussion is money derived by the State from a certain source, and therefore such money must go into the State Treasury. The said constitutional provision and also the statute above quoted forbids the disbursement of such money, except in pursuance of regular appropriations and upon warrants issued in accordance with such appropriations.

Furthermore, Article X, Section 19, Constitution of Missouri, reads in part as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; *** "

It is true that Section 8106, R. S. Mo. 1929 provides that the monies due to the State of Missouri from the United States by reason of highway construction shall be received by the State Treasurer and deposited in a separate fund and paid out by the State Treasurer on requisitions drawn by an officer of the State Highway Commission on a warrant of the State Auditor. Said latter section further provides that no appropriation shall be necessary for the expenditure of such funds. Said Section 8106 was passed at the First Extra Session of 1921 (see Section 16, page 131, Laws Mo. 1921, First Extra Session)

July 1, 1938

However, in 1931 the Legislature, by an act which appears at pages 319-320, Laws Mo. 1931, made different provisions for the handling of these particular funds coming to the State from the Federal government. Section 8147 reads as follows:

"There is hereby created a state road fund which shall receive all moneys from sale of bonds and all moneys given the state by the United States government for road purposes and the balance from the state highway maintenance-construction fund as provided in section 8146 of this article. Appropriations from this fund shall be made only for the purpose of constructing state highways and for carrying into effect the provisions of section 44a, Article 4, of the Constitution of Missouri. (Laws 1929, p. 87, Sec. 4.) "

This later expression of the Legislature definitely requires the funds received from the United States government to go into the State Road Fund. Said later arrangement also provides for appropriations from this fund, which is made up in part of funds received from the Federal government. This later arrangement definitely marks these funds coming from the Federal government as State money.

In the case of State ex rel. vs. Board of Regents, 264 S. W. 1.c. 701, the Supreme Court said:

"In the foregoing discussion of the constitutional provision invoked by relator, we have stated generally that no statute required the payment into the state treasury of the money here in controversy, and that a statutory enactment was a prerequisite to such payment and its receipt and deposit by the treasurer to entitle it, under the Constitution, to be classified as State money."

July 1, 1938

Even absent the constitutional provision above referred to (Article IV, Section 43), the foregoing statute (Sec. 8147) definitely requires the particular funds in question to be paid into the State treasury. This latter section therefore definitely marks the funds as State money. Being State money, the treasurer can only pay it out in accordance with regular appropriations by the Legislature.

The State has spent its own money to construct certain roads upon a promise from the Federal government that it will be reimbursed to a certain extent for such expenditures. The money of the State of Missouri has therefore been expended by way of an advancement to the Federal government. The money which the Federal government pays back to the State really represents a replacement of the State's money, and for this reason also, the funds which are paid to the State under such an arrangement really become the State's money, since it replaces the State's money which has been expended.

We cannot escape the conclusion, therefore, that both by the provisions of the Constitution and applicable statutes, the funds coming from the Federal government to the State for highway purposes can be received only by the State Treasurer, and that after received by him, they can be paid out only upon appropriations by the Legislature.

CONCLUSION.

It is, therefore, the opinion of this office that money due and to be paid to the State of Missouri by the Federal government for highway purposes or by way of reimbursement of the State for similar sums expended by it for highway purposes, must be paid into the State treasury and be withdrawn from the State treasury only upon warrants issued pursuant to regular appropriations by the Legislature.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

NEPOTISM: If a candidate for presiding judge is elected and votes for the appointment of his wife's blood nephew as Superintendent of the Infirmary, he is subject to ouster; if he does not conspire, connive or agree to the appointment and votes against the same, he is not subject to ouster.

July 29, 1938

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Sir:

This Department acknowledges receipt of your letter of July 19th, wherein you make the following inquiry:

"I would deeply appreciate an opinion from your office as soon as possible on the following: Stephen Drake is now acting in the capacity of Superintendent of the County Infirmary, having been heretofore appointed to such a position by the County Court. Mr. Drake is a blood nephew of Mrs. C. G. Tarleton whose husband is now a candidate for the office of Presiding Judge of Marion County, Missouri.

"If Mr. Tarleton should be elected to the office of presiding Judge of this county, would the then County Court violate the constitutional provision as to nepotism by re-appointing Mr. Drake to this position?"

Your request involves the construction of Article XIV, Section 13 of the Constitution of Missouri, or, in other words, commonly referred to as the "nepotism section." Said section is as follows:

"Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The general principle which this Department has followed with reference to determining relationship by affinity is contained in 2 C. J. 378, as follows:

"Blood relations of the husband and blood relations of the wife are not related to each other by affinity. Nor does the term 'affinity' ordinarily include the person related to the spouse simply by affinity."

The principle is found enunciated in the Encyclopaedia Britannica, 11th Ed., Vol. 1, page 301 as follows:

"The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relation is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

Applying that principle to the relation which you state exists with reference to the blood nephew of Mrs. Tarleton, whose husband is a candidate for presiding judge

of Marion County, we are of the opinion that the relation existing is one prohibited by the nepotism section.

We next discuss the affect of Mr. Tarleton in the event he is elected, and Mr. Drake is re-appointed as Superintendent of the County Infirmary.

A situation similar in nature and wherein the principle can be applied, arose in a decision from Miller County, Missouri, in the case of State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, 1. c. 101. In discussing the nepotism provision, Judge Gantt says:

"The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

In the case of State ex inf. Ellis v. Ferguson, 333 Mo. 1177, Judge Hays hold that a mayor in appointing his first cousin to the position of pumper of the water works, is subject to ouster as follows:

"A mayor of a city of the third class, in appointing his first cousin to the position of pumper of the waterworks system of the city, violated the nepotism amendment to the State Constitution, Section 13, Article XIV, and thereby forfeited his right and title to the office and was subject to ouster in quo warranto proceeding."

A more recent case is that of State ex rel. McKittrick v. Becker, 81 S. W. (2d) 948, which decision was also written by Judge Hays and will be referred to again in our ultimate conclusion. The court held as follows:

"Two of judges of Court of Appeals could in exercise of their jurisdiction appoint first cousin of third judge as commissioner, and such appointment would not violate provision of Constitution forbidding officers to appoint relatives to public service, where third judge refrains from voting and other judges exercise appointive power free from connivance, agreement, or conspiracy (Const. art. 14, sec. 13, adopted in 1924)."

Another decision with reference to nepotism is that of State ex inf. Norman v. Ellis, 325 Mo. 154, which was really the pioneer decision with reference to the nepotism act in this State.

Conclusion.

We are of the opinion that, if the party now a candidate for Presiding Judge of Marion County should be successful in his candidacy and become the Presiding Judge of the County Court, and is confronted with the question of appointing his wife's nephew as Superintendent of the County Infirmary, he will violate the nepotism section and be subject to ouster if he votes for or participates in naming the said Superintendent. On the other hand, if he refrains from voting and the other members of the County Court exercise the appointive power, free from connivance, agreement, conspiracy or collusion, directly or indirectly, on the part of the Presiding Judge with any other member, then the said

Hon. Walter G. Stillwell

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July 29, 1938

Presiding Judge will not have violated the nepotism section.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

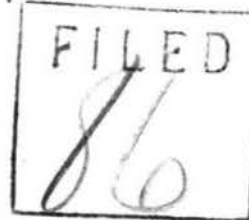
J. W. BUFFINGTON
(Acting) Attorney-General

OWN:EG

COURT HOUSES: County court has control over court houses
and their use rather than sheriff.

August 26, 1938

Hon. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Sir:

We acknowledge receipt of your opinion request
which reads as follows:

"For many years it has been customary for different organizations to use the Court room of the Hannibal Court of Common Pleas in the evenings for holding meetings and it has also been used by both political parties for political meetings and speakers.

The question arises as to whether the Sheriff or the County Court has the right to permit the use of this facility to such organizations."

While your letter does not so state, yet we have ascertained from outside information that the Hannibal Court of Common Pleas is held in a room of a court house owned by Marion County.

Article VI, Section 36, Constitution of Missouri, provides in part as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law."

Pursuant to the foregoing constitutional provision, the Legislature has passed the following statutes:

"Sec. 2078. Shall control county property.--The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

"Sec. 12071. Court may alter and repair county buildings, when.--The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

It seems the foregoing statutes clearly lodge in the county court the control and management of the court house since it is part of the property belonging to the county.

In the early case of Sparks v. Purdy, 11 Mo. 220, the Supreme Court in passing on the right of the county court to summarily eject trespassers from the court house said:

"The law intrusts the County Court with the control and management of the property, real and personal of the county; and under this power the court superintends the public buildings."

If the county court is charged by law (Section 12071) with the duty of taking such measures as shall be

August 26, 1938

necessary to preserve the buildings and property of their county from waste or damage, it follows they would have the right to say who might use the property and for what purposes it might be used. We find nothing in the law which directs or authorizes the sheriff to have control of the court room wherein court is held.

CONCLUSION

It is, therefore, the opinion of this office that the county court of Marion County has the right to control and manage the court room of the Hannibal Court of Common Pleas so far as permitting use of such room for political gatherings or for other purposes outside of its use by the Court of Common Pleas.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

MOTOR VEHICLES: Under Section 7759, R.S. Mo. 1929, an owner of an automobile dealing as an independent contractor is not an operator or chauffeur.

September 7, 1938

Honorable Louis V. Stigall
Chief Counsel
State Highway Department
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of September 1, 1938, requesting an opinion from this department, which reads as follows:

"There has arisen a difference of opinion among police officers regarding the interpretation of the word 'chauffeur' in Section 7759, R. S. Mo. 1929. In some instances officers and prosecuting attorneys take the position that a person owning his own automobile who purchases products at one point, pays for them and then resells them at other points in the state, is a chauffeur within the meaning of said section. It is our belief that such a person is not a 'chauffeur' even though he may have regular routes and make regular deliveries to the same merchants, so long as he purchases and pays for the commodities and resells them. We recognize that if the merchant had ordered and was paying for the commodity, the car operator would be a chauffeur within the meaning of Section 7759.

"Under the circumstances outlined, we shall be pleased to have a ruling from you regarding this matter."

Section 7759, R. S. Mo. 1929, defines the word "chauffeur" as follows:

"Wherever in this article, or in any proceeding under this article, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows: 'Chauffeur.' An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employe operates a motor vehicle carrying passengers or property for hire. * * * *"

Under this definition, a chauffeur is an operator who operates a motor vehicle in the transportation of persons or property, and who is paid compensation for services in wages, salary, commission or fare, or who as owner or employee operates a motor vehicle carrying passengers or property for hire. Neither of the above definitions, according to the wording, covers the case where the owner of his own automobile purchases products at one point, pays for them and resells them at other points in the state. He is known as an independent contractor and receives his pay in the nature of a profit and not as a compensation for hire.

In 59 C. J., page 952, it is said:

"The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualification which might have been in the mind of the legislature, but the statute must be given effect according to its plain and

obvious meaning." (Citing Gendron v. Dwight Chapin & Co., (App.) 37 S. W. (2d) 486; Betz v. Kansas City So. R. Co., 284 S. W. 455; 314 Mo. 390; Grier v. Kansas City, C. C. & St. J. Ry. Co., 228 S. W. 454, 286 Mo. 523.

No decision has been rendered in this state at this time which interprets that part of Section 7759, supra, as above set out, but in the State of Texas, in the case of Matthews v. State, 85 Tex. Cr. 469, 214 S. W. 339, the court held:

"Where a statute, requiring a license to operate a motor vehicle as a chauffeur, defines the term 'chauffeur' as any person whose business or occupation is that of operating a motor vehicle for compensation, wages, or hire, in order to bring a person within the class of chauffeur he must operate the motor vehicle as such for compensation, wages, or hire, and this has direct relation to his employment to run the vehicle itself for hire, and not as incident to the delivery of goods, wares, and merchandise for his employer."

Also, in the case of Commonwealth v. Cooper, 19 Pa. Dist. 271, 277, 37 Pa. Co. 277, the court said:

"As far as the automobile industry and users of motor-vehicles are concerned, it would only be by a strained and unnatural construction and foreign to the accepted usage that the term 'chauffeur' could be made to include operators other than employees for hire. The 'National Association of Automobile Manufacturers' and the 'American Automobile Association' use the word 'chauffeur' to mean 'an operator for hire,' and it is the opinion of the court that the word, as we believe we have shown, has always been used in that sense in dealing with motor-vehicle legislation."

In the case of *In re Automobile Licenses*, 19 Pa. Dist. 271, 37 Pa. Co. 46, the deputy Attorney General in commenting on the definition of the word "chauffeur", said that it meant one who operates an automobile or motor vehicle, but under our statute it specifically sets out that a chauffeur, to be designated as such, must be one who operates an automobile for hire by way of wages, salary, commission or fare.

In the case of *People v. Ritter*, 120 Misc. 852, 200 N.Y.S. 816, the court said:

"Where one who owns a truck which he uses to deliver bread and other products, which he purchases at a discount from a named bakery and sells to his own customers, has an owner's license, carries his own liability insurance, and the name of the bakery does not appear on the truck, he was an independent contractor, and not an 'employee,' within a statute requiring a chauffeur's license of any person driving a motor vehicle as an employee or for hire."

This case practically sets out the same state of facts as described in your request.

CONCLUSION

In view of the above authorities, it is the opinion of this department that under Section 7759, R. S. No. 1929, the owner of an automobile who purchases products at one point, pays for them, and then resells them at other points in the state is an independent contractor, and not an employee, and should not be considered a chauffeur under said section.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

LOTTERY - Premium coupon books.

November 1, 1938

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Sir:

We have your request of October 29, 1938 for an opinion, which in part is as follows:

"The Klump Oil Company, who operate a filling station in the city of Hannibal, have been distributing promiscuously certain coupon books which in substance are presented by the purchaser of gasoline or other petroleum products at the time of purchase and in accordance to the amount purchased stamps are placed in the book by employees of the Klump Oil Company. After the book has been filled the seal on the book is removed and the holder of the book received a certain gratuity, such as gasoline or merchandise. Evidently a small illustrated leaflet is distributed promiscuously throughout this city and the name of the distributor of the leaflet is written thereon and it is handed to a prospective customer and the person whose distributees make the most purchases receives a radio free. For the convenience of this office, I am enclosing one of these small leaflets and also the stamp book which in reality are self-explanatory."

In Missouri, a lottery is any scheme or device wherein anything of value, is for a consideration allotted by chance.

In the present case, people purchase oil and pay for it and receive a coupon book, and stamps representing each purchase are pasted in the coupon book. This constitutes consideration. The prize in the case, in the coupon book handed to us, is four quarts of oil. Prizes may consist of 5 gal. gasoline; grease job; oil change; 1 gal. Phil-A-Penn Oil, 50¢ in cash; \$1.00 in cash; \$2.00 in cash; \$5.00 in cash or \$10.00 in cash. These constitute a prize.

The element of chance is involved in the distribution of the coupon book. There is attached to each coupon book a seal, under which is hidden the name of the prize. No one can tell what the prize is that he is to receive. This, therefore, constitutes chance, the same as if numbers were drawn out of a hat, upon which was written the prize that the contestant would receive.

Some of the cases in this state interpreting the lottery laws are State ex inf. McKittrick vs. Globe-Democrat Publishing Company, 110 S. W. (2d) 705; State vs. Emerson, 1 S. W. (2d) 109; State ex rel. vs. Hughes, 299 Mo. 529; 253 S. W. 229; 28 A.L.R. 1305; State vs. Becker, 248 Mo. 555, 154 S. W. 769.

It is, therefore, the opinion of this office that the "Bonded Customer Dividend Plan", as distributed by the Klump Oil Company, is a lottery, in violation of Section 4314, R. S. Mo. 1929.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:FE

CANCER COMMISSION: Scientific research and printing supplies.

July 13, 1938 7/13

FILED

88

Doctor Fred J. Taussig
Vice-Chairman
State Cancer Commission
3713 Washington Avenue
St. Louis, Missouri

Dear Sir:

We have your request of July 2nd for an opinion presenting two questions:

(1) The right of the Commission to pay a salary of One hundred and fifty dollars a month and expenses for a period of four months for a scientific statistical research on the factors contributing to cancer mortality in the State of Missouri;

(2) Whether the State Cancer Commission comes under the State Printing Contract.

I.

The power of the Commission
to conduct scientific statistical
research.

The Act creating the State Cancer Commission, Section 7, Laws of Missouri 1937, p. 496, provides in part as follows:

"The State Cancer Hospital shall be primarily and principally designed for the care and treatment of indigent persons afflicted with cancer, such scientific research as will promote the welfare of indigent patients committed to its care
* * * *".

It is apparent from the Act itself that the Legislature intended to authorize the Cancer Commission to employ scientifically trained individuals and fix their compensation (Section 5), and to conduct scientific research with reference to diseases of a cancerous nature.

It is therefore the opinion of this office that the Commission has authority to make the appropriation to pay the salary and expenses of a person to do scientific statistical research on the factors contributing to cancer mortality in the State of Missouri.

II.

State Printing Contract

We find no reference in the Act creating the State Cancer Commission to the printing or furnishing of printing supplies to the Commission.

Section 13783 R.S. Missouri 1929, relating to the classification of state printing, provides in part as follows:

"The printing of all blanks, circulars and other work necessary for the use of the executive departments, * * * * shall constitute the third class,* * *"

In the case of State vs. Wilder, 199 Mo. 470, 97 S.W. 940, the Supreme Court In Banc held that the Insurance Department was a separate and distinct department of State Government and that the disbursement of its funds appropriated to pay its expenses, including its expenses for printing, were under the exclusive control of the Superintendent of Insurance. In that

case it was pointed out that the Insurance Department was authorized to disburse funds for printing forms for use of the Department only upon the requisition and approval of the Superintendent of Insurance (l. c. 486).

Thereafter the Legislature amended the law, particularly Section 13799, wherein they defined "Executive Departments" to mean "both the heads of said departments and the subordinate branches thereof, the boards, commissions, bureaus and officers appointed by the heads of said departments, except the Board of Education and eleemosynary institutions of the State".

Thereafter, in State vs. Hackmann, 282 S.W. 1007, the Supreme Court in determining the effect of this statutory amendment on the opinion of State vs. Wilder, supra, l. c. 1010, said:

"There is nothing in the rulings in the case of State vs. Wilder, 97 S.W. 940, 199 Mo. 470, which, when intelligently analyzed, will support the contention of relator. That case had to do with the allowance of an account for printing furnished to the insurance department. Under the law then in force, as we have stated, there was only a general reference to the executive departments of the state, and, without consideration as to what constituted such departments, it was held to be a separate and distinct department of the state government, and was not subject to the provisions of the statute then regulating public printing. With the correctness of that ruling we need not concern ourselves, as it was rendered under different statutes from those we are now considering. Subsequent to the rendition of this opinion, the Legislature repealed the section of the statute (section 10356, R.S. 1909) in force at the time of the

rendition of the Wilder opinion, and enacted section 9714, which, as we have shown, in addition to a general declaration as to the executive departments, specifically defined the same, and all of their subordinate branches. Had this statute been in existence when the Wilder Case was determined, and the laws regulating the insurance department had been the same as those now applicable to the highway commission, it is but a reasonable conclusion that the opinion in the Wilder Case would have been different. Presumptions aside, however, the conclusion as to its not constituting a precedent in the instant case is authorized by the difference, not only in the statutes concerning the insurance and highway departments, but in those in regard to public printing then and now."

In this case the Cancer Commission of the State of Missouri is created by legislative enactment and constitutes four members appointed by the Governor with the advice and consent of the Senate. Its origin therefore springs from legislative enactment. As to whether or not such a commission so created is a part of the executive branch of the State Government, Walker, J. in *State vs. Hackmann*, supra, speaking for the Court said, 1. c. 1010:

"Let us consider, therefore, in what manner the state highway commission should be classified. It was created by a legislative enactment in 1921 (Laws 1921, 1st Ex. Sess. p. 132). It consists of four members appointed by the Governor. Its duties, generally stated, are the construction, improvement, and maintenance of highways; and to that end auxiliary power is conferred necessary to the performance of the main purpose of the creation of the commission (section 14, Laws 1921, 1st. Ex. Sess. p. 137).

Doctor Fred J. Taussig

-5-

July 13, 1938

Created by legislative enactment, and
clothed with powers therein defined,
through the appointment of the Governor,
under all recognized rules of construction
it is, when properly classified, a sub-
ordinate branch of the executive department."

It is therefore the opinion of this office that the
Cancer Commission should obtain its printing supplies under the
State Printing Contract.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

TAXATION:
SALES TAX:
CONDITIONAL SALES AND
CHATTEL MORTGAGES:
TAX: WHEN COLLECTED

Sales tax due and collectible at time title to tangible personal property passes unless the sale is a charge or time sale. If chattel mortgage and note are given for balance of purchase price, tax is to be collected.

March 1, 1938 3/10



Mr. J. W. Thurman,
Sales Tax Department,
Jefferson City, Missouri.

Dear Sir:

This is to acknowledge receipt of yours of February 21, 1938, requesting an official opinion from this department, which is as follows:

"Under date of February 18, a conference was held in our Saint Louis office with the operators of the above mentioned Saint Louis credit furniture house. * * * * *

The business of the furniture house is conducted altogether on credit. It is their custom to require a down payment, the balance of the purchase price to be paid in installments and the Company is protected by requiring the purchaser to give a promissory note for the balance due and also to sign a chattle mortgage as additional security for the fulfillment of their contract. A considerable portion of the furniture of necessity must be repossessed as the purchaser fails to make the installment payments in accordance with the stipulated agreement. The records of the furniture house indicate that the tax is collected at the time the sale is completed and the furniture delivered to the purchaser. * * * *

The point in issue is whether or not sales should be treated as final when a note and chattle mortgage are given, or whether or not the balance on the note should be treated as a time sale and the furniture house liable for tax only when payment is received

March 1, 1938

on the notes representing the sale price
of the furniture. * * * * *

Your request particularly relates to the time when the sales tax is to be collected in case of the entire purchase price is not paid at the time of the transaction and in case such transaction is not a charge and time sale.

Sub-section b of Section 1 of the Sales Tax Act, Laws of Missouri, 1937, page 553, provides as follows:

"(b) The term "Sale" or "Sales" includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale, and means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration and the rendering, furnishing or selling for a valuable consideration"
* * * * *

Sub-section g of Section 1 defines the term "retail sale" as follows:

"(g) "Sale at retail" means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."* * * * *

Sub-section 5 of the Act provides as follows:

"Every person receiving any payment or consideration upon the sale of property or rendering of service subject to the tax imposed by the provisions of this Act, or required to make collection of the tax imposed by the provisions of this Act, shall be responsible not only for the collection of the amount of the tax imposed on said sale or service but shall, on or before the 15th day of each

March 1, 1938

month, make a return to the State Auditor of all taxes collected for the preceding month or required to be collected for the preceding month, and shall remit the taxes so collected or required to be collected to the State Auditor. The seller of any property or person rendering any service, subject to the tax imposed by this Act is directed to collect the tax from the purchaser of such property or the recipient of the service as the case may be. The tax imposed by this Act is a tax upon the sale, service or transaction and shall be collected by the person making the sale or rendering the service at the time of making or rendering such sale, service or transaction. " * * * * *

And sub-section 10 of said Act provides as follows:

"Every person making or rendering any sale, service or transaction taxable under this Act shall on or before the fifteenth day of the month after this Act becomes effective, and on or before the fifteenth day of every calendar month thereafter, individually or by duly authorized officer or agent make and file with the Auditor a written return, in the manner and form designated or prescribed by said Auditor, and upon blanks furnished by him showing the amount of gross receipts from sales, services and taxable transactions by such person and the amount of tax due thereon during and for the preceding calendar month, or that portion thereof subsequent to the effective date of this Act, and with such written return such person shall remit to the Auditor the amount of said tax due. In case of charge and time sales the amount thereof shall be included as sales in said returns as and when payments are received by the person, without any deduction therefrom whatsoever." * * * * *

Your request indicates that the furniture house collects the sales tax at the time the sale is completed and the furniture is delivered to the purchaser. Section 5 plainly sets out that it is the duty of the seller to remit all taxes collect-

ed to the State Auditor. The seller is merely acting as an agent for the state in the collection and remitting of the sales tax.

Sub-section b of Section 1 of the Act provides that the term "sale" shall include conditional sales or sales in any other manner. When the ownership or title to the property is transferred, then by the terms of sub-section g of Section 1 of the Act the "Sale at Retail" is consummated and if such transaction is not a charge or time sale, it is the duty of the seller at that time to collect the amount of the sales tax and remit the same as provided by Section 10 of the Act.

The State of Michigan has a sales tax act which is somewhat similar to the Missouri law and the Supreme Court of that state in passing on that act as it applies to conditional sales. In the case of *Montgomery Ward and Company v. Frye, et al.*, 269 N.W. 166, 170, said:

"Count 4 seeks refund of the sales tax upon the unpaid balance on canceled conditional sales contracts, where there had been recapture of the merchandise. Plaintiff appeals from an adverse holding.

The act of 1933 included conditional sales and other title retaining contracts and levied the sales tax upon the gross proceeds and defined the gross proceeds as 'the amount received in money, credits, property or other money's worth in consideration of sales at retail within this state, without any deduction * * for losses' (section 1), but an allowance of refunds for returned goods.

Plaintiff's former district supervisor for Michigan, during the period here involved, and now an assistant retail manager, testified relative to such conditional sales:

'Count IV, Class D, relates to the sale of items of merchandise upon which we take a title retaining contract. We collect the sales tax from the customer when the sale is made. At the time of repossession, we

make no refund of sales tax to the customer. When this merchandise is repossessed, we re-sell it through the regular channels of our business as second-hand merchandise. * * *

'During the period of time in question we paid the tax as we collected the money. Our procedure has been changed since that time. In other words, at that time we did not pay the sales tax when the sale was made but we paid the sales tax as the money was collected. I know that was the fact although I don't know what the law required.'

Under this testimony there can be no refund. Under the statute credits or refunds for returned goods may be deducted, but such does not apply to repossession of merchandise under conditional sales contracts.

Denial of judgment for this item is affirmed."

And in the case of Rudolph Wurlitzer Co. v. State Board of Tax Administration, 275 N.W. 248, l.c. 249, the Supreme Court of the State of Michigan said:

"Plaintiff sold merchandise at retail under conditional sales contracts, paid the tax upon the full contract price, but upon recapture of the merchandise took credit for the amount of the tax so paid above the amount of the money received.

This amounted to quite a sum and coming to the attention of the tax authorities led to a demand that the amount of such taken credits be paid, and thereupon plaintiff paid the same under protest and upon being refused refund thereof brought this action to have recovery.

The court below awarded plaintiff judgment, and defendants review by appeal presenting the following question: 'May a licensee in making its monthly returns pursuant to the Michigan 'General Sales Tax Act (Act

No. 167 of 1933)' lawfully deduct from gross proceeds of retail sales any unpaid balances on canceled conditional sales contracts, 'where there has been recapture of the merchandise?'"

The General Sales Tax Statute, Act No. 167, Public Acts 1933, provides, section 1 (b.1): 'The term 'sale at retail' includes conditional sales, installment lease sales and any other transfer of such property when the title is retained as security for the purchase price but is intended to be transferred later,'

It also provides: 'Credits or refunds for returned goods may be deducted.' Section 1 (c).

Upon conditional sales the tax is computed on the full sale price, and upon recapture of the property for nonpayment of installments there is no refund or right to credit.

We had occasion in *Montgomery Ward & Co. v. Fry*, 277 Mich. 260, 269 N.W. 166, 170, to consider the question here presented. In that case count 4 of the declaration sought refund of the sales tax upon the unpaid balance on canceled conditional sales contracts where there had been recapture of the merchandise. Upon this point we held: 'Under the statute credits or refunds for returned goods may be deducted, but such does not apply to repossession of merchandise under conditional sales contracts.'

Counsel for plaintiff in the case at bar state:

'That decision seemed to be based wholly on the fact that the General Sales Tax, Section 3663-1, subsection (b.1) (Comp. Laws Supp. 1935), states:

'The term sale at retail includes condi-

March 1, 1938

tional sales, installment lease sales, and any other transfer of such property when the title is retained as security for the purchase price but is intended to be transferred later.'

'We agree with that decision and with the attorney general that goods sold on conditional sales contracts are subject to this tax and the record shows that plaintiff in this case, when making a sale on conditional sales contract, paid the full amount of the tax to the state of Michigan in its next monthly return. Our contention is, however, and it was apparently not strongly argued in the Montgomery Ward Case, that under the clause 'credits or refunds for returned goods may be deducted,' that we are entitled to such credits or refunds when goods are necessarily repossessed by the seller.'

We again hold that the statutory provision permitting the seller to deduct credits or refunds for returned goods relates to transactions wholly apart from conditional sales. Merchandise is sometimes returned by a purchaser and refund of the purchase price made or credited. Such is not the case under conditional sales." * * * * *

Upon the question of when should the transaction be treated as final for the purpose of computing the tax, that is, when the note and chattel are given or when they are paid off. In other words, if the giving of the note and chattel mortgage make the transaction a charge and time sale; then by the provisions of said section 10 of the Act, the sales tax is to be collected and remitted as and when the payments are made; but if the giving of the note and chattel mortgage does not make the transaction a charge and time sale, then the tax is due at the time of the giving of such note and mortgage and of the delivery of the title and possession of the property.

Your request indicates that it is the custom of the furniture house to require a down payment of the purchase price and to take the balance in installment notes secured by a chattel mortgage on the articles sold. In the Montgomery Ward case, supra, the plaintiff stated that it collected the tax at the

time the sale was made and that if it repossessed the property it would not refund any of the tax.

Your letter also indicates that the tax is collected at the time the sale is made but it does not reveal whether or not, in case the furniture is repossessed, the company refunds any of the tax. If the dealer collects the tax at the time the sale is made and remits it to the auditor within the time provided by law then and thereafter he could not refund any of the tax to the person from whom the furniture is repossessed. The terms of the contract entered into at the time of the sale of the furniture would be controlling on this point. Volume 55 Corpus Juris, page 1197, Section 1174 on the construction of such instruments the rule is stated as follows:

"* * * and whether or not a contract is one of conditional sale, or a contract of a different character, is a question of the intent of the parties as shown by the language of the whole contract without regard to its form or the name which the parties may have given it." * * * *

If for the balance of the purchase price of the property the purchaser gives the seller a note secured by a chattel mortgage on the articles sold, then the transaction would be considered final at that time because the title of the chattel is then delivered by the seller and the relationship of creditor and debtor exists between the parties. If this were not the case, the mortgagor who is giving the chattel mortgage on the articles he has purchased could not deliver the title of the chattels to the mortgagee as required by Section 3097 R.S. Mo. 1929 which is as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust," * * * *

Then by the provisions of sub-section g of Section 1 of the Act the title and ownership of the chattels having been transferred to the purchaser, the sale at retail has been completed and the tax is then due and collectible.

March 1, 1938

If the seller of the tangible personal property retains the title to such property until it is paid for, then all the elements of a retail sale as defined by said subsection g of Section 1 are not present, for the purchaser does not own and have title to the chattel until it is paid for and the creditor and debtor relationship does not exist between the parties.

So in case a conditional sales contract is entered into when the furniture is sold, the sales tax would only be due and payable as the collections for the balance of the purchase price are made. In distinguishing between chattel mortgages and conditional sales contracts in the case of *Branham et al. v. Peltzer et al.*, 177 S.W. 373, 374, the Supreme Court said:

"* * * the test by which to determine whether a transaction is a mortgage or a conditional sale is this: If, after the execution and delivery of the instrument evidencing the transfer, the debt still subsists between the parties, it is a mortgage; if, however, there is no debt still subsisting, and the grantor has the privilege of refunding if he pleases within a given time, thereby entitling him to a reconveyance, it is a conditional sale." * * * * *

Apparently the contract with the furniture house has been treated by the parties as a final sale when the note and chattel mortgage were given for at that time the furniture house delivered title and possession of the furniture to the purchaser and took the note and chattel mortgage back thereby creating the relationship of creditor and debtor between the parties.

CONCLUSION

From the foregoing, this office is of the opinion that the sale in which a note and chattel mortgage are given for the balance of the purchase price for tangible personal property is final at the time of the delivery of title of such property to the purchaser and of the giving of the note and chattel mortgage and that it is the duty of a seller of such property to collect from the purchaser the two per cent sales tax as provided by law.

March 1, 1938

And we are further of the opinion that if in the act of such a transaction, the relation of creditor and debtor exists between the seller of the property and the purchaser of the property, then the instrument given evidencing the transfer is a chattel mortgage, and the sales tax is due at the time of giving of such instrument, but if at the time of the transaction no debt subsists and the seller of the goods has the privilege of refunding as he pleases within a given time thereby entitling him to a reconveyance or retaking of the property, then the instrument is a conditional sales contract and a sales tax is due and payable as the installment payments are made.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

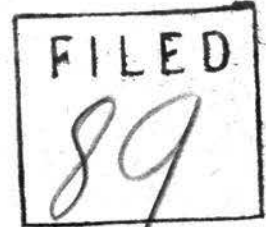
J. E. TAYLOR
(Acting) Attorney General

TWB:DA

ELECTIONS: Committeemen or committeewomen for county committee to be selected from wards of incorporated cities and from territory outside of such cities in the township.

June 17, 1938

Honorable Hampton Tisdale
Prosecuting Attorney
Cooper County
Boonville, Missouri



Dear Mr. Tisdale:

This will acknowledge receipt of yours of the 6th, which reads as follows:

"I have been asked to interpret Section 10278, R. S. of Missouri, 1929, insofar as it applies to the selection of Precinct Committeemen and Committeewomen.

"I would appreciate your giving me an opinion on the following questions:

- (1) May Committeemen and Committeewomen be elected from each voting precinct in the County instead of Township Committeemen and Committeewomen at the August Primary under Section 10278 R. S. Mo. 1929?
- (2) Is an elector who complies with Section 10257 R. S. Mo. 1929 in its entirety entitled to have his or her name placed on the ballot for Precinct Committeeman or Committeewoman at the August Primary election?
- (3) In case an elector files for both Township and Precinct Committeeman or Committeewoman, does the Township or Precinct take precedent, and which name should be placed on the ballot?

June 17, 1938

The section to which you refer, to-wit, Section 10278, reads in part as follows:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county, or in the case of a city not within the county, of the city of which such voting precinct, or district is a part: *** "

Section 10284 reads as follows:

"The word 'county' as used in this article shall include the several counties of this state and the city of St. Louis, and the word 'precinct' and the words 'election districts' shall include and refer to wards or townships as the case may require, but shall not apply to any subdivision less than a ward within any city subdivided into wards, or to any subdivision less than a township in any county."

The foregoing statutes have not been interpreted by the courts of this State. We think that Section 10278 authorizes the voters of each township or election district to elect a committeeman and committeewoman to represent that territory on the county committee. Section 10284 provides that "election districts" shall include and refer to wards or townships as the case may require, and therefore, in view of Section 10278, we think that each ward in an incorporated city would be entitled to a committee-

man and committeewoman and that in a township which does not contain incorporated cities, such township would be entitled to a committeeman and a committeewoman on the county committee. In a township containing one or more incorporated cities, the territory in such township outside of such incorporated city or cities would also be entitled to a committeeman and a committeewoman in addition to committeemen and committeewomen from the wards of such incorporated city or cities.

In such latter case, the territory outside such city or cities would be an election district. We think the statute is quite clear that each ward in an incorporated city is entitled to a committeeman and a committeewoman, and in order to give the territory outside of such incorporated city representation on the county committee, that territory would likewise be entitled to a committeeman and a committeewoman. We see nothing in the statute which would give any preference to a committeeman or committeewoman from the township outside of incorporated cities over the committeemen and committeewomen elected from the wards of incorporated cities. It would seem to us that in a township containing an incorporated city of three wards, such township would be entitled to four committeemen and four committeewomen on the county committee, each ward of such city being entitled to one committeeman and one committeewoman, and the territory outside of such city being entitled to one committeeman and one committeewoman.

The proviso in Section 10278 reads as follows:

" ** Provided, that any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot, or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 10257, R. S. 1929."

The language of this proviso is clear and it definitely states that an elector who complies with Section 10257 is entitled to have his name placed on the ballot to become a candidate for committeeman or committeewoman.

June 17, 1938.

CONCLUSION.

It is, therefore, the opinion of this office:

(1) Each ward in an incorporated city is entitled to one committeeman and one committeewoman on the county committee, and in addition to these, the territory of a township lying outside of such incorporated city or cities and within the township, is entitled to one committeeman and one committeewoman on the county committee.

(2) An elector who complies with Section 10257 is entitled to have his or her name placed on the ballot as a candidate for committeeman or committeewoman for either the ward of an incorporated city or for the township, the township committeeman being the one selected from the territory of a township not within an incorporated city or town.

(3) That there is no preference between a township committeeman and a ward committeeman, each being of equal rights and priorities. If, therefore, an elector who resides in a ward of an incorporated city, and such ward elects a committeeman or committeewoman for the county committee, such elector would not be eligible as a candidate for the office of township committeeman or committeewoman, since he would not reside in the territory of the township outside of the incorporated city.

If, however, the wards of such city are not selecting committeemen and committeewomen for the county committee, there would be no reason why such an elector residing in such city would not be eligible to the office of township committeeman or committeewoman, since in that case the whole township would be the election district from which the committeeman and committeewoman are being selected.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK

Attorney General

MUNICIPALITIES:
BOND ISSUE: VALUATION:
HOW DETERMINED:

Municipalities in determining the amount for which they may vote bonds shall use the assessment next before the last completed assessment as a basis of such bond issue.

July 29, 1938



Mr. Morris Thompson, Secretary
Chamber of Commerce,
Trenton, Missouri.

Dear Sir:

This is in reply to yours of July 23rd requesting an official opinion from this department based upon the following letter:

"The city of Trenton is considering the advisability of some new construction which will necessitate a bond issue. In connection with this, we would like to know the maximum bonded indebtedness allowed Trenton under the law.

If you have these figures available, we will be grateful for the information. If not, we will appreciate advice as to where we can secure the information."

Section 12 of article X of the Constitution relating to municipal indebtednesses provides in part as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the

July 29, 1938

consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness,* * * * *

As to which assessment the foregoing section of the Constitution referred to the court in the case of State ex rel. v. Gordon, 251 Mo. 303, held as follows:

"The assessments to be considered in determining whether a proposed indebtedness exceeds the constitutional limitation, in view of the words that such indebtedness cannot exceed ten per cent of 'the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes,' are the two successive, antecedent, completed assessments made by the State Board of Equalization previous to incurring the indebtedness; that is, previous to the time of the popular election to increase the indebtedness. If it was proposed to hold an election in August, 1912, to increase the city indebtedness, and the assessment as of June 1, 1911, had not then been completed by the State Board of Equalization, the taking of the assessment as of June 1, 1910, as the basis, would not be in compliance with the Constitution, for its language means that it must be 'the assessment next before' that completed assessment. The assessment that the Constitution con-

July 29, 1938

templates was the one as of June 1, 1909, and if the taxable value of the property within the city as shown by that assessment, was \$485,466, a bond issue of \$53,000, voted in August, 1912, was in excess of the constitutional limit, and the State Auditor properly refused to register them."

This office does not have any information as to what the amount of the assessments of your property is but this information can be obtained from the records of your city clerk, county clerk or city collector.

From the holding in the Gordon case, supra, if the assessment for June, 1937, is not yet completed, the last completed assessment would be the assessment for 1936, and as the foregoing section of the Constitution provides that the amount of the bonds which may be issued shall be based upon the assessment next before the last assessment for county purposes, the assessment upon which you should base your valuation for the purpose of determining the value of the property and the amount for which the city may vote bonds is the assessment for the year 1935.

Section 9862, R. S. Mo. 1929 provides as follows:

"The board shall meet at the capitol in the City of Jefferson on the last Wednesday in February, 1894, and every year thereafter, the majority of whom shall constitute a quorum, and the members thereof shall each take an oath or affirmation that he will, to the best of his knowledge and ability, equalize the valuation of real and personal property among the several counties in the state, according to the rules prescribed by this chapter for equalizing and valuing real property; and the secretary of the board shall keep an accurate account of

all their proceedings and orders, and file the same, together with all their papers, in the office of the state auditor."

If the State Board has now performed all of its duties required by the foregoing section in regard to the assessment made as of June 1, 1937, then by the rules hereinbefore set out the assessment as of June 1, 1936, would be the one the city would use in determining what amount of bonds it could vote.

If the construction which you are contemplating erecting is one that is permitted by Section 12a, article X of the Constitution, then your voters by a vote may become indebted in a larger amount than that specified by Section 12 of article X of the Constitution which amount shall not exceed ten per cent of the value of the taxable property. The valuation under this section is to be ascertained and based upon the same assessment as is provided for by Section 12 of article X of the Constitution of Missouri.

Section 12a, article X of the Constitution of Missouri provides in part as follows:

"Any city in this State, containing not more than thirty thousand (30,000) inhabitants, may, with the assent of two-thirds ($\frac{2}{3}$) of the voters thereof voting at an election held for that purpose, be allowed to become indebted in a larger amount than specified in section 12 of article 10 of the Constitution of this State, not exceeding an additional ten (10) per centum on the value of the taxable property therein, for the purpose of purchasing or constructing waterworks, ice plants, electric or other light plants, to be owned exclusively by the city so purchasing or constructing the same: * * * * *

July 29, 1938

CONCLUSION

From the foregoing it is the opinion of this department that the city may, by a proper vote, become indebted in an amount not exceeding five per cent on the value of the taxable property therein less any indebtedness which may have been authorized by section 12 of article X of the Constitution, which valuation shall be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness; that if the State Board of Equalization has completed its duties pertaining to the 1937 assessment, then the valuation as fixed by the 1936 assessment is the one upon which you should base your bond issue, and if said board has not completed its duties pertaining to the 1937 assessment, then the valuation for the 1935 assessment is the one the city should use as a basis of its bond issue.

We are also of the opinion that if the project which the city contemplates construction is one that is authorized by section 12a of article X of the Constitution, then an amount in addition to the then existing indebtedness, if any, which may have been authorized by said section 12a, but not exceeding ten per cent of the value of the taxable property therein may be voted by the people. Such valuation to be determined in the same manner as is hereinbefore set out relating to the bond issue not exceeding five per cent of the value of the taxable property.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

TWB:DA

ELECTIONS: Public utility company not entitled to have challengers and watchers in polls in a municipal bond election on the question of incurring indebtedness to buy or build municipal utility plant.

FILED 89

September 21, 1938

Hon. Charles R. Timmons
Attorney at Law
Carrollton, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"I enclose several enclosures which speak for themselves. The facts, briefly, are these:

A special bond election has been called for Sept. 27th to vote on the proposition of whether or not the citizens of the Town of Carrollton shall issue bonds for the construction of a Municipal Water & Light plant. The Town council has appointed all of the judges and clerks of said election, all of whom are favorable to the municipal ownership. Carrollton is a town existing by virtue of a Special Charter, and the only ordinance that we have on the subject is that all elections of every kind shall be governed by the general election laws of the State of Missouri. A request has been made by the Kansas City Power & Light Company, who now furnish the Town electric and water service, for witnesses to the count and challengers. This request has been vigorously denied and refused by the council. That the Kansas City Power and Light Company is an interested party there can be no doubt, as the bond proposition itself is worded 'to build or buy (the existing) electric light plant'. Parenthesis mine."

The proposed election is provided for by Section 7218, R.S. Missouri, 1929, which reads as follows:

"For the purpose of testing the sense of the voters of any incorporated city, town, or village upon a proposition to incur debt as authorized in the preceding section, the council, board of aldermen or trustees, as the case may be, shall order an election to be held of which they shall give notice signed by the city clerk.

* * * * *

Except as herein provided, such election shall be conducted in the same manner and by the same election commissioners (if there be such election commissioners) judges and clerks and other officers and employees as other elections are conducted."

By the foregoing section, the proposed election should be conducted in the same manner and by the same election officials as other elections. The question then is, how are other elections conducted with respect to challengers and watchers at polls?

The provisions of the 1929 statutes which govern challengers and watchers in primary elections are as follows:

Section 10270 -

"The county, ward or township committeeman of each party in each county, or the ward committeeman in any city with a population of over 300,000, may appoint two party agents or representatives, with alternates for each, who may represent his party at the polling place in each precinct during the casting, canvass and return of the vote at a primary, who shall act as challengers and witnesses to the count of the vote for their respective parties, and have the power prescribed by law."

Section 10271 -

"It shall be the duty of the challenger to challenge and the duty of the judges of election to reject the ballot of any person attempting to vote other than the ticket of the party with which he is known to be affiliated, unless such person, when challenged, obligates himself, by oath or affirmation, administered by one of the judges, to support the party nominees of the ticket he is voting in the following general election. All judges of the election shall have authority and are empowered to administer such oath, or affirmation, and any person offering to vote who shall fail or refuse to take or make such oath or affirmation when demanded by such challenger, or required by any judge, shall not be allowed to vote at such primary election."

Section 10272.

"The canvass of votes shall be made in the same manner and by the same officers as the canvass of an election. The party chairman of the city in a precinct canvass, of the county in a county canvass, of the state in a state canvass, or some duly appointed agent to represent each party, shall be allowed to be present and observe the proceedings."

From the foregoing, it will be seen that the political parties are permitted to have challengers at the polls and watchers at the canvass of returns at elections. It should be borne in mind that primary elections are held to select candidates for elective offices (Section 10253). The primary election is in reality a method provided by law by which political parties can choose their candidates. Each political party is given the right to name challengers whose duty it is to challenge the right of a voter to participate in the selection of candidates for that party when such voter is known not to affiliate with that party. The results of a primary election determine who shall be the candidates of

particular political parties in the general election, and it is not strange that the Legislature has provided that the political parties to be affected shall have something to do with the selections to be made.

Section 10206, R.S. Missouri, 1929, which controls general elections, provides, among other things, as follows:

"No person or persons shall be admitted into the room or office where such ballots are being counted, except the judges and clerks of election: Provided, that any political party may select a representative man who may be admitted as a witness of such counting."

In the general election, it will be seen that no persons except the judges and clerks are permitted to be present at the count of ballots except that political parties may have a witness at the counting. Political parties are associations of electors having distinctive aims and purposes. In the case of *Kelso v. Cook*, 110 N.E. 987, 994 (8), it is said:

"A 'political party' is an association of voters believing in certain principles of government, formed to urge the adoption and execution of such principles in governmental affairs through officers of like beliefs. They have existed in some form under all systems of government where the people were accorded any political rights. They originated here with the adoption of the Federal Constitution in 1787. In a republican form of government they are a necessity."

We do not think that anyone can claim that a public utility company such as the Kansas City Power and Light Company could, by any strained construction of language, be classed as a political party. In fact, we do not understand that such company makes any such claim. However, the company takes the position that it is an interested party in the proposed bond election and that it represents the side opposed to the people of Carrollton incurring an indebtedness to purchase a municipal water and light plant and that the city council represents the

side in favor of the people incurring such indebtedness, and that therefore, the lineup in the proposed bond election is similar to the lineup of an ordinary election where political parties are arrayed against each other. The company reasons that it stands in a position similar to one political party in an ordinary election and that therefore, it should have the same privileges as a political party in an ordinary election in respect to challengers and watchers.

The fallacy of the company's position is that elections are regulated by statute and that city councils and other officers or agencies charged with the duty of conducting elections can only do what the statutes provide. This is true as to allowing challengers and watchers in the voting places. In 20 C.J. 174, it is said:

"Whether persons other than the election officers and the voters may lawfully be present in a voting place depends upon the provisions of the particular statute. * * * * * but it seems that statutes authorizing watchers at elections do not apply to special elections on abstract or economic questions of municipal government upon which political parties themselves divide."

In the case of *In Re Easton City Election Overseers*, 12 Pa. Dist. Rep. 526, the court was passing upon the right of opposing factions in a municipal bond election to have overseers who would correspond to our challengers and watchers. In discussing the case, the court said:

"It is suggested by counsel for petitioners that as the Act of 1893 does not authorize watchers where there are no candidates for offices to be filled, overseers may still be appointed under the Act of 1874 in such cases as now presented, and which, in that particular, is not repealed. But the natural interpretation of all these provisions, it seems, must rather apply them to elections only where there are contests between political candidates for office, and not to special elections on abstract or economic questions of municipal government, upon which political parties themselves divide."

* * * * *

If these statutes were applicable to an election in the city to determine whether there should be an increase of indebtedness, then the Act of 1874, if not repealed, would be complied with when the court should appoint in each district one Republican and one Democrat, both of whom were in favor of the increase of debt. This would be incongruous.

If the appointments now petitioned for can be required, we give to the expression 'different political parties' a meaning which extends it to embrace those who are supposed to have opposing views upon the subject-matter of the special election.

Political parties are separate organizations, well understood as objects of discriminating legislation, but it is impossible to reach similar results in individual classification."

The Missouri statutes allow challengers and watchers to political parties, but as shown by the foregoing authorities, political parties do not include opposing groups in a bond election.

It might be said in passing that there is one provision in our statutes where challengers are provided for by organizations other than political parties. That provision is found in Sections 10392 and 10393, R.S. Missouri, 1929. These sections provide that opposing campaign committees in elections on Constitutional Amendments shall have the right to have challengers at the polls. The sections provide also how the campaign committee may gain recognition and how any dispute between various committees planning to be the campaign committee of one side of the question shall be settled. While we do not think that even if the situation in Carrollton could be compared in every detail with an election on Constitutional Amendments, the opposing groups in the bond election would be entitled to challengers (since there is no statute authorizing such challengers), yet there is a great difference between the situation provided for in Sections 10392 and 10393 and the

situation in the bond election. For instance, suppose the Kansas City Power and Light Company should claim it has the right to select challengers because it is one opposing group in the election, and at the same time, several groups of citizens should each claim that they represent the opposition to the bond issue. There would be no authority authorized by law to settle the disput and recognize either group of claimants. Challengers and watchers in bond elections are simply not provided for in our Missouri law.

CONCLUSION

It is, therefore, the opinion of this office that the Kansas City Power and Light Company is not entitled to challengers or watchers to the count in the special election to be held in the City of Carrollton on the 27th day of September, 1938, to test the sense of the voters of said city on the proposition of incurring an indebtedness to build or buy an electric light plant.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED BY:

J.W. BUFFINGTON
(Acting) Attorney General

COLLECTOR OF ST. LOUIS:

Collector of St. Louis County
can not retain an amount greater
than \$10,000.00 under Section 9935
Division 14 as amended by Session
Laws of 1937.

January 17, 1938

Hon. M. Ralph Walsh,
Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.



Dear Sir:

I have your letter of September 20, 1937 enclosing a letter to you of even date from E. O. Harper, Comptroller of St. Louis County, requesting that you obtain an opinion from our office. The Comptroller's letter is in the following terms:

"I respectfully request that you obtain an opinion from the Attorney General in the following matters:

Section 9935 Div. XIV provides that the Collector may retain \$10,000.00 per annum as compensation. This section also states

'All fees, commissions or other compensations heretofore charged, received or allowed by or to any such collector as compensation for his services, whether under or by virtue of State law or not, or hereby abolished; and such collector and all his deputies and employes are hereby forbidden, under penalty of forfeiture of office, to collect, charge or receive, directly or indirectly, any fees or commissions in the nature of compensation, or other compensation other than those allowed and authorized by this section.'

"In view of the fact that the law specifically states the maximum compensation, and that all fees, etc., heretofore allowed whether by virtue of State laws or not abolished, can the Collector of St. Louis County retain an amount greater than \$10,000.00?

January 17, 1938

"Trusting that you will request such an opinion at once, I am"

According to your request you desire to know whether or not the collector of St. Louis County can retain an amount greater than ten thousand dollars (\$10,000.00) a year from the fees as salary. The county collector of St. Louis County is a ministerial officer and must be governed by Section 13, article 9 of the Constitution of the State of Missouri. This section reads as follows:

"The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

There has been many cases decided by our Supreme Court which passes on or touches on section 13, article 9 of the Constitution of Missouri in connection with section 12, article 9 of the Constitution of Missouri.

In the case of Little River Drainage District v. Lasater Township Collector, 29 S.W. (2d) 716; 325 Mo. 493, the court held that a township collector was entitled to fees for collecting drainage taxes and held the act set out by the legislature was not unconstitutional as to not applying uniformity to all county officers in connection with article 9, section 12 of the Constitution. In this case also the court held that a statute authorizing county courts to increase county and township collectors fees for collecting drainage taxes was not unconstitutional as authorizing increase in county or municipal officers compensation during terms, in connection with article 14, section 8 of the Constitution. This case was originally brought by the drainage district against the township collector for the reason that he had retained drainage taxes collected during his term and which were allowed as an increase during his term and was unauthorized by the Constitution. The court

held that it was added duties in an incident to his office and the increase during his term of office did not violate the Constitution. This case did not hold that he or a county collector could receive more than the maximum of ten thousand dollars (\$10,000.00) as set out by section 13, article 9 of the Constitution.

In the case of State ex rel. Saline County v. Price et al, 246 S.W. 572, the court held:

"The first question confronting us in the record arises upon the contention of the respondent that section 11036, R.S. 1919, is unconstitutional because it reduces the maximum compensation allowed to public officers, including the sheriffs of the several counties, to be paid out of the fees of the office, to \$5,000 per annum, while section 13, art. 9, of the Constitution fixes the maximum amount at \$10,000.

The constitutional provision referred to is as follows:

"The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

It will be seen that this provision applies to all executive and ministerial officers of the counties and municipalities of the state, and there is nothing in the words in which it is expressed that either fixes the amount of their total compensation or the amount which

they may retain from the fees of their respective offices for such compensation. It is simply a limitation on the maximum amount of compensation which may be allowed them by the Legislature, without interfering with its right to confine the compensation of any one or all of them to what it may consider the actual value of the service rendered in the office. The theory of the provision seems to be that all fees are imposed by the state through its laws, and that when collected by its officers they become the property of the state to be disposed of at its pleasure. This duty of collection may be and is performed by salaried officers as well as by those depending upon the fees for their compensation, and in many instances they bear no relation to the service involved in connection with the matter to which they pertain. The prominent and only idea expressed in this constitutional provision is the protection of the state from unreasonable charges by ministerial and executive officers affected, and to provide for their compensation out of a fund created in the performance of their duties. The only limitation upon the legislative branch of the government, either expressed or implied, is, as we have said, a limitation of the maximum amount of the compensation to be so paid. The provisions of sections 11036 and 11037, R.S. 1919, have no tendency to interfere with that purpose. This point must be ruled against the respondent."

In this case Saline County attempted to collect from the sheriff an amount of fees withheld by the sheriff which was in excess of five thousand dollars (\$5,000.00) per year as allowed by the statute. The amount that the county of Saline attempted to recover was four thousand four hundred sixty eight dollars and twenty two cents (\$4468.22). The court in this case decided solely on the fact that where

the sheriff had received money for the board of prisoners it was not fees under the statute or constitution and the court allowed the sheriff to retain fees up to within five thousand dollars (\$5,000.00) and the amount that he received for the board of prisoners. The court did not hold that he was allowed for extra services beyond the maximum amount set out under the statute.

In the case of State v. Lashly v. Wurdeman, 187 S.W. 257 1.c. 259, the court in its opinion held as follows:

"The Constitution and the statute (Const. art. 9, 13; R.S. 1909, 10734, 10735, 10736) provide and limit all fees which can be retained by the relator, and impose the duty of making quarterly returns, showing the amounts so received, under the penalties prescribed in the statute. It necessarily follows that any excess over the fees thus limited was money belonging to the public and in the custody of such officer until turned over."

Under this decision any excess over the fees limited to ten thousand dollars (\$10,000.00) was money belonging to the public and in the custody of such officer until turned over.

In the case of Greene County v. Grant C. Lidy, 263 Mo. 77, the court held that a probate judge was not a ministerial or executive officer under section 13, article 9 of the Constitution but was classified with the judiciary act of the Constitution and therefore was not limited to the amount of fees set out in section 13, article 9 of the Constitution.

In your letter of request you quote part of section 9935, Division 14 in which you quote that certain fees have been abolished by this section. That part of the letter which you quote only covers the abolishment of fees that are not set out in Division 14 of Section 9935 of the Session Laws of 1937 page 547 which repealed the same section of the Laws of Missouri of 1933 found on page 454.

The only difference of division 14 of Section 9935 of the Act of 1937 repealing 1933 reads as follows:

"On all back taxes and all other delinquent taxes, he shall be allowed a commission of two per cent which shall be added to the face

of the tax bill and collected from the party paying such tax as a penalty in the same manner as other penalties are collected and enforced, which commission the collector shall be entitled to retain as compensation for additional services rendered in collecting delinquent taxes and the amount of said commission shall not be included in computing the maximum salary allowed the collector."

This part of division 14 which was added states that the collector shall be entitled to retain as compensation for additional services rendered in collecting delinquent taxes and the amount of said commission shall not be included in computing the maximum salary allowed the collector. Also in division 14 of Section 9935 of the 1937 Act the legislature provides:

"Said collector shall present for allowance proper vouches for all disbursements made by him on account of salaries and expenses of his office and other costs of collecting the revenue, which shall be allowed to him as against the commissions retained by him; and out of the residue of such commissions in his hands after deducting the amount of such vouchers allowed he shall be allowed and authorized to retain, as far as the said residue of such commissions in his hands will permit, a compensation at the rate of ten thousand dollars per annum. Should such residue of commissions be less than sufficient to cover the above compensation, then the entire residue shall be allowed to him, and shall be in full payment for his services. If, however, such residue is more than sufficient to cover such compensation, then the surplus shall be paid over to the state, school, county and city in proportion as the amount collected."

Also in division 14 of Section 9935 of the 1937 Act the legislature provides as follows:

"Collectors of revenue under this subdivision shall keep at all times in their office a notary public, who shall

administer oaths and take notarial acknowledgments in connection with such office without charge. All fees, commissions or other compensations heretofore charged, received or allowed by or to any such collector, as compensation for his services, whether under or by virtue of state law or not, are hereby abolished; and such collector and all his deputies and employes are hereby forbidden, under penalty of forfeiture of office, to collect, charge or receive, directly or indirectly, any fees or commissions in the nature of compensation, or other compensation other than those allowed and authorized by this section."

This partial quotation of section and division refers to any other fees than that set out in division 14 of Section 9935 of the 1937 Act.

There is no question but that part of division 14 of Section 9935, page 550 of the 1937 Act which states that the amount of delinquent taxes for which the collector was allowed a commission of two per cent should not be included in computing the maximum salary allowed the collector, is unconstitutional in connection with section 13, article 9 of the Constitution of Missouri. In the case of *Barker v. St. Louis County*, 104 S.W. (2d) 371, the court held:

"Statute will not be held unconstitutional unless it contravenes organic law in such manner as to leave no doubt of its unconstitutionality, but if there is no such doubt, court, whose duty it is to decide, must declare statute, or part thereof in conflict with Constitution, void.

Invalidity of part of statute does not render remainder invalid, if remainder shows legislative intent and furnishes sufficient means to effectuate that intent."

CONCLUSION

In conclusion will state that in view of all of the authorities above set out, the collector of St. Louis County can not retain an amount greater than ten thousand dollars (\$10,000.00) from all the fees collected by him in any one year.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

SHERIFFS:

Assistant taking patient to State
Hospital allowed \$4.00 per day.
County court may furnish siren and
red light for sheriffs privately
owned car. May appoint deputies
with approval of circuit
judge.

February 8, 1938

Mr. Rudy J. Walter,
Sheriff of Moniteau County,
California, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of January 27, 1938, requesting three official opinions from this office which request reads as follows:

"As sheriff and officer of the State of Missouri, I would like to have a written opinion from your office on the following legal questions.

1. Under Section 11791, R.S. 1929, entitled, Fees of Sheriffs, Marshalls and other officers, there is provided that in cities and counties having a population of three hundred thousand inhabitants and over, each deputy sheriff, not more than two, shall be allowed for each day during the term of court three dollars.

How many deputy sheriffs are allowed under the law in a county of 12,173 population for each day during the circuit court? (court being actually in session) And what fee are they to be paid?

2. It has been ruled by the prosecuting attorney of this county that the county is without power to furnish or purchase for the use of the sheriff a siren and red light, said equipment to belong to the county and be passed on to the succeeding sheriff in office. The basis for this opinion was rendered on the fact that equipment belonging to the county could not be attached to the sheriff's car when privately owned.

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I would like to know if the county can legally furnish this equipment such as red light, siren, handcuffs, guns, and other equipment which is necessary for the sheriff to properly cope with crime. Said equipment to be passed on to the succeeding sheriff in office. In what class should this equipment be budgeted?

3. At page 408 Laws of Missouri 1933 under Section 8662, entitled, Compensation of Sheriffs. 'The sheriff or other person, for taking a patient to a state hospital or removing one therefrom, upon the warrant of the clerk, milage going and returning, at the rate of ten cents per mile and one dollar per day for the support of each patient on his way to or from the hospital shall be allowed, to each assistant allowed by the clerk and accompanying the sheriff, or other person acting under the warrant of the clerk, four dollars per day for the time actually consumed in making said trip said sum, to include all expenses of such assistant, -----.'

In regard to the pay of each assistant, does this section mean \$4.00 to be paid them regardless of the fact that it takes only three hours for the trip to the hospital, or should this \$4.00 be pro-rated.

It is also provided that \$1.00 be paid the sheriff for maintenance of the patient, does this mean that he is to receive the \$1.00 regardless of the fact that he is not put to any expense for support?

As Sheriff of Moniteau County I would appreciate a written opinion on these three legal questions which are above stated."

I

Section 11513 R.S. Mo. 1929 reads as follows:

"Any sheriff may appoint one or more deputies, with the approbation

of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

Section 11514 R.S. Mo. 1929 reads as follows:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

Under Section 11513 R.S. Mo. 1929 which is the general law in regard to the appointment of deputies, the appointment of deputies must be approved by the judge of the circuit court.

Under Section 11516 R.S. Mo. 1929, in case of an emergency, the sheriff may appoint deputy sheriffs without permission from the judge of the circuit court and their salary shall be two dollars (\$2.00) per day. This section reads as follows:

"Every sheriff shall be a conservator of the peace within his county, and shall cause all offenders against law, in his view, to enter into recognizance, with security, to keep the peace and to appear at the next term of the circuit court of the county, and to commit to jail in case of failure to give such recognizance. In any emergency the sheriff shall appoint sworn deputies, who shall be residents of the county, possessing all the qualifications of sheriff. Such deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

In the case of Scott v. Endicott, 38 S.W. (2d) 67, the court held:

"There can be no doubt that a deputy sheriff appointed by the sheriff, as provided by section 11513, R.S. Mo. 1929, is a public officer. State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, 33 L.R. A. 616. That being true, he is subject to the same general limitations as any other public officer in the matter of

salary and fees. There is no provision in the law providing a salary for deputy sheriffs in counties such as Ozark county.
*****"

Under Section 11789 R.S. Mo. 1929, the fee of the deputy sheriff for attending each court of record or criminal court and for each deputy actually employed in attendance upon such court, the number of such deputies not to exceed three per day, they shall be allowed three dollars (\$3.00) per day.

Bearing in mind Section 11513 as above set out, this deputy who attends court must be approved by the judge of the circuit court. The only other section pertaining to the fees of sheriffs is Section 11791 which applies only to criminal cases. Section 11790 applies to fees allowed sheriffs in cities having a population of six hundred thousand (600,000) or more and part of Section 11791 applies to only cities and counties having a population of three hundred thousand (300,000) inhabitants and over. In view of the fact that Moniteau County only has a population of twelve thousand, one hundred seventy three (12,173), the sheriff of this county is only allowed fees as set out in Section 11789 and Section 11791.

CONCLUSION

In conclusion, it is the opinion of this office that you are limited to the appointment of deputy sheriffs in that any appointment you should make must be approved by the judge of the circuit court of that county. When the deputy or deputies is appointed and approved by the judge of the circuit court, they shall be allowed as salary or fee for attending court three dollars (\$3.00) per day while actually employed.

II

Section 2078 R.S. Mo. 1929 reads as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against

the county."

Under this section the county court has the power to purchase either real or personal property for the use or benefit of the county.

Section 3, article X of the Constitution of the State of Missouri reads as follows:

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general laws."

This section of the constitution prohibits in a way the collecting of taxes and using the same for any purpose other than public purposes.

In your letter you state that the county court was informed that they could not furnish a siren and red light on your car for the reason that the car was privately owned. In the case of State v. Hackmann, 218 S.W. 318, the court said:

"But neither of the opinions in that case rules that new debt may not be incurred for the valid public purpose (if such be a valid public purpose) of discharging a prior valid indebtedness. And this is the vital question here.

The first thing to be determined is whether or not the discharge of a valid existing indebtedness is a county public purpose. The second is whether there is (under the facts of this case) a new debt created for such public county purpose."

In your request the question is whether or not the furnishing of a siren and red light for your privately owned car is for a public service. The furnishing of this equipment is for the maintenance of the police car of the county and in no event would be of any use to you as a private individual.

In the case of State ex rel. Gilpin V. Smith, 96 S.W. (2d) page 40, the court also held that:

"Payment of valid existing debt by county is 'county public purpose' within constitutional requirement that taxes could be levied and collected for public purposes only (Const. art. 10, Section 3)."

"Words and Phrases" defines county purpose as follows:

"The Constitution does not attempt to give a definition of 'county purpose,' and, to obtain a correct interpretation of that phrase, we must look to the contemporaneous legislation upon that subject, and the uniform action of the county courts under the territorial government. By this reference it will be abundantly demonstrated that, at the time the Constitution was adopted, 'county purposes' were taken to embrace principally the erection and repair of courthouses and jails; the opening and maintaining of public thoroughfares within the limits of their respective counties, by opening roads, building bridges, and causeways, and keeping the same in repair; licensing and regulating ferries and tollbridges, etc. It is thus seen that the entire subject of highways was at that time an object peculiarly within the jurisdiction of the county authorities, and we are hence warranted in the assumption that it was so understood by the convention when they used the phrase 'county purposes.' Duval County Com'rs. v. City of Jacksonville, 18 South. 339, 343, 36 Fla. 196 (quoting and approving Cotton v. Leon County Com'rs, 6 Fla. 610).

'County purposes,' as used in Const. art. 12, 6, providing that the Legislature shall authorize the several counties and incorporated towns to impose taxes for county and corporation purposes, include the support of their officers;

the building of courthouses and jails; the paying of the legitimate indebtedness of the counties; the construction of roads, bridges, and works of public necessity and convenience; and the expense of a county in the management of its affairs, the maintenance of internal police and good order, the public schools, 'and such other matters of public concern as may peculiarly affect the people of the county in their property and local interests.' Gadsden County v. Green, 22 Fla. 102, 110."

15 Corpus Juris, page 674, in describing county purpose holds as follows:

"The term is one which cannot be precisely defined, and to obtain a correct interpretation of the phrase recourse must be had to the contemporaneous legislation upon the subject and the uniform action of the county courts, and since the authorities have formulated no generally accepted definition of county purpose, it is necessary to leave each case involving the question to be decided as it may arise. It may be said, however, to be a purpose in accordance with the object of its organization, and will include such enterprises as would not advance the wants and demands of the community independently of public aid; such matters of public concern as may peculiarly affect the people of the county in their property and local interests. The term has been held to embrace the erection and repair of bridges; courthouses; roads; jails; poorhouses; public schools; public thoroughfares within the limits of their respective counties; and works of public necessity and convenience; also the licensing and regulating of ferries and toll bridges; the maintenance of internal police and good order; the support of county officers; the paying of the legitimate indebtedness of the counties; and the ordinary expenses of the county.*****."

CONCLUSION

In view of the above authorities, it is the opinion of this office that the county court may furnish a siren and red light for installation on the private car of the sheriff, providing the county court retains ownership of the siren and red light.

III

Section 8662 R.S. Mo. 1929 as amended and set out at page 408, Session Laws of 1933, reads as follows:

"To the Sheriff or other person, for taking a patient to a state hospital or removing one therefrom, upon the warrant of the Clerk, mileage going and returning, at the rate of ten cents per mile, and \$1.00 per day for the support of each patient on his way to or from the hospital shall be allowed: to each assistant allowed by the clerk and accompanying the Sheriff, or other person acting under the warrant of the clerk, \$4.00 per day for the time actually consumed in making said trip said sum, to include all expenses of such assistant. The computation of mileage in each case is to be made from the place of arrest to hospital by the nearest route usually traveled. Provided, that the said Sheriff shall furnish all necessary means of transportation without charge other than as above allowed. The cost specified in this Section shall be paid out of the County Treasury of the proper county."

This section is not ambiguous in any respect and provides for the payment of four dollars (\$4.00) per day for an assistant to accompany the sheriff. This payment is for the time actually consumed in making the trip and to include all expenses of such assistant. There is nothing in the section which provides for pro-rating the four dollar per day consumed in the trip by the assistant.

In the case of State ex rel. Cobb v. Thompson, (2d) 57, the court held:

"The rule is well stated, as follows:

'A statute is not to be read as if

February 8, 1938

open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'*****."

The court in the same case further held:

"***** In Lewis-Sutherland Stat. Const. vol. 2 (2d Ed.) p. 737, it is said:

'Where the omission is not plainly indicated and the statute as written is not incongruous or unintelligible and leads to no absurd results, the court is not justified in making an interpolation.'*****."

CONCLUSION

In view of the above authorities, it is the opinion of this office that the assistant shall receive four dollars (\$4.00) per day as set out in said section 8662 regardless of the fact that the actual time consumed going to the hospital would be only three hours.

It is also the opinion of this office that the sheriff is entitled to one dollar (\$1.00) as allowed by the statute as a fee for the maintenance of the patient, regardless of the fact that he is not put to any expense for support.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

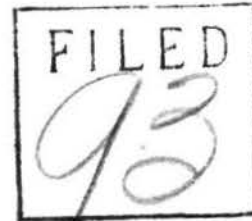
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

DEATH WARRANT: Form of.

April 9, 1938



Hon. Joseph M. Walsh
Assistant Circuit Attorney
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

We have your request of April 7, 1938, which is as follows:

"This office has been requested by the Clerk of the Circuit Court for Criminal Causes in this city to draft form of death warrant, or warrants, provided for in the Act passed at the session of the 59th General Assembly and approved June 4, 1937 relating to the duties of courts in capital cases (Laws of Missouri 1937, p. 221).

I would appreciate your furnishing me with an approved form of the warrant, or warrants, referred to in Sections 3719 and 3721 of said Act, if you can conveniently do so, in order that I may give same to the Clerk of our criminal division for his future use."

Section 3800 R. S. Missouri 1929, provides that for good cause shown either the Court or the Governor may prolong the time or suspend the execution.

April 9, 1938

Section 3742 R. S. Missouri 1929, provides that when an appeal is taken in any case involving the death penalty the appeal shall automatically stay the execution.

In most cases involving the death penalty an appeal is immediately taken from the judgment of the trial court. In such cases the Circuit Clerk should attach to the death warrant either a certified copy of the order granting the appeal, or a certification to the effect that the appeal was granted, giving the date of the appeal. All orders of the Governor postponing the date of execution should be attached to the death warrant by the person receiving such orders.

We have carefully examined the 1937 Law, S.B. 115, Laws of Missouri 1937, page 221, consisting of eight sections. We have prepared a form of warrant which is attached hereto, and this office is of the opinion that the attached warrant meets the requirement of the 1937 Act.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

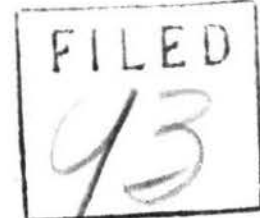
FER: MM

LIQUOR CONTROL:

City council of third class city cannot delegate power to issue non-intoxicating permits. Duty of mayor to sign license issued is ministerial.

September 6, 1938

9-6



Honorable M. Ralph Walsh
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of August 4, 1938, requesting an opinion on the following question:

"A city of the third class in my County, by ordinance, has provided that 3.2% beer licenses must be signed by the Mayor of the city.

"The City Council by a majority vote has voted to issue a 3.2% beer license to a citizen of the city.

"The Mayor arbitrarily refuses to sign the license, maintaining that in as much as the ordinance provides for his signature, he has a right to veto or refuse the license in his own discretion.

"Query: Can the Mayor legally refuse to sign the license, and is he within his rights in doing so?"

We have not been supplied with a copy of the ordinance in question, so do not know its exact import and cannot determine whether the ordinance itself attempts to invest veto power in the mayor with reference to the

issuance of said license. All we can determine is whether or not this power could legally be delegated to the mayor by ordinance.

The authority of a city of the third class to issue a license to a person desiring to engage in the liquor traffic is contained in Section 13139-e, Laws 1935, page 396. This section provides: "The Board of Aldermen, City Council or other proper authorities of incorporated cities, * * * may charge for licenses issued to * * * retailers of non-intoxicating beer within their limits, * * *."

Section 6791, R. S. Mo. 1929 concerns how licenses are to be issued. This section provides: "All license tax shall be regulated by ordinance, * * *. Licenses shall be signed by the mayor and clerk, and countersigned by the collector, and the clerk shall affix the corporate seal of the city thereto."

In Hays v. Poplar Bluff, 263 Mo. 1.c. 531, it is said: "* * that, under our system of government, municipal corporations possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or by other statutes applicable to them.* * "

Under this rule a third class city may only issue a non-intoxicating beer permit as the statute directs, and in no other way. And we might add that only the body authorized to issue the permit may do so.

In 33 Corpus Juris, page 521, section 69, it is stated that the, "Power granted by the legislature to a municipal corporation to * * * license the sale of liquor, cannot be delegated by the municipality to any other body or individual. Thus, if the power is conferred upon the council of a city, it cannot be delegated by the council to the mayor." However, an exception is recognized to this rule. It is stated in 43 Corpus Juris, page 243, section 242 that: "Where the thing regulated is of such a character, * * * that the prosecution of the business * * * under certain circumstances is calculated to endanger the * * safety * * or welfare of the public, and those conditions and circumstances are not in their

nature susceptible of being foreseen and made the subject of common prescription, then the right to the prosecution of such an enterprise * * * may be left by the council to the discretionary determination of some appropriate board or officer."

In determining who may issue a beer license in a city of the third class we must, of course, look to the statute. It says: "the Board of Aldermen, city council or other proper authorities." To determine who might be included within "other proper authorities", we apply the rule of ejusdem generis. The application of this rule is concisely stated in Puritan Pharmaceutical Company v. Penn. Ry. Company, 77 S. W. (2d) 1.c. 511, to be: "that, where general words in a statute follow specific words, designating special things, the general words will be considered as applicable only to things of the same general character as those which are specified." Thus, the phrase, "other proper authorities" means other bodies of the same character as the Board of Aldermen or City Council.

The city council of a city of the third class is the proper licensing authority. It is plain that this authority cannot be delegated because the exception to the rule above stated does not apply in that all conditions and circumstances surrounding the liquor traffic are "susceptible of being foreseen and made the subject of common prescription."

Also another applicable rule is that officers cannot delegate their powers and duties if in their exercise a discretion is called for. The act of determining whether one is qualified to hold a beer permit calls for the exercise of discretion on the part of the city council.

With the city council having no power to delegate their authority to issue non-intoxicating beer permits, then what is the significance to be attached to section 6791, supra, wherein it is provided: "Licenses shall be signed by the mayor"? Does this provision confer on the mayor of said city the right to withhold his signature and in effect veto a license issued by the council?

In State ex rel. v. Russell, 131 Mo. App. 638, a

mandamus suit, a question very similar to the instant question was considered. In this case the Board of Aldermen of Jackson, Missouri, passed on an application for a dramshop license. They found it sufficient and ordered the license issued. The mayor of said city was required by statute to sign said license and this he refused to do. He asserted as reason for his action that the application for said license was not sufficient. In deciding this question the court said at l.c. 649:

"* * We think the effect of the general ordinance which had been adopted by the city of Jackson relating to saloon licenses, was to constitute the board of aldermen a tribunal clothed with authority to pass on the sufficiency of a particular application and petition, and that in doing this the board acts judicially instead of legislatively. This question of the character of the proceedings by a board of aldermen in granting dramshop licenses is decisive, not only against the right of the mayor to participate in the proceedings as being municipal legislation, but of the conclusiveness of the board's action on the rights of the applicant. In an opinion by Judge BLAND, wherein the subject was carefully examined, this court declared the decision by a board of aldermen of a fourth-class city, of whether an applicant for saloon license had complied with the law and entitled himself to a license was no less judicial than a similar decision by a county court or excise commissioner, which has always been regarded as judicial. (Weber v. Lane, 99 Mo. App. 69, 71 S. W. 1099, and cases cited in opinion.) We adhere to said ruling as well supported by principle and precedent. After the board of aldermen of Jackson had found

in favor of relator's petition and qualifications, and had ordered a license to issue, he submitted his bond, the board approved it, he paid all fees, took the collector's receipt for same, the city clerk issued the license and said clerk and the collector signed it as the law provides. (R. S. 1899, sec. 5951.) The statute reads as follows:

'All license tax shall be regulated by ordinance, and no license shall be issued until the amount prescribed therefor shall be paid to the city collector, and no license shall in any case be assigned or transferred. Licenses shall be signed by the mayor and clerk and countersigned by the collector, and the clerk shall affix the corporate seal thereto.'

"Under said section it was as much the duty of respondent, the mayor, to sign relator's license, as it was the duty of the city clerk and collector. And we think in the instance of each of said officials, the duty was ministerial and not discretionary--was intended not as an additional determination by them of relator's right to a license, but as an attestation that one had been granted him.* * * * *

Thus, under this holding it is clear that the duty of the mayor of a third class city to sign a non-intoxicating beer permit is ministerial and not discretionary, and that if he refuses he may be compelled to do so in a proper proceeding. The mayor of a third class city is not vested with any discretion with reference to signing beer licenses, nor could he be so authorized by any ordinance which the city council might adopt.

Hon. M. Ralph Walsh

-6-

September 6, 1938

CONCLUSION

Therefore, it is our opinion that the mayor of a third class city is not and cannot be invested with any discretion in the issuance of non-intoxicating beer licenses; that his duty to sign licenses authorized and issued by the city council is purely ministerial and upon his refusal to sign a license so issued he may be compelled to do so by a proper action in the courts.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:DA

RECORDERS OF DEEDS:
PUBLIC RECORDS -
INSPECTION BY PUBLIC:

Any person may inspect the records in the office of recorder of deeds and make a memorandum or copy thereof, subject to reasonable rules and regulations made by the recorder.

September 26, 1938

Honorable Harold V. Walker
Circuit Clerk and Recorder
Fayette, Missouri

9-27
FILED
93

Dear Sir:

This is in reply to yours of recent date wherein you request an official opinion from this department based upon the following statement:

- "(1) Is it compulsory that I show all the chattels each week to a person making an abstract of chattels to sell the public?
- (2) This same person makes a list of all land transfers and they are published in the paper each week. I have had lots of complaints from the owners of the property and have people ask me to not publish the transfers. What can be done to prevent this?"

By the various statutes of the state, different instruments affecting title to real estate and to personal property are required to be filed and/or recorded in the office of the recorder of deeds of the various counties. By statute, the recorder is the custodian of such records, and he is required to give a bond for the safekeeping of them and turning them over to his successor. The intention of the lawmakers in this respect is evidenced by Section 11527, R. S. Mo. 1929, which is as follows:

"The recorder shall keep his office at the seat of justice, and the county court shall provide the same with suit-

able books, in which the recorder shall record all instruments of writing authorized and required to be recorded. If there is no courthouse or other suitable county building at the seat of justice, the county court shall provide an office for the recorder at any other place in the county where there is a courthouse and courts of record are held."

Section 11529, Laws of Missouri, 1933, page 360, reads as follows:

"Every clerk, before entering upon the duties of his office as recorder, shall enter into bond to the state, in a sum not less than one thousand dollars (\$1000) nor more than five thousand dollars (\$5000) at the discretion of the county court, with sufficient sureties, to be approved by said court, conditioned for the faithful performance of the duties enjoined on him by law as recorder, and for the delivering up of the records, books, papers, writings, seals, furniture and apparatus belonging to the office, whole, safe and undefaced, to his successor."

In Vol. 53 C. J., page 622, Section 38, the rule as to a public official being custodian of the books in his office is stated as follows:

"A public officer, by virtue of his office, is the legal custodian of all papers, books, and records pertaining to his office, and is responsible for their safekeeping and protection against alteration, injury, or mutilation. Correlative with that duty is his right to exercise a reasonable discretion in the care, management, and control of such records and their preservation."

In our research for some law on the duty of the recorder in respect to your question, we find that no law has been enacted pertaining to same except Section 3097, R. S. Mo. 1929, which relates to chattel mortgages. This section is as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, and in the case of the city of St. Louis, with the recorder of deeds for said city, or, where such grantor is a non-resident of the state, then in the office of the recorder of deeds of the county or city where the property mortgaged was situated at the time of executing such mortgage or deed of trust; and such recorder shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; * * *."

It will be noted that by this section, chattel mortgages on file in the office of the recorder of deeds may be inspected by all persons.

In our research of the case law on this question, we find that it has not been before the Missouri courts and the cases cited from other states are ruled upon by the construction of some statute of that state applicable to the question. However, from the authorities we have found we find some general principles which we think are applicable to your question regardless of the absence of a statute relating to the subject.

The same rule as to inspection of the records generally applies to chattel mortgages. In Vol. 80 A. L. R., page 766, the rule is stated as follows:

"Where, by virtue of statute or otherwise, constructive notice is imparted by instruments which have been filed for record, to the same extent as instruments actually on record, it would seem that such instruments should stand upon the same footing with respect to inspection and copying by abstracters as ordinary records."

As to who may inspect the public records, in Vol. 80 A. L. R., page 770, a Kansas court opinion is quoted as follows:

"For instance, it might be decided or admitted that in all cases where a person wishes to examine the records of a public office, whatever that office may be, whether the register's office, the district clerk's office, or any other office, unless he has a present and existing interest of a pecuniary character in the information to be obtained from such records, he has no right of action of any kind, mandamus, injunction, for damages, or other action, although the officer in charge may utterly refuse to let him even see the records. And it may also be admitted that no person has any absolute right to examine the records except during office hours,

and during a time when the records are not in the rightful or proper use of any other person. The refusal of the officer in charge to permit a person to gratify a more idle curiosity, or to examine the records for the mere purpose of taking copies or memoranda thereof for some supposed possible use in the future, or to examine the records when they are otherwise rightfully and properly in use by some other person, cannot constitute a basis for any kind of action. Some present and existing right of a person must be infringed to the injury of such person, before any cause of action of any kind can accrue in his favor."

On the question of the purpose for which any person may examine a public record, the case of *Burton v. Tuite*, 44 N. W. 282, is quoted in Vol. 80 A. L. R., page 771-2, as follows:

"In discussing the general right of abstracters to examine public records, the court said: 'I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend ever to have. I also have the right to examine any title that I see fit, recorded in the public offices, for purposes of selling such information, if I desire. No one has ever disputed the right of a lawyer to enter the register's office and examine the title of his client to land as recorded,

or the title of the opponent of his client, and to charge his client for the information so obtained. This is done for private gain, as a part of the lawyer's daily business, and by means of which, with other labors, he earns his bread. Upon what different footing can an abstracter--can Mr. Burton--be placed, within the law, without giving a privilege to one man or class of men that is denied to another? The relator's business is that of making abstracts of title, and furnishing the same to those wanting them, for a compensation. In such a business it is necessary for him to consult and make memoranda of the contents of these books. His business is a lawful one, the same as is the lawyer's, and why has he not the right to inspect and examine public records in his business as well as any other person? If he is shut out because he uses his information for private gain, how will it be with the dealer in real estate, who examines the records before he buys or sells, and buys and sells for private gain? Any holding that shuts out Mr. Burton from the inspection of these records, for this reason also shuts out every other person except the buyer, seller, or holder of a particular lot of lands, or one having a lien upon it, or an agent of one of them, acting as such agent without fee or reward. It cannot be inferred that the legislature intended that this statute should apply only to a particular class of persons, as, for instance, those only who are interested in a particular piece of land; any person means all persons."

The recorder has a right to prescribe reasonable rules and regulations as to the time and manner in which the records of his office may be inspected. In the case of *Upton v. Catlin*, 17 Colo. 546, that court is quoted in 80 A. L. R., page 778, as follows:

"It requires no argument to show that, by reason of this responsibility, a wide discretion must necessarily be vested in the clerk with reference to permitting the examination of the records of his office by those other than employees thereof. The liability of having the records mutilated, changed, or obliterated is always present when strangers are about the office; and while it is necessary, perhaps, that abstracters should be allowed to examine and make copies from these records, they must in so doing be subjected to such reasonable regulations as the county clerk may prescribe. It is to be remembered that the officer receives no compensation or extra fee for this work."

Under the Missouri statute, no fees are allowed the recorder for exhibiting the records of his office to any person.

Under the common law rule, only persons interested in the particular record were permitted to inspect the record. As to what constitutes an interest, the courts differ. However, your question deals primarily with chattel mortgages and we have a special statute governing them, which statute has been heretofore cited.

In the case of *Tobin v. Knaggs*, 107 S. W. 677, 1. c. 680, in construing who was entitled to copy records by authority of a statute which permitted any citizen to inspect and copy the records, the Civil Court of Appeals of Texas said:

"Nor does the statute restrict the right to copy records to citizens having a particular, or specific, or personal interest in the records to be copied, or any particular purpose to serve. It is objected by appellee that appellant's interest in making copies is to commercialize the same, through the making of abstracts of title, and the like. The same may be said of those making typewritten copies for like pur-

poses, and who, according to the record, are freely permitted by appellee to exercise the right. The law would not sanction the discrimination that would result from appellee's proposed course. The plain and obvious purpose and effect of the statute is to give the right, alike to every citizen, to make copies of the records in the clerk's office, and the clerks have no discretion or power to deny that right to any citizen who agrees, as has appellant in this case, to observe all reasonable rules and regulations imposed in good faith by the clerks upon those demanding the right."

You state in your request that some of the parties desiring to inspect the records are making copies or memoranda thereof. On this question, we find the rule stated in Vol. 53 C. J., at page 625, as follows:

"A statute which provides for inspection of public records grants the right to inspect with all of its common-law incidents, including the right to make copies. The right to copy has been held a necessary incident of the right to inspect granted by the statute. Thus the right to inspect under the statutes includes the right to make memoranda or copies."

CONCLUSION

From the foregoing authorities, we are of the opinion that any person may inspect the records of chattel mortgages and of any other conveyances on record in the office of the recorder of deeds, and may make copies or memoranda thereof, subject, however, to reasonable rules and regulations that the recorder may make as to the time and manner of such inspection.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

TAXATION AND
REVENUE:

Clerk of city of the third class cannot legally collect county taxes. He has no duty to keep a record of the collection of such county taxes.

October 26, 1938

Mr. George E. Waite
City Collector
Webster Groves, Missouri

Dear Mr. Waite:



We desire to acknowledge your request for an opinion on October 20th, which is as follows:

"We have a request from a party who purchased a few pieces of property at our tax sale held November 1st, 1937 on 1932 Real Estate Taxes to post the County Tax payments which he makes on property held under a City Tax Sale certificate and not allow that certificate to be redeemed without the payment of the County Taxes which he has advanced.

"We would appreciate a ruling from you as to the legality or advisability of my office to collect County Taxes and to save at least a year's taxes for the purchaser of one of our certificates.

"I understand also that this same party has requested the County Collector to post the City Tax payments which he makes on property held under a County Tax sale certificate and not allow that certificate to be redeemed without the payment of City Taxes which he has advanced.

"I see several angles and also some very vital points to guide future purchasers of Real Estate property under the Jones-Munger sale as quite a difficulty would arise if the Collector would give a collector's deed to one individual and I as Collector of Webster Groves would give a Collector's deed to another.

"Before answering this party I would greatly appreciate a ruling from your office."

In the second paragraph of your letter you state:

"We would appreciate a ruling from you as to the legality or advisability of my office to collect County Taxes and to save at least a year's taxes for the purchaser of one of our certificates."

An opinion was rendered by this department to the State Tax Commission outlining the powers and duties of cities of the third class as to the collection of taxes after the passage of Senate Bill No. 94 of the 1933 Session Acts of Missouri, which held that collectors in cities of the third class were to collect city taxes under and by virtue of the procedure provided in said Senate Bill No. 94, supra. A copy of said opinion, relating to cities of the third class, is enclosed herein.

In establishing a rule of construction for tax statutes, the Supreme Court of Missouri, en Banc, in State vs. Markway, 110 S. W. (2nd) 1118, 1. c. 1119, said:

"The power to levy and collect taxes

is purely statutory, and has been confided to the Legislature and not the courts.' State ex rel. Parish v. Young, 327 Mo. 909, loc. cit. 915, 38 S. W. 2d 1021, 1023. 'It is well established that the right of the taxing authority to levy a particular tax must be clearly authorized by the statute, and that all such laws are to be construed strictly against such taxing authority.' State ex rel. Ford Motor Co. v. Gehner, 325 Mo. 24, loc. cit. 29, 27 S. W. 2d 1, 3."

The court in the case of Chillicothe ex rel. vs. Henry, 136 Mo. App. 468 l. c. 474, in establishing a rule as to the powers of a municipal corporation, in a matter of taxation, said:

" * * * in deciding any question whether certain power or authority has been given to a municipality, every doubt must be resolved against the power and in favor of the citizen. (St. Louis v. Telephone Co., 96 Mo. l. c. 628; St. Louis v. Kaime, 180 Mo. 309, 322.) And such argument is also met by that other rule of interpretation of such statutes, which is that municipal corporations can exercise only such powers as are granted in express words or are necessarily fairly implied in or incident to such as are expressly granted. (City ex rel. v. Eddy, 123 Mo. l. c. 557.)"

We have not been able to find any statute giving to a collector of a city of the third class the right

Mr. George E. Waite

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October 26, 1938

to collect county taxes nor any statute making it mandatory for such city clerk to keep a record of such county payments.

CONCLUSION

Therefore, it is the opinion of this department that a city clerk of a city of the third class cannot legally collect county taxes and that he has no duty of keeping a record as to the collection of such county taxes.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney-General

SVM:LB

ELECTIONS:

JUSTICES OF THE PEACE:

TERMS:

) Justices of the Peace who are appointed to
) fill a vacancy hold office until the next
) general election for county officers and
Justices of the Peace, which is on each
quadrennial period after November 1882.

December 1, 1938

Hon. M. Ralph Walsh
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

We have a letter from Mr. Philip A. Foley, Attorney at Law, Clayton, Missouri, requesting an opinion on a certain statement of facts, and requesting that we direct this letter to you. It appears from his letter that Mr. Ryan, who is the justice of the peace interested in this question, brought your letter to this office and we are therefore sending this opinion to you. The statement upon which the request is based is as follows:

"On July 15, 1935, the County Court of St. Louis County entered an order subdividing Central Township into three Townships, viz., Normandy, Clayton and Jefferson Townships. (The action of the Court was held valid by the Supreme Court in the case of State ex rel. Tegethoff, 89 S.W. (2d) p. 667).

"There were three Justices of the Peace already elected in Central Township prior to the time of its subdivision and under the provisions of Section 2150 R.S. Mo. 1929, such Justices rightfully continued to act, because it so happened that they fell into the new Townships. This left only one Justice to be appointed by the County Court in each of the respective Townships.

"The County Court did, on the 31st day of July, 1935, appoint an additional Justice for the respective Townships. One James

Ryan was appointed Justice of the Peace of Jefferson Township, St. Louis County, was duly qualified and commissioned. At the next general election of County officers, which was in November 1936, Ryan was duly elected to succeed himself, qualified, and was given a commission for four years which would expire in 1940, or until his successor was duly qualified.

"In August 1938, the Election Board declared that they were going to put his office of Justice of the Peace for Jefferson Township on the ballot in the primary and also at the general election of 1938, in spite of the fact that Ryan was elected in 1936 and commissioned for four years. He filed for said office, was nominated in the primary, and defeated by his Republican opponent in the general election of November, 1938."

When Central Township in St. Louis County was subdivided and offices of justices of the peace were created for each of the subdivisions of said township, there was a vacancy in each of these offices formed by such subdivision.

In State ex rel. vs. Boecker, 56 Mo. l. c. 21, on the question of the creation of a vacancy when an office is created, the Court said:

"There is no technical nor peculiar meaning to the word 'vacant,' as used in the Constitution. It means empty, unoccupied, as applied to an office without an incumbent. * * * An existing office without an incumbent is vacant, whether it be a new or an old one."

In Words & Phrases, Volume 8, p. 7261, a vacancy is defined as follows:

"It has been held that a 'vacancy' may exist when an office is created and no one has been appointed to fill it; and it has been said an existing office without an incumbent is vacant, whether it be a new or an old one."

Pursuant to the formation of the new justices of the peace districts in St. Louis County the County Court appointed Mr. Ryan as a justice of the peace to fill one of these vacancies. Under Section 2150 R.S. Missouri 1929, the justices of the peace in the township before it was subdivided continued in office until their commissions expired. Section 2150 provides as follows:

"When a township shall be divided, and any justice of the peace of the original township shall fall into the new township, he shall continue to discharge the duties of justice of the peace until his commission expires as if the township had not been divided."

Therefore, their term did not expire until the November election 1938, because they were elected under the statute which provides for justices of the peace to be elected in 1882 and every four years thereafter. The County Court by virtue of the provisions of Section 2140 R.S. Missouri 1929, appointed Mr. Ryan to fill the vacancy in the office caused by the creation of the office on account of the subdivision of Central Township. Section 2140 R.S. Missouri 1929, provides as follows:

"When a vacancy occurs in the office of justice of the peace, the county court of the county in which such vacancy occurs may supply the same by the appointment of

some person competent and qualified, who shall hold his office until the next general election of county officers, and until his successor is elected, commissioned and qualified."

This section provides that such appointee shall hold the office until the next general election of county officers and until his successor is elected, commissioned and qualified. The next general election after Ryan's appointment was in 1936. At that election he was elected and was commissioned by the County Court for a term of four years pursuant to Section 2144 R.S. Missouri 1929, which is as follows:

"Justices of the peace are to be commissioned by the county court, and shall hold their offices for four years, and until their successors are elected and qualified.

Section 2138 R.S. Missouri 1929, which was Section 2807 of the 1879 statutes, is as follows:

"Justices of the peace, as herein provided for, shall be elected at the general election to be held in eighteen hundred and eighty-two, and shall hold their offices for four years, or until their successors are elected, commissioned and qualified; but every justice of the peace now in office shall continue to act as such until the expiration of his commission, and until his successor is elected and qualified."

From a comparison of Sections 2144, 2138 and 2140, there seems to be a conflict in the provisions of these sections. However, under the general rule of construction these statutes should be construed so as to give effect to all of them if possible. Mr. Ryan claims that because he was elected at the General Election in 1936 and commissioned by the County Court for a term of four years that the election in November of 1938 to fill this office was a nullity. The Legislature in 1935, Laws of Missouri 1935, at page 210, amended Section 2136 which applies to justices of the peace, by adding a new section thereto known as Section 2136a. This section is as follows:

"In all municipal townships which have been divided, or may hereafter be divided, into justice of the peace districts and in which the boundary of the municipal township is or may be extended beyond the boundaries of said justice of the peace districts, the county court of the county in which said township is or may be located is authorized and empowered to appoint and commission not to exceed two additional justices of the peace for such township when, in the opinion of said county court, there is need for such justices of the peace, who may maintain their offices at any convenient place in said township and who shall take the same oath and have the same duties, qualification and jurisdiction as other justices of the peace of such township. The justices of the peace first appointed under this section of the statute shall hold office till the general election day in 1938, and all other justices of the peace thereafter appointed hereunder shall hold office for a term of four years: Provided that said office shall terminate at any time the aforesaid justice of the peace districts are extended so as to include all of the territory of such township. Each justice of the peace appointed under this act shall have authority to appoint a constable who may appoint not to exceed three deputies, which constable and deputies shall hold office at the pleasure of the appointing justice of the peace, and shall take the same oath and possess the same qualification, and have the same duties and authority and give the same bonds as other constables and deputies in said township. Said justices of the peace and constables shall, in lieu of salary, be

allowed the same fees for services as is provided for justices of the peace and constables in Section 11777 and 11779 respectively of Article 2, Chapter 84, Revised Statutes of Missouri 1929. All acts or parts of acts in conflict herewith, to the extent of such conflict, are hereby repealed."

Shortly after this section was enacted Central Township was subdivided and it seems that it was by virtue of the provisions of this section that the township was subdivided. It will be noted from a reading of this amended law that the law-makers had in mind the provisions of Section 2138 R.S. Missouri 1929, as to when the election of the new justices of peace would be held, for in this amended law it is provided that the justice appointed should hold until the November election 1938, which was the time provided by Section 2138 R.S. Missouri 1929 for election of justices of the peace. The Supreme Court of Missouri in a number of cases has had Section 2138 under consideration. In *State ex inf. vs. Smith*, 152 Mo. 512, 518, the Court in speaking of the opinion in *State ex rel. vs. McCann*, said:

"In McCann's case, 81 Mo. 479, Mullery was appointed in 1879 to fill a vacancy, for an unexpired term ending in 1882, and until his successor was elected and qualified. Upon the theory that an appointee to the office of justice of the peace could only hold until the next regular election, McCann was elected to the office at the regular election in 1880; Mullery refused to surrender the office, McCann attempted to exercise the functions of the office. On quo warranto, McCann was ousted, and it was held that a person appointed to fill a vacancy in the office of justice of the peace, held title until the next regular time for electing justices of the peace, so as to secure uniformity of tenure, and that an election at any other time was invalid and therefore conferred no title upon the person elected."

And at l. c. 521 of the said Smith case, the Court further said:

"Inasmuch as the Act of 1891 provided that there should be an election for justice of the peace, in St. Louis, at the regular election of 1894 'and every four years thereafter,' and inasmuch as there was in legal intendment no election held in the fourth district in St. Louis for justice of the peace in 1898, there has been no successor yet elected for Haughton, and as the purpose of the lawmakers is that there shall be uniformity in the time of electing all justices of the peace, and as there is no special statute covering cases like this, it follows that there can be no legal election held to elect a successor for Haughton until the regular election in the year 1902, and that he has a right to continue to hold the office of justice of the peace for the fourth district, in the city of St. Louis, until a successor is elected at that time, and thereafter duly qualifies, by virtue of his appointment until his successor is duly elected and qualified."

In speaking of the latter clause of Section 2138, formerly Section 2807 R.S. Missouri 1929, the Court in State ex rel. Harvey vs. Manning, 84 Mo. l. c. 663, said:

"The latter clause of section 2807 applied to an existing state of things, and has ceased to be operative having accomplished all it was designed to effect. It continued in office justices of the peace who had been elected or appointed under the former law, until the election required by the first clause of the section, in 1882. It can have no application to any justice of the peace elected in 1882, or appointed subsequently."

In Mr. Foley's statement he indicates that the entire section 2138, formerly 2807, was passed to clear up a deplorable condition existing at the time of its passage. From a reading of the reported cases on this section we think that his statement would only apply to the latter clause of said section and we are justified in this view by the case of State ex rel. Harvey vs. Manning, supra.

In State ex rel. vs. Powles, 136 Mo. 376, the Court in speaking of the terms of justices of the peace elected in this state, at l. c. 381, said:

"As has been seen, the term of office of justices of the peace in this state is four years. They are elected quadrennially at the general election for county officers and have been so elected ever since 1882. The first general election for county officers and justices of the peace occurring after the appointment of the respondent, by the county court, was in November, 1890, at which a successor to the respondent might have been elected, upon whose qualification the term of the respondent would have ceased. But it seems that no successor was chosen at that election, and as the respondent, under his appointment by the county court, was authorized to hold and exercise the functions of said office not only until the next general election of county officers, but until his 'successor was elected, commissioned and qualified,' he thereafter continued lawfully the incumbent of said office and authorized to exercise the functions thereof until a successor for him should be chosen at the next general election for county officers, and justices of the peace in November, 1894. State ex rel. vs. Ranson, 73 Mo. 78."

The 1935 Act which authorized the division of Central Township is very plain on this question and it states that the first appointed justices of the peace shall hold their offices until the General Election Day in November, 1938. The Constitution provides that they shall hold their office until their successor is elected and qualified.

CONCLUSION

From the foregoing authorities we are of the opinion that the election and commissioning of the justices of the peace for a term of four years, in 1936, was a nullity and that Mr. Ryan, by virtue of his appointment at the time that Central Township was subdivided, was authorized to hold his office until the General election day in 1938, at which time his successor should be elected, commissioned and qualified for a term of four years. If no successor was elected in November, 1938, then he would remain in office until a successor is elected and qualified.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

TWB MM

ROADS AND BRIDGES: Warrants issued on special levy under
Section 7891 bear interest.
January 11, 1938.7

Hon. Randolph H. Weber
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri



Dear Sir:

This will acknowledge receipt of your letter of
November 17, 1937, in which you request an opinion as follows:

"In your letter of Nov. 10th
relative to the road and bridge
fund you state that warrants can
be issued by the County Court on
the anticipated revenue of the
County for that purpose and that
these warrants can be protested.

"However, the point involved, is not
so much on the issuance and protesting
of the warrants, but the matter of
Interest.

"May I call to your attention that
this section involved (7891) applies
to a special levy. Does that make a
difference in the issuance of the
warrants? If so, from what fund does
the interest come, the general rev-
enue fund or from the special road
and bridge fund?

"The section involved states that
the money raised can be used only
for the building and maintenance of
roads and bridges. Therefore can
you pay interest out of the fund?

January 11, 1938.

"As we have a few warrants of this nature outstanding and the matter is being held up in the Treasurer's office here, we would appreciate an early opinion on this matter of interest. Thanking you again for your opinion of the 10th and hoping to hear from you relative to these inquiries at your earliest possible convenience, I remain,".

Section 7891, R.S. Missouri 1929, which is the authorization for this levy made by the County Court is in part as follows:

"In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county:."

This article and section does not expressly provide that interest may be paid on a warrant issued on said fund. However, we find that concerning regular county warrants, there is no specific provision that interest may be paid on said warrant, and the courts have long held that said warrants fall within the terms of the general interest statute (Section 2839, R.S. Missouri 1929) and bear interest, after protest, at six percent per annum.

In Robbins v. Lincoln County, 3 Mo. 57, a proceeding to compel the county court to audit and pay interest on a warrant which had not been paid when

presented, it is said by the court:

"The only question presented is, do the warrants issued by the County Court bear interest? If they bear interest, then the plaintiff would be entitled to his warrant for the amount of interest, as the treasurer is expressly required only to pay money on the order of the County Court.

"The law relied on by the plaintiff in error is, the first section of an act, entitled, an act regulating the interest of money (See Revised Code, 461), which says that creditors, excepting as hereinafter excepted, shall be allowed to receive interest at the rate of six per centum per annum, for all moneys after they become due, on bond, bill, promissory note, or other instrument in writing, &c. (a) It is insisted by Messrs. Carr and Chambers, counsel for the plaintiff, that this act applies to their case; that here money appears to be due by an instrument in writing, which is the warrant and order of the County Court. It is contended on the other side by Mr. Hunt, the Circuit Attorney, that this act does not apply to the case, and he insists that when the Legislature made the above act, they only had in view individual debtors, and not counties as debtors; otherwise the county would have been named.

"It may be true that the Legislature did not even so much as think of embracing in the law, counties as liable to pay interest. But the words of the act are extensive enough to embrace all persons, and bodies, capable of owing money by bond, bill, promissory note,

or other instrument in writing. By law the county is able to buy and sell certain things, to contract and be contracted with, and a County Court is by law expressly required to audit and allow all demands against the county, and to draw a warrant on the treasury for the amount allowed; here there is an instrument in writing, which shows money is due, but we are clear that the warrant must be presented at the treasury for payment, and payment refused, before any interest arises; that has been done in this case."

State ex rel. v. Trustees of Town of Pacific, 61 Mo. l.c. 158, is a case concerning the payment of certain warrants drawn by the town authorities. These warrants were made payable out of money appropriated for street purposes. The town had no money in the treasury with which to pay said warrants and a suit was brought to compel payment. In the suit, interest was demanded on each of said warrants. The court said in disposing of this question:

"We cannot find anything in the charter of the defendants, giving them power to issue warrants for the town indebtedness in this form. They have no authority in this respect different from the general law, which provides that when warrants are presented to the treasurer for payment, and there is no money in the treasury to satisfy the same, the treasurer shall endorse that fact on the back of the warrant, and from that time the same shall draw legal interest until funds are provided and set apart for its payment. A town warrant, therefore, will not bear interest till presentment is made to the treasurer, and there is an endorsement thereon that payment

January 11, 1938.

Hon. Randolph H. Weber

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cannot be made because there are no funds. (2 Wagn. Stat., 1325, para. 11; Skinner v. Platte Co., 22 Mo. 437.) And when interest thus begins to run, it can only be at the rate of six per cent."

In Isenhour v. Barton County, 190 Mo. l.c. 176, 177, 178, it is said:

"It is conceded by the parties that the rule has been, in this State, since 1831, that county warrants bear interest from the date of their presentment for payment and refusal to pay because of no money applicable thereto. (Robbins v. Co. Court, 3 Mo. 57; Skinner v. Platte Co., 22 Mo. 438; State ex rel. v. Trustees, 61 Mo. 158.)"

* * * * *

"It has already been pointed out that the statutes relating to county warrants make no provision whatever for the payment of interest thereon, but that this court has held that they do bear interest and that the general statute in reference to interest is as applicable to such warrants or the debts they evidence, as to any other character of debts. The Legislature evidently intended that such should be the case, and the failure to provide specially for interest was not a mere casus omissus. For ever since 1865 there has been a provision upon the statutes of this State in reference to city warrants, similar

to the provisions herein set out January 11, 1938.
as to county warrants and the protesting of the same when there was no money to pay them, except that it was further provided that such warrants so protested should draw legal interest until funds for the payment thereof should be set apart therefor."

* * * * *

"It is obvious, therefore, that the Legislature intended that the general statute in reference to interest should govern such cases. The statute in referring to interest (sec. 3705, R.S. 1899) provides that in the absence of an agreement between the parties, interest shall begin to run after the debt becomes due and demand shall have been made. But the statute contains no provision or regulation as to the demand. Hence the general rules of the common law as to demand apply, for the common law is the law in this State except so far as it has been modified by statute."

The excerpts from the Isenhour case are from a dissenting opinion filed along with the majority opinion. However, the majority opinion is in accord with the dissenting opinion on this point, the difference being on another point.

The levy made under authority of Section 7891 has been held to be no part of the regular county levy and is not to be classified for general county purposes, as fixed by Section 9874, R.S. Missouri 1929 (Amended Laws 1933, page 35). The case holding this (State v. Pemiscot Land and Cooperage Co., 295 S.W. 78) did not have the precise point involved that is under consideration here. That case held that the levy was no part of the regular county levy, insofar as it pertains to the restriction made in Section 9873, R.S. Missouri 1929, prohibiting an increase of more than ten percent in any one year's levy over that of the prior year.

It cannot be questioned that the tax under consideration here, which is levied and collected for the purpose of building and maintaining roads, is a tax for a county purpose, because certainly the building of roads is a governmental function. A tax to carry on a governmental function

of a county is, in a broad sense, a tax for a county purpose.

Section 7891, supra, provides that the money raised by said levy is "to be used for road and bridge purposes, but for no other purpose whatever". Unless this provision prevents, we think warrants issued on this fund draw interest, after protest, the same as regular county warrants, because the language of Section 2839, R.S. Missouri, is "extensive enough to embrace all persons, and bodies, capable of owing money by bond, bill, promissory note, or other instrument in writing" (Robbins v. Lincoln County, 3 Mo. 57). A warrant issued on the fund is an instrument in writing.

Let us consider this provision to see if, by its terms, that the payment of interest out of these funds would be contrary to it in the light of the reasoning in the above cases pertaining to regular county warrants.

Section 7891 was adopted by the legislature pursuant to Article X, Section 22, of the Constitution of Missouri. In Road District v. Ross, 270 Mo. 77, 85, the court construed the general legislative plan of raising revenue for road purposes as follows:

"In considering these questions our attention has been arrested by the general plan evident in recent legislation for raising and expending funds for road and bridge purposes in connection with sections 11 and 22 of article 10 of the State Constitution. The limit placed upon the levy for 'county purposes,' including this fund, has been acquiesced in as sufficient and salutary for all such purposes until the development of the State developed a growing necessity for additional expenditure upon its highways. This resulted in the amendment of 1908 embodied in section 22, authorizing an 'additional' levy of twenty-five cents on the taxable property of the State to be used for these and no other purposes whatever. In other words, it was found desirable to increase the amount to be raised by taxation for this

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purpose without increasing the amount to be raised for other county purposes, which had been found to be entirely satisfactory. The amendment was adopted for this purpose alone, and legislation was immediately begun to carry it into effect in accordance with the spirit of economy which it exhibited."

Thus we see that general revenue is to be used for "county purposes" and nothing else. This is evident in view of Article X, Section 1, and Article IV, Sections 47 and 48, of the Constitution of Missouri. These sections provide in substance that taxing power may be exercised by counties under authority granted by the legislature for county purposes; that public money may not be given to private individuals; and that no claim against a county shall be paid without express authority of law.

The money raised by the levy under Section 7891 is nothing more than a levy for a special county purpose, and as such, is not to be commingled with money raised for general county purposes.

The courts have held, as we have heretofore pointed out, that warrants on funds raised for county purposes - that is, general county warrants - draw interest, after protest, at six percent per annum. The money raised by the levy under Section 7891 is for a county purpose, but it is a special county purpose. The restriction as to the use of said money refers to the commingling and using of said money for general county purposes under the classes provided in Section 9874, R.S. Missouri 1929 (Amended Laws 1933, page 35), and to nothing more.

CONCLUSION

Therefore, it is the opinion of this department that warrants issued upon "the special road and bridge fund" of the county, which is raised by a tax levy under

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authority of Section 7891, R.S. Missouri 1929, bear interest, after presentation and protest, at the rate of six percent per annum until paid, or until money is set aside out of said fund for their payment.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED by:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

CIRCUIT CLERKS: Expenses of Circuit Clerk of Jasper County.

August 30, 1938

Hon. Ray E. Watson
Judge Division No. 1
Circuit Court Jasper County
Webb City, Missouri



Dear Sir:

We have your request of August 15, 1938, for an opinion which is in part as follows:

"Representatives of the State Auditor's office have been auditing county records for several weeks and the question has again arisen concerning the propriety of the county court making any allowance of approximately \$112.50 each year to the circuit clerk for travelling expenses. In this county we have two divisions of circuit court and court is held in two places, three terms at Joplin and three terms at Carthage each year. The clerk lives at Carthage and has his principal office there, but it is necessary for him to divide his time between the Carthage and Joplin office, having only three deputies to care for the two offices, each of which must be kept open at all times. It has been the custom for a great many years for the county court to allow travelling expense to the clerk for duties performed out of the county seat. This is approved by the Circuit Judges and the Budget officer and paid by the County Court and without any question is equitable. The question arises as to its legality."

We note the population of Jasper County is approximately 73,000, and by the terms of Section 2028 R.S. Missouri 1929, Circuit Court is held in both Carthage and Joplin.

The salary of the Circuit Clerk in your County is fixed by Section 11786 Laws of Missouri 1937, page 444. We find no statute authorizing the payment of expenses. The question arises therefore, can expenses necessarily incurred by a public officer in the discharge of his duties be recovered without express authorization found in some statute?

It is now recognized in Missouri that in the payment of compensation, salary or fees to an officer there must be statutory authorization authorizing such payment. Williams vs. Chariton County, 85 Mo. 645; Hill vs. Butler County, 195 Mo. 511; State ex rel. Stewart vs. Wofford, 22 S.W. 486, 116 Mo. 220; State ex rel. Troll vs. Brown, 47 S.W. 504, 146 Mo. 401; Holman vs. City of Macon, 137 S.W. 16, 135 Mo. App. 398; Gammon vs. Lafayette County, 76 Mo. 676; King vs. Riverland Levee District, 279 S.W. 195.

The question is, does this strict rule for the payment of compensation to public officers apply with equal force to the allowance of expenses or the reimbursement of public officers for expenses incurred in the performance of their official duties. We think a different rule applies where the question of expenses are involved. In 46 C.J. p. 1018, Section 246, the rule is stated as follows:

"But where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement therefor, and where a public duty is demanded of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done."

August 30, 1938

The above rule has been consistently followed in this state. County of Boone vs. Todd, 3 Mo. 140; Hark Reader vs. Vernon County, 216 Mo. 696; Buchanan vs. Ralls County, 283 Mo. 10, 222 S.W. 1002.

In Ewing vs. Vernon County, 216 Mo. 681, 1. c. 694, the Court said:

"Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo."

It would appear that since the Circuit Clerk of Jasper County is required by law to be in two different places, to-wit, Joplin and Carthage, for different terms of court, that the expenses of the Circuit Clerk incurred in travelling between the two offices (as distinguished from travelling from his home directly to either office) should be matters of expense for which he should be reimbursed.

It is therefore the opinion of this office that the Circuit Clerk of Jasper County is entitled to reimbursement for expenses necessarily incurred in the performance of his duties in travelling from the Circuit Clerk's office in Carthage to the Circuit Clerk's office in Joplin and return. What is a reasonable allowance for such expenses is largely within the discretion of the County Court.

Respectfully submitted,

APPROVED:

FRANKLIN E. REAGAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

FER:MM

TAXATION: Sales of admission tickets, cash admission, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events are subject to sales tax by the City of St. Charles.

June 7, 1938

Hon. Joseph B. Wentker
Prosecuting Attorney
St. Charles County
St. Charles, Missouri



Dear Mr. Wentker:

We desire to acknowledge your request for an opinion on June 4th, which is as follows:

"The City of St. Charles, Mo. has a well developed park, municipally operated, with management through several members appointed by the Mayor constituting a Park Board. Among the various activities sponsored are a Soft-Ball League and a swimming pool which charge fees for the entertainment thereby afforded. The admission charges thus collected go directly to the City of St. Charles to the credit of the Park Maintenance Fund.

"I have been requested on behalf of the city officials to seek from you your opinion as Attorney General as to whether or not under the law a sales tax must be collected and paid by the City of St. Charles upon the admission charges above referred to."

Your request for an opinion is divisible into two parts; first, under the 1937 Statute relating to sales tax, could those who participate in amusements, entertainments, recreations, games and athletic events be required to pay a sales

June 7, 1938

tax; second, under said statute, are sales of admission tickets, cash admissions, charges and fees to or in places of amusements, entertainments, recreations, games and athletic events taxable?

An opinion was rendered by this department to Mr. Edwin C. Orr, Prosecuting Attorney of Boone County, on August 21, 1937 in answer to the first question, a copy of which is enclosed.

II.

The Missouri Sales Tax Act being House Bill No. 6 of the 59th General Assembly of Missouri, 1937 Laws, provides in Section 2 (b) as follows:

"A tax equivalent to two (2) per cent of the amount paid, for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events."

The Legislature has defined the term "person" in Section 1 (a) of the 1937 Sales Tax Act on page 555 to include as follows:

"'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency (except the State Highway Department) estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number."

On page 556 of said 1937 Session Acts, the Legislature has defined the term "purchaser" and "seller" to include those persons buying, selling or furnishing tangible property or rendering services, the receipts from which are taxable

under the Sales Tax Act.

Therefore, the City of St. Charles must collect and pay sales tax, under the 1937 Session Acts for admission fees to exhibitions of soft-ball and swimming pool contests unless it be exempt from such payment under one of the two sections of said Act providing who may be exempt.

Section 3 at page 558 of the 1937 Session Acts could not possibly be construed so as to bring said city within its exemptions and if said city be exempt, it is by virtue of Section 46 of said Act at page 568, which is as follows:

"In addition to the exemptions under Section 3 of this Act there shall also be exempted from the provisions of this Act all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the Department of Penal Institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a State Relief Agency in the exercise of relief functions and activities."

Taxation is a sovereign right of the state, and the abandonment of the right to exercise it can never be presumed; but the intention to abandon it must appear in the most clear and unequivocal terms which must be clear and unambiguous and should not be created by implication. *Scotland County v. Railroad Co.* 65 Mo. 134; *State ex rel v. Arnold* 136 Mo. 1.c. 450, 38 S.W. 79. *Pacific Railroad v. Cass County* 53 Mo. 1.c. 27.

The construction of laws exempting property from taxation must be strictly construed and as a rule all property is liable to taxation and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. *Fitterer v. Crawford* 157 Mo. 1.c. 58, 57 S.W. 533. 50 L. R. A. 191.

As the burden of taxation ordinarily should fall upon all persons alike, when one claims an exemption therefrom he must

June 7, 1938

be able to point to the law granting such immunity and must be clear and unambiguous. *Kansas Exposition Driving Park v. Kansas City* 174 Mo. l.c. 433, 74 S. W. 981. In state ex rel *Globe Democrat Pub. Co. v. Gehner* 316 Mo. 696, 294 S. W. l.c. 1018, the court said:

"The policy of our law, constitutional and statutory, is that no property other than that enumerated shall be exempt from taxation."

The above decisions announce a rule on exemptions in regard to personal and real estate.

In state ex rel *Mo. Portland Cement Co. v. Smith* (1936) 90 S.W. (2d) 405, the court says:

"A tax imposed upon every retail sale in the state of tangible personal property is an excise and not a property tax, and the imposition of such tax on a sale of personal property to the State Highway Department does not violate a provision of the State Constitution exempting the property, real and personal of the state, counties, and municipalities from taxation, since such exemption provision applies to property taxes only."

But the City of St. Charles being included in the classification of those who must collect and pay the sales tax unless exempted under said Section 46 supra, it must clearly show that it was the intent of the Legislature to include them in such exempted class.

The City of St. Charles is a municipal corporation, which is defined by the court in *D'Arcourt vs. Little River Drainage District* 212 Mo. App. l.c. 621, as follows:

"The term 'municipal corporation' is usually applied to corporations for local civil government. All corporations intended as agencies in the

June 7, 1938

administration of civil government
are public, as distinguished from
private corporations."

The right of exemption from the collection and payment of such tax by said city must necessarily exist by virtue of it being a charitable or eleemosynary institution in the conduct of regular charitable or eleemosynary functions or activities or it must show that it is entitled to such exemptions by reason of being an educational institution supported by public funds.

The expression 'educational institution supported by public funds' interpreted in the light of its usual meaning, in our opinion, could not even in its broadest sense comprehend such functions or activities of the City of St. Charles. Neither do we think that said City of St. Charles can possibly be classified as a charitable or eleemosynary institution.

CONCLUSION

Therefore, it is the conclusion of this department that sales of admission tickets, cash admissions, charges or fees to or in places of amusement, entertainment and recreation, games and athletic events conducted and operated by the City of St. Charles are subject to the payment of sales tax under said House Bill No. 6 of the 59th General Assembly of Missouri relating to sales tax.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SVM:RT

OFFICERS - SALARIES AND FEES - LIMITATIONS:

1. Constable is entitled to 10¢ per mile for serving jury summons for inquest.
2. Officer may make claim for any salary or fee provided the same is unpaid and the statute of limitations has not run.

August 8, 1938

Mr. Joseph B. Wentker
Prosecuting Attorney
St. Charles, Missouri



Dear Sir:

This is in reply to yours of July 27th wherein you request an opinion upon the following set of facts:

"A State audit of the books of St. Charles is now in progress. The local auditor has pointed out a previous opinion rendered by the Attorney-General's office that the Constables are not entitled to a \$1.00 fee for serving a warrant or summons of jury-men to serve at inquests conducted by the Coroner, inasmuch as no provision is made in the Statutes providing for such a fee.

"In order to further clarify as to what the Constable may be entitled to, and in order to get a definite ruling thereon, so as to clear the situation in this and other counties, may I submit the following propositions:

"1. Sec. 11777, Rev. Sta. Mo. 1929 Fees of Constables, provides 'For each mile actually traveled in serving any process'\$0.10. Now then the warrant or summons would seem to be a process, and would the Constable therefore be entitled to such 10¢ per mile in calling upon and selecting the jurors for inquests.

"2. If such 10¢ per mile fee is applicable to the serving of such warrant or summons

August 8, 1938

of inquest jurors, can the Constable make a claim therefor on inquests which have been closed, and to offset such claim against the \$1.00 fee (for summoning) improperly paid.

"If such 10¢ mileage fee is applicable and cannot be offset as to past inquests, then we take it of course that such fee can be charged in the summoning of future inquest jurors."

I notice from the first paragraph of your letter that you are under the impression that the Constable is not entitled to a \$1.00 fee for serving a warrant or summons of jurymen to serve at inquests conducted by the Coroner. On this particular question, this office on June 23, 1938, in an opinion rendered to Mr. Alvin H. Juergensmeyer, Prosecuting Attorney of Warren County, held that the Constable may charge a fee of \$1.00 for summoning a jury for a Coroner's inquest. I am enclosing a copy of this opinion for your information. This office has also furnished a copy of this opinion to the Auditor's Office, which will likely take care of that question in the audit of your Constable.

I.

Your next question goes to the authority of the Constable to charge mileage for serving the warrant or summons on the jurors for the Coroner's inquest.

Section 11777, R. S. Mo. 1929, provides the following fee for Constables:

"For each mile actually traveled in serving process.....\$0.10."

The word "process" is defined in Words and Phrases, (4th Ed.) Vol. 3, page 194, as:

"A writ, warrant, subpoena, or other formal writing issued by authority of law."

Section 11612, R. S. Mo. 1929, speaks of this process as a warrant directed to the Constable to summon a jury, which jury shall appear before the Coroner for the purpose of holding the inquest.

Section 11613, R. S. Mo. 1929, provides that the Constable shall forthwith execute the warrant and make return thereon.

CONCLUSION

From the foregoing, it is the opinion of this department that the warrant or summons which is delivered to the Constable by the Coroner for the purpose of summoning a jury comes within the class of process which is contemplated by the lawmakers that the Constable shall be entitled to charge mileage for service thereon by virtue of the provisions of said Section 11777.

II.

The second question submitted in your request goes to the question of whether or not a Constable can make a claim for mileage for serving a warrant or summons for the Coroner's jury, after he has already turned in his bill for the payment of his fees in such inquest and after the inquest has been closed.

On the last clause of this request, that is, whether or not if the Constable is entitled to the mileage fee, could he offset it against the claim improperly paid, as this office has held that such claim is not improperly paid, we deem it not necessary to rule on that part of your request.

On the question of whether or not an officer may make a claim for fees in a case which has been closed, we find that he may make such claim if the statute of limitations has not run.

Vol. 46, C. J., Sec. 275, page 1027, makes the following statement on this question:

August 8, 1938

"The acceptance of less compensation than that established by law for the office does not estop an officer from subsequently claiming the legal compensation."

Section 862, R. S. Mo. 1929, provides that the five-year statute of limitation runs on:

"Second, an action upon a liability created by a statute other than a penalty or forfeiture."

In the case of State ex rel. Wingfield v. Kansas City, 238 S. W. (Mo.) 516, an employee who was wrongfully discharged as a civil service employee sued for his salary. The court, in holding that his recovery for compensation due him was subject to the five-year statute of limitation, said:

"Moreover, we hold that section 1317, R. S. 1919, does apply; this being 'an action upon a liability created by a statute other than a penalty or forfeiture,' and that this case is governed by the five-year period of limitations."

CONCLUSION

From the foregoing, it is the opinion of this department that the Constable or any other officer may make a claim for any compensation which is due him under the statute provided such claim has not been paid and provided the five-year statute of limitation has not run.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

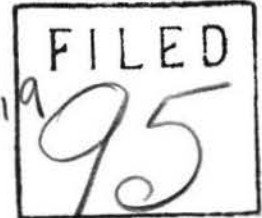
APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

COUNTIES - County court judges cannot borrow money to retire bond issue without assent of 2/3 of the voters.

October 18, 1938



Honorable W. L. Welsh
Presiding Judge of County Court
Reynolds County
Centerville, Missouri

Dear Sir:

We have your request for an opinion, which in part is as follows:

"There is a move on foot for the calling of a special election in Reynolds County to vote on a proposition to bond the county for the purpose of providing funds for the payment of certain judgment indebtedness, construction of roads and bridges and for the building of an addition to the court house. The last two items being in cooperation with the WPA for which we have an approved county wide road project for \$362,808.00, \$297,188.00 being allotted by the WPA and \$65,620.00 representing the County's share, of which \$51,000.00 is to be furnished in equipment rental, leaving about \$15,000.00 to be raised for materials.

"We have \$5,600.00 in road bonds of the 1918 issue, together with about \$200.00 in interest, and \$1,350.00 in interest of the 1932 judgment funding bond issue defaulting, and in order to keep the defaulting bonds and interest from reflecting in the new bond issue, the county court desires to borrow money against the sinking fund in order to take up the bonds and interest, for which a sufficient levy has been ordered and extended upon the tax

October 18, 1938

books for 1938 and the only thing involving the payment of the bonds and interest is the collection of the taxes for the year 1938, therefore, we desire your opinion on the question, 'may we borrow money from a bank or private source against the sinking fund for the purpose of retiring the defaulting bonds and interest, and issue to the bank or money lender, warrants, script or vouchers upon the sinking fund of the county in security of said loan, said warrants, script or vouchers to be paid out of said sinking fund in lieu of the bonds and interest coupons retired as aforesaid'. "

As we understand the facts from your letter, the county does not have enough current revenue or surplus to retire the 1918 road bonds and the judgment and interest in defaulting bond cases, and that in order to pay off this indebtedness the county court wishes to borrow money for that purpose.

I call your attention to Article X, Section 12 of the Constitution of Missouri, which provides in part as follows:

"No county ** shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, *** "

It is apparent from your request that the above constitutional provision would prohibit a county court from incurring an indebtedness, such as a loan, for the purposes outlined in your request for an opinion. The borrowing of these funds from a bank or other source would be incurring an indebtedness of the county in excess of the current revenue, and would require a two-thirds vote of the people to do so.

It is, therefore, the opinion of this office that the county court is without authority to borrow money for the purpose of retiring bonds and judgment with interest thereon.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROADS & BRIDGES: Sections 8012 and 8013 do not give county highway engineer the authority provided therein over the Special Road Districts organized under Articles 9 and 10, Chapter 42, R.S. Missouri 1929.

January 20, 1938



Mr. Bert Whitechurch
Surveyor and Highway Engineer
Newton County
Neosho, Missouri

Dear Sir:

This department is in receipt of your letter of January 3, 1938, in which you request an opinion as follows:

"I would like very much to have some advice, regarding Sec. 8012, and 8013, Laws of Missouri, relating to Roads, Highways and Bridges.

"Do the above mentioned sections apply to Special Road Districts not under Township organization."

Section 8012, R.S. Missouri, 1929, is as follows:

"The county highway engineer shall be custodian of all tools, material and machinery belonging to the road districts and to the county, except as may be otherwise provided by law. When delivering to any road overseer the tools and machinery belonging to the district, he shall require from the overseer an inventory and receipt for all such tools and machinery, and the overseer shall be responsible for the proper care and handling of said tools and machinery, and shall see that they are properly kept when not in use, and shall account for the same to the county highway engineer."

Section 8013, R.S. Missouri, 1929, is as follows:

"The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges. No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer. No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

In your request, you refer us only to "Special Road Districts" in counties not under township organization and do not state specifically, by referring to particular statutes, the type of district involved under your question. We must then, to be certain we have covered your request, consider all "Special Road Districts" in counties not under township organization.

The District organized under Article 9, Chapter 42, R.S. Missouri, 1929, is a "Special Road District". By Section 8032 of this article, the board of commissioners of said district is made the custodian of all tools and machinery used for constructing and improving the roads of said district.

Section 8033 of this article gives the board of commissioners of said district exclusive control and jurisdiction over all public highways within its limits and authorizes the board to buy, rent or lease implements, tools, machinery, and all kinds of motor power and all other

things necessary to carry on the road work of the district. The expenses thus incurred are paid by a warrant drawn by the board upon the treasurer of said board. (Section 8053).

Thus, we see the provisions of the three above mentioned sections in Article 9, Chapter 42, R.S. Missouri, 1929, are directly in conflict and inconsistent with the provisions of Sections 8012 and 8013, supra.

The district organized under Article 10 of Chapter 42, R.S. Missouri, 1929, is a "Special Road District". By Section 8065 of this article, the commissioners of said district are made the custodians of all tools and machinery used for working roads in the district. The commissioners have sole, exclusive and entire control and jurisdiction over the roads and bridges within the district. The expenses of said district are to be paid by warrants signed by the president and attested by the secretary and drawn upon the treasurer of said board, who is the county treasurer. (Section 8064).

Thus, we see the provisions of the two above mentioned sections in Article 10, Chapter 42, R.S. Missouri, 1929, are also directly in conflict and inconsistent with the provisions of Sections 8012 and 8013, supra.

These two types of districts are the only two districts provided for in counties not under township organization which may be termed as "Special Road Districts".

Sections 8012 and 8013, supra, are general laws relating to the duties of the highway engineer in all counties of this state except those specifically excepted by that article. State ex rel. Bulger, 289 Mo. l.c. 449. The laws providing the duties of the board of commissioners in the two above mentioned "Special Road Districts" are special laws, and as such, are exceptions to the general law.

In State ex rel. v. Smith, 67 S.W. 2nd, l.c. 57, it is said:

"It is the established rule of construction that the law does not favor repeal by implication but

that where there are two or more provisions relating to the same subject matter, they must, if possible, be construed so as to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject matter, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions."

Thus, under the ruling as laid down in this case, the laws pertaining directly to these two "Special Road Districts", being in conflict with Sections 8012 and 8013, supra, must prevail.

CONCLUSION

Therefore, it is the opinion of this department that the provisions of Sections 8012 and 8013, R.S. Missouri, 1929, do not make the county highway engineer the custodian of tools and machinery of the "Special Road Districts" organized under the provisions of Articles 9 and 10 of Chapter 42, R.S. Missouri, 1929, nor do these sections give the highway engineer the supervision of all roads or the expenditure of the funds of these "Special Road Districts". These matters are, by the statute above mentioned, placed exclusively in the hands of the board of commissioners of said districts.

Respectfully submitted,

APPROVED BY:

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

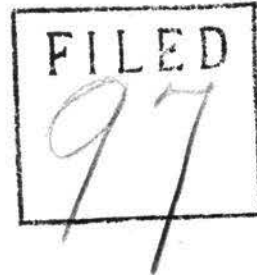
J.E. TAYLOR
(Acting) Attorney General

TAXATION:
CAPITAL STOCK TAX:
STATE BANKS:
FEDERAL RESERVE STOCK:

Banks to include in returns for assessment
of the bank stock for full amount invested
in stock of the Federal Reserve Bank.

January 10, 1938

3/5



Mr. Andy W. Wilcox,
Commissioner,
State Tax Commission of Missouri,
Jefferson City, Missouri.

Dear Sir:

This office acknowledges receipt of your request for
an official opinion which is as follows:

"The State Tax Commission desires an
opinion from your office on the following
question:

Are banks in the State of Missouri
entitled to deduct from their return,
for assessment of the stock of their
bank, the amount invested by them in
stock of the Federal Reserve Bank?

We have information that the Federal
Reserve Bank of the Kansas City district
owns their building which is carried on
the books of their bank at approximately
75% of the value of their capital stock.
The Federal Act does not allow the
Federal Reserve Bank to exempt real
estate from taxation. Consequently,
they (The Federal Reserve Bank) are
compelled to pay state and county taxes
on the value of same. This condition
raises the question as to whether or
not it would be double taxation on the
State Bank if they are compelled to
return their federal reserve stock
for taxation.

This Commission is completing an audit
of the assessment of banks as rapidly
as possible. Therefore, your attention
at your early convenience will be
appreciated."

The statutes which are relevant to the subjects of
your inquiry are as follows:

Section 9765, page 357 Session Acts of Missouri, 1931 is as follows:

"The property of manufacturing companies and other corporations named in article 7, chapter 32, insurance companies organized under the laws of this state and all other corporations, the taxation of which is not otherwise provided for by law, shall be assessed and taxed as such companies or corporations in their corporate names. Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock, less, also, the value of stock in other corporations held by such bank or joint stock institution or association doing a banking business: Provided, however, that no deduction shall be allowed on account of stock in any one manufacturing or business company in excess of forty per cent, of the capital, surplus and undivided profits of such bank or joint stock institution or association doing a banking business. Private bankers, brokers, money brokers and exchange dealers shall make like returns and be assessed and taxed thereon in like manner as heretofore pro-

vided: Provided, however, that the license hereafter required to be paid by any such bankers, brokers and dealers in addition to such taxes shall not exceed one hundred dollars per annum. It is hereby made the duty of the county clerk to include in his abstract of the assessor's books required to be sent to the state auditor, valuation of all property assessed under this section under the head of 'corporate companies,' and, in addition thereto, he shall make out from the lists delivered to the assessor as above provided, and send the same to the state auditor to be laid before the state board of equalization, on or before the twentieth day of February, in each year, an abstract of the assessment of all corporations or persons doing a banking business in his county, showing the name of each bank, the number of shares of stock and their face value, the amount of reserve funds, undivided profits, premiums or earnings, and all other values, together with the assessed value thereof, also the value of the real estate deducted as above provided, and the assessed value of such real estate as shown by the real estate book."

Section 9765a R.S. Mo. 1929 provides as follows:

"That the tax provided in section 9765, R.S. Mo. 1929, is hereby declared to be the sole method of taxing national banking associations, their income, shares therein and dividends from such shares."

Section 9766 R.S. Mo. 1929 provides as follows:

"The taxes assessed on shares of stock embraced in such list shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made."

Section 531 of Title 12 of chapter 4 on Banks and Banking U.S.C.A. provides as follows:

"Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom, shall be exempt from Federal, State, and local taxation, except taxes upon real estate."

In the case of *State ex rel. Bank of Eagle v. Leonardson*, 9 Pacific (2d) 1028, the court held that the state may tax national banks, property and capital stock only as congress consents, and then only in precise manner authorized.

Your inquiry particularly goes to the question of the authority of the taxing officials, in assessing the capital stock of banks which have their capital stock invested in the stock of the Federal Reserve Bank, to include in such assessment the stocks of the Federal Reserve Bank owned by such state bank, and if such Federal Reserve Bank owns real property which is carried as a part of the value of the capital stock upon which such Federal Reserve Bank pays a real estate tax, then should the bank which holds the Federal Reserve Bank stock be permitted in making its tax returns to value the Federal Reserve stock at its full value, reduced by such per cent as the investment in the real estate of the Federal Reserve Bank bears to the total value of the capital stock of such Federal Reserve Bank.

On the question of deducting from the returns for assessment of the bank the amount invested in the stock of the Federal Reserve Bank, we find that the Supreme Court of the United State has held that a state statute could assess to the stockholders shares of stock in a bank, and measure the value of such shares by assets exempt from tax. In the case of *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923) the court in discussing a statute of the State of Iowa which also states the same as Missouri statutes, said:

"The next contention that the statute subjects securities of the United States to tax, contrary to exemption laws of the United States in that it requires that the assessment be based on the aggregate of the capital, surplus and undivided earnings without any deduction or allowance on account of the investment in such securities--confuses the shares,

which are the property of the stockholders, with the corporate assets, which are the property of the bank. It is quite true that the state may not tax such securities, but equally true that they may tax the shares in a corporation to their owners, the stockholders, although the corporate assets consists largely of such securities, and that in assessing the shares it is not necessary to deduct what is invested in the securities. The difference turns on the distinction between the corporate assets and the shares--the one belonging to the corporation as an artificial entity and the other to the stockholders. (263 U.S. 112)."

Long before the above decision of the Supreme Court of the United States had upheld the precedence of the present Missouri Statute which is in question, in the case of Lionberger v. Rowse, 9 U.S. 468 (1870 which arose on a writ of error to the Supreme Court of Missouri, 43 Mo. 67) in which the Supreme Court of the United States said:

"It is no longer an open question in this court, since the decision in the case of Van Allen v. The Commissioners, that the shareholders in a national bank are subject to taxation, although the entire capital of the bank be invested in the bonds of the United States, which cannot be taxed by state authority."

That the Supreme Court of Missouri agreed with this conclusion is evidence from its opinion in State ex rel. Campbell et al Brinkop, 238 Mo. 293.

In the case of State ex rel. Gehner, 319 Mo. 1048, 5 S.W. (2d) 40, in which a bank claimed the deduction under the statute in question for stock of the Federal Reserve Bank which claim was disallowed by the board of equalization, and the right to make such deduction was not even argued in the Supreme Court of Missouri, the argument and opinion of the court being confined to a consideration of other phases of the ruling of the board of equalization.

January 10, 1938

It seems that it may be claimed that there would be a double taxation if the bank which holds Federal Reserve Bank stock as a part of its capital stock unless the bank is permitted to deduct from the value of its stock the proportionate part of such stock that is invested in real estate and upon which the Federal Reserve Bank pays the real estate tax.

On the question of the bank paying its capital stock tax based on the total value of the Federal Reserve Bank stock which it holds and not taking into consideration the value of the real estate owned by such Federal Reserve Bank and upon which the real estate tax has been paid, we find that the refusal to permit the bank to take credit for the proportionate value of the real estate of the Federal Reserve Bank, would not be double taxation. Volume 26, R.C.L. Section 233, states the rule as follows:

"Double taxation in its broader sense is permissible although the tax imposed by the laws of the same state *****, Mortgaged land may be assessed at its full value although the mortgage debt is included in the mortgagee's personal estate. (See cases cited there under.)"

Section 9765 Laws of Missouri, page 357, permits the bank which owns the real estate to deduct the amount it invests in real estate from its capital stock returns, but under a strict construction of the taxing statutes and the exempting statutes, we think the authority to deduct the value invested in real estate only applies to the bank which is making the return and which owns the real estate. We also find the rule of double taxation stated in 60 L.R.A., page 366 as follows:

"If a statute imposes the same tax more than once on the same subject and tax payer it is obviously unequal and not uniform."

Section 3, Article 10 of the Constitution of Missouri provides as follows:

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

The tax in question does not come within the above classification for it is not on the same persons.

While Section 9765 Laws of Missouri 1931, page 357 authorizes the officers of the bank in making returns to the assessor to list as a deduction from its valuation for assessment, "The value of stock in other corporations held by such bank or joint stock institution or association doing a banking business." Yet we think the law makers intended to include in this deduction only the stock of corporations which were taxable either through their stock or on their property.

We must assume that the act is constitutional and if possible give it such a construction. To give it a construction which would exempt taxable property would be unconstitutional.. Article 4, Section 10 Constitution of Missouri.

In the first place, the capital stock of banking corporations are taxable and they should only be relieved of paying the capital stock tax when the investments of the bank are in properties upon which a tax has been paid, either directly or indirectly. We think if the rule were otherwise, it would be in violation of Article IV, Section 10 of the Constitution of Missouri which provides that:

"All property subject to taxation shall be taxed in proportion to its value."

In the case of State ex rel. Orr et al v. Buder, Assessor et al, 271 S.W. 508, the Supreme Court held that the St. Louis Union Trust Company was authorized to list as a deduction in its returns to the assessor, the book value of stock it held in a realty company which consisted of non taxable securities. In this case the realty company had paid the tax which was assessed on the property of the corporations as provided by Section 9765 Laws of Missouri 1931, page 357, and the trust company was permitted to make this deduction, for to have required the payment of the tax would have been a double taxation which the legislature evidently did not intend to occur.

The stock of the Federal Reserve Bank is not otherwise taxed. Section 531 Title 12, chapter 4, Banks and Banking U.S.C.A. Therefore, to include such stock in the returns to the assessor would not be double taxation.

In the case of First National Bank v. Beaman, et al, 257 Fed. 729, the court held:

"Despite Federal Reserve Act, Dec.

23, 1913 (compiled statutes, 9785 9805), under Revised Statutes, p. 5219, (compiled statutes, section 9784,) stockholders of a national bank were not entitled, for purposes of assessment of state and county and municipal taxes, to any deduction of the value of their holdings on account of the bank's holdings of Federal Reserve Bank stock."

In the case of First National Bank v. Darr, 246 Federal l.c. 466, the court said:

"The stock purchased by the plaintiff in the Federal Reserve Bank is but a non taxable investment of a part of its capital surplus."

"The law does not consider the nature of the bank's investments not taxed in fixing the value of its stock. Palmer v. McMahon, 133 L.E.D. 772."

In the Darr case, supra, the court further said:

"Whatever values the shares issued by the plaintiff national bank possess, they are to that extent taxable in the hands of their owners and holders (cases cited). The courts have repeatedly ruled that in fixing the value of the shares of stock of national banks for taxing purposes, the value due to the banks ownership of non taxable United States Bonds as a part of its assets must be included. Cleveland Trust Company v. Lander 184 U.S. 111, 22 sup. ct. 394, 46 L.E.D. 456."

In the United States Bank et al v. Gehner et al, 5 S.W. (2d) 40 L.C. 42, the bank claimed a deduction under the statute in question for Federal Reserve Bonds. This deduction was disallowed by the board of equalization, and the right to make such deduction was not even argued in the Supreme Court.

Section 9765 Laws of Missouri 1931, page 357 amended Section 9765 R.S. Mo. 1929 by adding the deduction mentioned above which is as follows:

"Less, also, the value of stock in other corporations held by such bank

or joint stock institution or association doing a banking business; provided, however, that no deduction shall be allowed on account of stock in any one manufacturing or business company in excess of forty per cent. of the capital, surplus and undivided profits of such bank or joint stock institution or association doing banking business."

Considering this amendment as a whole, we are further convinced that the legislature intended to permit only deductions of stock in manufacturing or business companies which were taxable, for there would be no need to make the proviso of the amount if the stock was in a non taxable manufacturing or business company.

All of the stock of the banks are taxable in the first instance and it is the duty of the officials of the bank to return a list of such stock and the value thereof. Then, for the reason that the law makers did not want to double tax this stock it permitted the bank to deduct the value of its holdings in real estate because it had paid the tax on that property which makes up a portion of its capital stock; then, in 1931 the legislature and after the ruling in the case of State ex rel Orr et al v. Buder, et al. (The St. Louis Union Trust Company case) case desiring to take care of the double tax question raised in State ex rel Orr case, by the amendment, permitted the banks to deduct from its returns the value of stock in other corporations held by such bank.

If to include the value of stock in other corporations would result in double taxation, then the value of such stock may be deducted from the return but if it does not result in double taxation, then by the provisions of the constitution cited supra, it should be included in the return.

The legislature could not have exempted the stock of the bank from the taxes, for by the provisions of Section 6, Article 10, of the Constitution only certain properties are exempted which section is as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent

January 10, 1938

of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Under the general rule of tax exemption laws they should be strictly construed against the tax payer. Under the rulings of the case the First National Bank of Cincinnati v. Buder, 267 Federal 729 and the statutes and cases cited therein, the Federal Reserve Bank stock in the hands of the national bank are to be included in the returns of such bank for assessment and taxation.

CONCLUSION

From the foregoing sections and authorities this office is of the opinion that the banks in making their returns to the assessing officials should include in the return for the assessment of the bank stock the full amount invested by them in the stock of the Federal Reserve Bank.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

TAXATION: Tenant occupying premises for a term, may, within such term, redeem such premises from a holder of a certificate of purchase, within statutory period.

January 15, 1938

Mr. Mark W. Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri



Dear Mr. Wilson:

We wish to acknowledge your request for an opinion dated January 11, 1938, which is as follows:

"The county treasurer has asked me to secure an opinion from your department as to the construction of Section 9956a, Laws of Missouri, 1933. In said section it reads 'the owner or occupant of any land or lot sold for taxes, or any other person having an interest therein, may redeem the same at any time during the two years next ensuing, etc.' The particular problem before the treasurer is the case of a tenant occupying land sold for taxes and who is now endeavoring to redeem said land on the ground that he is an occupant.

"The treasurer would like to know if said tenant has such an interest in the land that he may redeem. We will appreciate an opinion on this section as soon as possible."

Section 9952a of the 1933 Session Acts, at page 430, is in part as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale; * * * "

Section 9956a of the 1933 Session Acts, at page 437, is in part as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, * * * "

Section 9954a of the 1933 Session Acts, at page 435, is in part as follows:

"The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time after one year from the date of sale be entitled to the immediate possession of the premises so purchased during the redemption period provided for in this act, unless sooner redeemed; provided however, any owner or occupant of any tract or lot of land purchased may retain possession of said premises by making a written assignment of, or agreement to pay, rent certain or estimated to accrue

January 15, 1938

during such redemption period or so much thereof as shall be sufficient to discharge the bid of the purchaser with interest thereon as provided in the certificate of purchase. The purchaser, his heirs or assigns, may enforce his rights under said written assignment or agreement in any manner now authorized or hereafter authorized by law for the collection of delinquent and unpaid rent; provided further, nothing herein contained shall operate to the prejudice of any owner not in default and whose interest in the tract or lot of land is not encumbered by the certificate of purchase, nor shall it prejudice the rights of any occupant of any tract or lot of land not liable to pay taxes thereon nor such occupant's interest in any planted, growing or unharvested crop thereon. Any additions or improvements made to any tract or lot of land by any occupant thereof, as tenant or otherwise, and made prior to such tax sale, which such occupant would be permitted to detach and remove from the land under his contract of occupancy shall also, to the same extent, be removable against the purchaser, his heirs or assigns."

The terms of the above provisos indicate that the word "tenant" is comprehended by the word "occupant" in 9956a, supra, which recites that an "occupant" may redeem.

CONCLUSION

Therefore, it is the opinion of this department that a tenant, occupying premises for a term, may, within such term, redeem such premises from a holder of a certificate of purchase, within statutory period.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

COUNTY OFFICER:

Removal of a coroner from one county to another. He can continue to hold office.

January 25, 1938

Mr. W. P. Wilkerson,
Prosecuting Attorney,
Scott County,
Sikeston, Missouri.



Dear Sir:

This is to acknowledge receipt of your letter of January 17, 1938 asking for an official opinion, which letter reads as follows:

"It appears that the coroner of Scott County has moved out of the county, and that five or six would be office holders are bringing pressure on the County Court to have them take steps to remove the said coroner so that one of them can be appointed to the office. The County Court has asked me whether the removal of this officer from the county constitutes grounds for removing him from the office, it being conceded that he has in no way failed to perform any of his official duties unless it be that his removal across the line into an adjoining county constitutes a failure to perform an official duty.

I am frank to say that I have found no satisfactory answer to the question, and hence I pass it on to you. Has the coroner made himself liable to removal from office because of the fact that he has moved his residence across the line into Mississippi County, it being conceded that he has never at any time failed to perform or neglected any official duties?"

For the qualifications on eligibility of public officers in Missouri, we must look to the Constitution and the statutory provisions therefor. Section 10, article 8 of the Constitution of Missouri makes the following limitations:

"No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment."

The Constitution of the State of Missouri in Section 10, article 9 provides for the election of the sheriff and coroner and reads as follows:

"There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office. Before entering on the duties of their office, they shall give security in the amount and in such manner as shall be prescribed by law, and shall be eligible only four years in any one period. Whenever a county shall be hereafter established, the Governor shall appoint a sheriff and coroner therein, who shall continue in office until the next succeeding general election and until their successors shall be duly elected and qualified."

You will notice in this section that the only qualifications or limitations set out are for malfeasance in office, and the requirement of a bond.

Section 11 of article 9, Constitution of Missouri sets out a vacancy in the office of coroner may be filled and reads as follows:

"Whenever a vacancy shall happen in the office of sheriff or coroner, the same shall be filled by the county court. If such vacancy happen in the office of sheriff more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same,

and the person by it appointed shall hold office until the person chosen at such election shall be duly qualified; otherwise, the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified. If any vacancy happen in the office of coroner, the same shall be filled for the remainder of the term by such county court. No person elected or appointed to fill a vacancy in either of said offices shall thereby be rendered ineligible for the next succeeding term."

You will notice that this section of the Constitution does not require residence in the county.

In an early case in Missouri State ex rel. Attorney General v. Woodson, 41 Mo. 227, l.c. 230, the court said:

"The power of the state to declare in its fundamental law, or, when that is silent upon the subject, by legislative enactment, what shall constitute the test of eligibility to office is as clear and unquestioned as is the power to fix the qualifications of voters."

The state may fix the qualifications of those who shall hold state offices, and subject to such limitations as may be imposed by the State Constitution, such power may be exercised by the state legislature. 46 Corpus Juris, page 936. And at page 938, Section 35 of the same text, it is said:

"In the absence of a constitutional or statutory provision residents within the district of which the jurisdiction of the officer extends is unnecessary to eligibility."

In Mechem on public officers, Section 438, page 280, it is said:

"Where the law thus requires the officer to reside within the district which he represents, and a fortiori so where it expressly declares that his removal from the district shall create a vacancy,

a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result."

And conversely where the law does not require one to reside in a district, a removal of an officer does not create a vacancy in the office.

As to the election of coroners the state legislature in Section 10167 R.S. Mo. 1929 legislated how the coroner should be elected. This section reads as follows:

"On the first Tuesday after the first Monday in November, in the year 1880, and every two years thereafter, there shall be an election held in each township in this state, and in each ward of the city of St. Louis, for the election of a member of congress from each congressional district, of senators and representatives in those districts and judges of the county courts in those counties where the term of those elected has expired, and for sheriffs and coroners, and such other officers as may be required by law to be elected at such elections."

You will notice that in this section it does not require and does not set out that the coroner should be a resident of the county wherein he was elected.

The legislature has only created two sections in the Missouri Statutes which would cause a vacancy in the office of the coroner. One of the sections is section 11611 R.S. Mo. 1929 which reads as follows:

"If a coroner neglect to give bond and qualify within twenty days after his election, or shall fail to give bond when required under the preceding section, his office shall be deemed vacant."

The other section is 11635 which reads as follows:

"Any coroner who shall knowingly charge to any person, or present to the county court for allowance, any items of fees,

costs and expenses not authorized by law, or for any service not actually performed, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall forthwith be removed from office. Such removal shall be declared in the judgment for such misdemeanor, and thereupon the office of such coroner shall be declared vacant, and his successor appointed according to law."

It does not set out in either one of the two sections 11611 and 11635 that the grounds for vacancy would be removal from the county.

Section 6, article 14 of the Constitution of Missouri provides as follows:

"All officers, both civil and military, under the authority of this State, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

and Section 7 of article 14 of the Constitution of Missouri provides as follows:

"The General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers, on conviction of willful, corrupt or fraudulent violation or neglect of official duty. Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

By an examination of the statutes of Missouri, specific qualifications are required before one may hold certain offices and it is provided in some cases that officers must be residents of township, county or district from which they were elected or appointed, and in other cases residence is not a pre-requisite

1/25/38

to the holding of the office. In the case of the coroner, there is no pre-requisite that he be a resident of the county, but if he should violate any of the facts above set out which would cause a vacancy in the office, it would be necessary to file a separate action to try him under the merits of his particular case.

CONCLUSION

In view of the fact as set out in your letter that it is conceded that the coroner of Scott County has never at any time failed to perform nor neglected any of his official duties, and that he has moved his place of residence across the county line into Mississippi County, Missouri, he is still the coroner of Scott County. I am assuming from your letter that he is still a resident of the State of Missouri and that he has performed all of his duties as set out in your letter.

It is, therefore, the conclusion and the opinion of this office that until his term, for which he was elected, expires, he is the legal coroner of Scott County notwithstanding the removal of his residence from Scott County to Mississippi County, Missouri.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

OFFICERS
CONSTABLES

Duties as to making arrests, carrying weapons, etc.
deputy constable classed as a peace officer

February 5, 1938.

2-8

Mr. James L. Williams
Sheriff
Jackson County
Kansas City, Missouri



Dear Sir:

This Department is in receipt of your letter of January 18th, wherein you make the following inquiry:

"This office has had several complaints and inquiries regarding the carrying of weapons and the policing activities of Deputy Constables in Jackson County. Our information is that certain people carry Deputy Constable commissions but do not serve any papers, writs or process in connection with the Justice Court work.

"We would like to have your opinion on the general powers and duties of constables as to: Making arrests, carrying weapons, policing the highways; and in general whether a Deputy Constable is to be classed as a 'peace officer' in the accepted meaning of that term."

Your letter does not state whether you desire the information concerning deputy constables in the City of Kansas City or in the rural sections of Jackson County.

In cities of over three hundred thousand inhabitants the appointing of deputies by a constable is controlled by Section 2418, R. S. Mo., 1929, which is as follows:

"Every constable shall have power to appoint deputies not to exceed two in number, for whose conduct he shall be answerable, and such appointments shall be in writing, and said appointments shall be filed in the office of the clerk of the circuit court having jurisdiction in such city."

Under Section 2407, R. S. Mo., 1929, if the business of a justice court district has exceeded two thousand two hundred cases in a year, two justices of the peace and two constables may be elected.

Section 2399, R. S. Mo., 1929, makes the general law applicable to constables. Said section reads as follows:

"All laws now or hereafter in force, concerning justices of the peace and constables, applicable to townships, shall be applicable to the districts of said justices and constables, as provided in this article, except where inconsistent with the other provisions hereof."

The authority of a constable generally to appoint deputies is contained in Section 11754, R. S. Mo., 1929, which is as follows:

"Every constable may appoint deputies who shall possess the same qualifications as the constable, who shall take the same oath of office and for whose conduct he shall be answerable, which appointment and oath shall

be filed in the office of the clerk of the county court; said deputy or deputies, so appointed, shall devote his time to the duties of such office, provided, no such deputy or deputies shall be appointed who is or may be directly or indirectly connected with or engaged in the mercantile business, or a member of any firm engaged in such business, or a member of or connected with any collection agency, credit house, installment house or loan agency where money or moneys are sought to be collected by suit; and any service of writ, process or execution in any court by such pretended deputy shall be void."

The general powers and duties of a constable are contained in Section 11756, R. S. Mo., 1929, which is as follows:

"Constables may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties. "

It is a well recognized rule that a deputy constable has the same powers as his superior if he is a legally appointed deputy. In the decision of *Huhn v. Lang*, 122 Mo. 600, it was held that the powers and duties of a constable within the jurisdiction of a justice of the peace are identical with those of the sheriff,

In view of the provisions of the statutes herein quoted it would appear that there is no authority for

a constable to issue certain persons deputy constable commissions in excess of the number mentioned in the statutes, and, under the provisions of Section 11574, supra, the deputy must devote his time to the duties of the deputy constable. In other words, we find no provision to authorize a constable to issue indiscriminately deputy constable commissions, honorary in nature or to friends, which would entitle them to carry weapons and be immune from the law. As to the general powers and duties of constables in making arrests, carrying weapons and policing the highways, we think the matter is fully discussed in the case of State v. Whitehead, 295 S.W. 746:

"Constables stand on the footing of sheriffs, and other police officers whose bona fide duty it is to execute process, civil or criminal, make arrests, and aid in conserving the public peace. To such officers, whether engaged in the discharge of their official duties or not, the act has no application. State v. Davis, 284 Mo. 695, 706, 225 S. W. 707. In State v. Brown, 306 Mo. 532, 535, 267 S. W. 864, 865, Judge Blair said:

" 'The persons described in the exception are merely those not within the operation and effect of the law denouncing the crime, which is otherwise completely defined without reference to such proviso.'

"In State v. Mosby, 81 Mo. App. 207, a constable was convicted on a charge of exhibiting a pistol in a rude, angry, and threatening manner. On appeal the conviction was reversed.

Judge Gill said (page 209):

" 'It is clear that the defendant came within the persons last designated. He was manifestly within those excepted from the operation of section 3502 (Rev. St. 1889). This being so then the statute could not apply to him whether he was at the time engaged in the proper performance of his duties or not. The exemption has no such qualification. Section 3503 absolutely and unequivocally relieves all police officers, constables and the like from the operation of the provisions of the preceding section. And since there is no doubtful language used it is not in the province of the courts to modify or change its obvious import.

'As to this defendant the matter stands as though no such statute as 3502 had ever been enacted. There is no such offense at common law as the one charged against the defendant, and as the statute has no application to him, he ought to have been discharged.'

"See, also, 40 Cyc. 857.

"We think this is a sound construction of the statute as it now appears in section 3275. It has no application to sheriffs, constables, police officers, and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace. They may be called upon at any

moment to make an arrest or aid in conserving the public peace. The court erred in overruling the demurrer to the evidence. The judgment is accordingly reversed, and the defendant discharged."

CONCLUSION

From the above decision, we are of the opinion that the constable has powers co-extensive with the sheriff or other police officers in executing process, civil or criminal, within his own jurisdiction and this would include the policing of the highways and it being his duty, under the statute, to conserve the public peace, we naturally come to the conclusion that he should be classified as a police officer. In construing the above decision it would also appear that there is no limitation on his authority to carry weapons.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

OWN LC

PROSECUTING ATTORNEYS: Where two or more defendants are jointly charged and convicted, a prosecuting attorney fee should be assessed against each defendant.

April 7, 1938

Mr. Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri



Dear Sir:

In compliance with your request of March 30th for an opinion on the matter set forth in your letter, we are pleased to give you the following as the opinion of this department thereon. We here set forth your letter pertaining to the matter as follows:

"Referring to Section 11783, R. S. Mo. 1929--Fees of prosecuting attorneys, with reference to that part reading as follows:

' - - - for the conviction of every defendant in the circuit court, upon indictment or information, or before a justice of the peace, upon information, when the punishment assessed by the court or jury or justice shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, five dollars,--'

"When two defendants are jointly charged upon an information and plead guilty to the charge and are given a fine, should the five dollar fee be assessed against each defendant? Misdemeanor charge and fined by Justice."

April 7, 1938

I.

In addition to that part of the above statute which you quoted, it further provides as follows:

"* * for the conviction of every defendant where the punishment assessed shall be by confinement in the penitentiary," etc.

Prior to 1887, the above statute, then Section 5596, R. S. Mo. 1879, so far as concerns the matter in question here, read as follows:

"* * for conviction in the circuit court upon indictment or before a justice of the peace, upon information, when the court, or jury, or both, shall be by fine or imprisonment in the county jail, or both such fine or imprisonment, five dollars (\$5.00); * * * for conviction in any case where the punishment assessed shall be by confinement in the penitentiary," etc.

In 1886, the St. Louis Court of Appeals ruled in the case of In the Matter of Jerry Murphy and Jerry Spillane, 22 Mo. App. 476 where the defendants had been charged and convicted jointly and a fine and costs assessed as punishment, that the prosecutor was entitled to but one fee, or in other words, five dollars (\$5.00). Consequently, it might appear upon first impression, at least, that the question was settled.

The ruling in this case, however, was based upon the above Section 5596 of the 1879 statutes which was the law in force at the time of the court's decision and was quoted therefrom in the court's opinion.

It is to be noted that Section 5596 says, among other things:

" * * for conviction in the circuit
court * * * or justice of the peace
* * * five dollars (\$5.00)"

Again, in a subsequent part of the section,

"* * for conviction in any case" etc.

Subsequent to the ruling by the St. Louis Court of Appeals in the above case at the legislative session of 1887, Section 5596 was amended and has ever since stood in its present form.

By the amendment of the above section, there was added to the foregoing language of the statute, at both places where found in the section, the words "of every defendant", so that the law as changed and as it stands today is as follows:

"* * for conviction of every defendant in
the circuit court * * * or justice of the
peace * * * five dollars (\$5.00)."

Again,

"* * for conviction of every defendant
in any case", etc.

It is fair to assume that when the Legislature of 1887 considered the amendment in question, it was aware of the ruling, of the St. Louis Court of Appeals made some six months or more prior to the convening of the legislative session, that the Court had construed the statute, as it stood at that time, to mean that it provided the allowance of ^{more} ~~more~~ than one fee or five dollars (\$5.00) to the prosecuting attorney when more than one defendant was charged at one and the same time.

Hence, by insertion in the statute of the words "every defendant" by the amendment of 1887, the only logical conclusion

to be reached is that the Legislature intended that thereafter the prosecuting attorney should receive a fee of five dollars (\$5.00) in a misdemeanor case (and a fee of a larger amount in a felony case) for the prosecution of each and every defendant, whether the charge is separately or jointly with other defendants, upon conviction; and that the Legislature of 1887 as a consequence of such amendment intended that the effect of the prior ruling of the St. Louis Court of Appeals would thereby be nullified.

In view of the fact that the above mentioned amendment to the 1879 law was the only amendment made and that it was made at the first opportunity following the above ruling of the Court of Appeals, the only reason that can sensibly be ascribed to such legislative action is that it desired the law or rule to be the exact opposite to that which the Court of Appeals had held on the question, that is to say, that the Legislature of 1887 decided that thereafter it should be specifically understood that prosecuting attorneys were not to be limited to one fee where defendants were jointly charged, whether in a misdemeanor or felony case, and that it (the Legislature) intended to expressly so provide by the language used and added by the amendment as shown above.

A well established rule of statutory construction is found in the case of *Pembroke v. Huston*, 180 Mo. l.c. 636 wherein the court said:

"To get at the true meaning of language employed in a statute we must look at the whole purpose of the act, the law as it was before the enactment and the change in the law intended to be made."

Again, in the case of *Gum v. St. L. & F. Ry. Co.*, 220 S. W. l.c. 704, the court said:

"In the interpretation of an amended statute, the state of the old law and the mischiefs arising thereunder are to be considered."

II.

CONCLUSION

We believe, in view of the state of the old law and interpretation given it by the St. Louis Court of Appeals, that if the above rules of statutory construction be applied to the amended law, which is the present law, it leads inevitably to the conclusion that where two or more defendants are indicted or informed against jointly and whereby convicted or plea of guilty and a fine or jail sentence, or both, is assessed as punishment, there should be assessed against each defendant a fee of five dollars (\$5.00) for the benefit of the prosecuting attorney.

Respectfully submitted,

J. W. BUFFINGTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

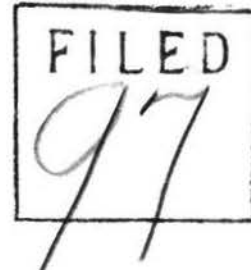
JWB:RT

PROSECUTING ATTORNEY) Cannot apply fees collected to salary and
CIRCUIT CLERK) assign salary warrant to treasurer in lieu
COUNTY CLERK) of paying said fees into treasury.

May 16, 1938

5-23

Hon. Carl E. Williamson
Prosecuting Attorney
Ripley County
Doniphan, Missouri



Dear Sir:

This department is in receipt of your letter of May 5, 1938, in which you request an opinion on the following question:

"May a county officer who is paid a stated salary, and who also, by virtue of his office, receives cash in the nature of fees, retain the cash fees and turn into the county treasury the same amount of his county salary warrants, and thus comply with statutory provisions concerning the paying of said fees into the treasury, and the payment of his salary."

You refer us to two opinions heretofore rendered by this department. One, to Howard R. Maness, Prosecuting Attorney of Ripley County under date of January 28, 1933, answers the above question in the negative. The other, to J.E. Johnson, Treasurer of Ripley County, under date of July 4, 1933, answers the above question in the affirmative, with the qualification that said warrant must be worth at once its face value.

The Prosecuting Attorney, Clerk of the Circuit Court and Clerk of the County Court are the officers concerned, being the county officers who charge and collect fees for their services and receive a stated salary in lieu thereof.

The Prosecuting Attorney charges and collects fees for the services rendered by him, in some instances, and must account for and pay these fees into the county treasury monthly. Section 11315, R.S. Missouri, 1929. The Prosecuting Attorney is paid monthly, by warrant, a stated salary in lieu of all other fees. Section 11314, Laws of 1937, page 178.

The Circuit Clerk charges and collects fees for the services rendered by him and must account for and pay these fees, except change of venue fees, into the county treasury monthly. Section 11814, Laws of 1937, page 447. The Circuit Clerk is paid monthly, by warrant, a stated salary in lieu of all other fees, except those the statute expressly provides he may keep. Sections 11786 and 11814a, Laws of 1937, pages 445 and 447.

The County Clerk charges and collects fees for the services rendered by him and must account for and pay these fees into the county treasury monthly. Section 11811, Laws of 1937, page 441. The County Clerk is paid monthly, by warrant, a stated salary in lieu of all other fees, except those the statute expressly provides he may keep. Section 11811, supra.

Thus, we see the similarity in the mode each of the above officers is to be paid. Each charges and collects fees for his services and must account for and pay the same, with some exceptions, into the county treasury monthly. Each receives a stated monthly salary in lieu of those fees he must pay into the county treasury.

In Mechem on Public Officers, Section 873, page 585, it is stated that:

"An officer who is compensated by a salary payable out of the public treasury, and whose duty it is to pay into the treasury the fees received by him, cannot retain from such fees the amount of his salary, or offset the amount due to him as salary against an action for the fees so collected. Said the court in such a case of one who was wharfinger of a city and ex officio collector of levee dues: 'His duties were to collect the money due to the city in the department in which he held office; his obligation was to deposit the money so collected in the city treasury. His salary was to be paid as the salaries of other officers of the city were paid, to wit: out of the common treasury. There is no place for the plea of compensation in a case of this kind. Compensation takes place of right

between individuals when the debts due by the respective parties are equally due and demandable, and where the character of the debts is the same. It cannot be opposed by a fiduciary acting in the line of his duty. There is no such thing as compensating a debt due by an agent for moneys collected by him in the performance of his duties, by a debt due by the principal to the agent. No officer of a government, State or municipal, is empowered to pay himself his salary, or plead in compensation a demand made against him for moneys collected by him in his official capacity, by an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof and to get his pay as other officers get theirs. In other words, he cannot pay himself.' New Orleans v. Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569."

This statement from Mechem is in effect approved in King v. Riverland Levee District, 279 S.W. 195, 196 (Mo. App.) where it is said:

"that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans v. Gordon, supra. (245 Mo. 12)"

To permit the officer to assign his salary warrant to the County Treasurer in payment of the fees collected by that officer would be to change the mode of payment of his salary, even though indirectly, causing him to be paid on this basis, and as if entitled to retain all fees up to a certain amount (the amount of his salary) and pay the excess, if any, into the county treasury. The law does not permit a thing to be done indirectly that is prohibited being done directly. State ex rel. v. Gordon, 236 Mo., l.c. 767.

May 16, 1938

The statutes contemplate that the officer collect the fees charged by him in legal tender or perhaps a check, which is at once worth its face value. It also contemplates that the fees collected be paid into the county treasury in the same medium of exchange.

CONCLUSION

Therefore, it is the opinion of this department that the Prosecuting Attorney, Circuit Clerk and County Clerk of counties in this state may not retain for their own use the fee collected by them for their services and assign their salary warrant to the County Treasurer as payment into the county treasury of the fee so collected, unless said warrant is worth at once its face value. These officers must pay the fees so collected to the County Treasurer in legal tender or other medium of exchange worth at once its face value, and may look only to their salary warrant for their compensation.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

TAXATION:

NATIONAL MORTGAGE ASSOCIATIONS: exempt from taxation.

Bonds and/or debentures of
National Mortgage Associations

May 25, 1938



Mr. Andy W. Wilcox,
Commissioner, State Tax Commission,
Jefferson City, Missouri.

Dear Sir:

This is in reply to yours of May 21 requesting
an official opinion from this department based upon the
following letter:

"As you know the National Housing
Act, a law recently established
by Congress, provides for the in-
corporating of national mortgage
associations, which associations
shall have the power to issue bonds
and/or debentures. The State Tax
Commission would appreciate your
opinion advising us if the bonds
and/or debentures of such national
mortgage associations will be tax-
able under the laws of the State
of Missouri.

We would appreciate an opinion on
or before the first of June, date
of the next assessment."

Section 1722 of Title 12, Banks and Banking, U. S.
C. A., as amended by congress February 3, 1938, Laws 1937-
1938, U. S. C. A., page 250, provides as follows:

"All notes, bonds, debentures, or
other obligations issued by any
national mortgage association shall

be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. Every national mortgage association, including its franchise, capital, reserves, surplus, mortgage loans, income, and stock, shall be exempt from taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. Nothing herein shall be construed to exempt the real property of such association from taxation by any State, county, municipality, or local taxing authority to the same extent according to its value as other real property is taxed. As amended Feb. 3, 1938, c. 13, Section 8, 52 Stat. 24."

From the foregoing section it is evident that congress has placed the notes and bond debentures or other obligations issued by National Mortgage Associations in the same class as that of personal property belonging to national banks. In the case of Bank of California, N. A., v. King County et al, 16 Federal Supplement, page 976, the court said:

"National banks are instrumentalities of the federal government, and states and counties are without power to tax the personal property of such banks."* * * * *

Mr. Andy W. Wilcox

-3-

May 25, 1938

CONCLUSION

From the foregoing this office is of the opinion that the bonds and/or debentures which are issued by National Mortgage Associations are exempt from any and all taxes assessed and levied by virtue of the laws of the state of Missouri or any subdivision thereof.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

CRIMINAL COSTS:

Statute of limitations begins to run after conviction and sentence and not from the time of certification of a fee bill.

June 3, 1938

Mr. W. P. Wilkerson,
Prosecuting Attorney,
Scott County,
Sikeston, Missouri.



Dear Sir:

This is in reply to your request dated May 30, 1938 for an official opinion from this department which request is as follows:

"The above named Defendants were convicted in our Circuit Court on felony charges and sentenced to the penitentiary. At the time of conviction they were all given bench paroles. They were out on parole for a period of more than two years during which time the cases were carried on our docket and reports of good conduct were made. At the end of a little more than two years they violated their paroles and were sent to the penitentiary at which time the Judge ordered the costs certified which accordingly was done in due course and payment was refused by Mr. Nutter, the criminal cost clerk, on the ground that the claims were not exhibited within the two years statute of limitations as provided in Sec. 11416, Page 7803 M.S.A. In addition to this statute Mr. Nutter also relies on State vs. Draper, 48 Mo. 56, for the proposition that the statute of limitations applies to criminal cost bills and on State ex rel. v. Kelly, 274 S.W., l.c. 733, on the proposition that

the case was concluded when final judgment and sentence was rendered.

In other words Mr. Nutter has reached the conclusion that the statute begins to run when final judgment and sentence was rendered which in this case was more than two years before the cases were certified.

I have no quarrel with his conclusion of law that criminal cost bills are subject to the two years statute of limitations. I think he was undoubtedly right about that.

But I feel that he has been improperly advised when he says that the Kelly case is authority for the proposition that the statute begins to run at the time of judgment and sentence. The Kelly case involves only a determination of the powers of a special judge in connection with a parole and in this connection I will say that I am now defending an action in the Springfield Court of Appeals in the nature of Habeas Corpus, which if the points raised are fully passed upon, will completely clarify the powers of a special judge as well as those of the regular judge where the plea is heard by a special judge in connection with granting and revoking paroles. I have been very close to the Kelly case and have heard it argued a hundred times and by counsel on each side of it and by Judge Kelly, and I can say to you and I do not believe it can be contradicted that the whole point in that case revolves about the powers of special judges in criminal cases and incidentally the power of the Circuit judge to commit where the action of the special judge is void for the lack of jurisdiction.

It is my idea, and the law must be, that the statute of limitations does not begin to run on cost bills such as these, that is, where a parole was granted, until the order to certify same is entered. If the law is otherwise it would cost the State thousands of dollars annually that otherwise could be avoided. In this county at least we use every possible method to compel parolees to pay all costs and that is the reason and the only reason that the costs in these cases were not certified until the cases were finally terminated by commitment to the penitentiary. We had hopes that we might compel the Defendants to pay these costs and thus save the State that much money.

It is apparent to me that as far as the workings of our courts are concerned, it makes little difference whether the State Auditor will say that the statute of limitations begins to run at the time of sentence and judgment, or whether it begins to run at the time certification is ordered. I take it there is no doubt that the court can and no doubt will order all costs in criminal cases certified at the time sentence and judgment is entered so that they may be paid by the State as the law provides, and the county saved unnecessary expense, but to do so it seems to me would be an unwise move for the reason that by bringing pressure to bear on parolees, the courts all over the State no doubt will collect large sums from them and save the entire governmental setup that much money and in my opinion they should be encouraged to do this.

However, as I say I am sure it will be no inconvenience to us one way or the other, but we would like to have the point definitely settled so that criminal cost bills in the case of parolees can be handled in such a way as to meet the requirements of the

State Auditor's Office in the future.

Will you please, therefore, let me have your opinion as to whether the statute of limitations in cases such as these, begins to run at the time of judgment and sentence or at the time the case is finally closed and the parolee ordered discharged or committed, and the costs ordered certified."

Section 11416, R.S. Mo. 1929, reads as follows:

"Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not thereafter."

In State ex rel. Johnson v. Draper, State Auditor, 48 Mo. 56, the court passed upon a section of the general statute which was very similar to Section 11416, supra, It said in respect to this statute as follows:

"It is admitted that these supplemental costs bills were not presented until after the expiration of two years from the final determination of the prosecutions, and I can see no reason for excluding this class of claims from the operation of the statute. The language is general, and if the statute should be held not to apply to the claims of those interested in costs bills, I know not whose should be included, or how to fix any rule for enabling the auditor to decide what must be presented within two years, or what may lie by for an indefinite period. The reason of the requirement certainly

applies with as much force to this as to any other class of claims, and we have no authority to say that the Legislature did not intend to require their prompt presentation. It is clear that the Legislature intended to limit the power of the auditor to recent and fresh claims, reserving to itself the power, if any strong equity should be shown in favor of an older one, to pass upon it by a special act."

Section 3844, R.S. Mo. 1929 reads as follows:

"When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be;" * * * * *

In your letter of request you desire to know when the statute of limitations begin to run. You ask if it starts at the time of certification of cost bill or does it start at the time of conviction and sentence. In the case of *State v. Kelly*, 274 S.W. 731, 1.c. 733, the court said:

"Of course, the special judge may pass on the motion for a new trial, grant an appeal, settle the bill of exceptions, etc. This because such matters, being but procedural steps to be taken in arriving at the ultimate determination of defendant's guilt or innocence, are so related to the trial of the cause as

to be deemed incident thereto. But the granting of a parole has naught to do with the ascertainment of guilt or innocence. It presupposes the defendant's guilt. An application for parole cannot be entertained until after a judgment of conviction has been rendered (sections 4156 and 4157, R.S. 1919) and that judgment has become a finality (section 4167, R.S. 1919). The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence or a conditional pardon is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. No appeal lay from the judgment entered on the pleas of guilty of defendants Morgan and Burnett. It was a final determination of the cause. When Judge Ing rendered that judgment, his powers and duties as special judge came to an end. Consequently he was not the judge of the Cape Girardeau county circuit court on the 31st day of August, 1923, for any purpose whatever."

In this opinion the court not only passed on the authority of the special judge in granting a parole but also ruled that the parole was an incident to the conviction and was no part of the trial of the cause and could not be given until after a judgment of conviction had been rendered and that judgment has become a finality. This holding means that after the judgment and sentence, the cause was finally disposed of and that the parole was a matter separate and apart from the case itself and, therefore, the statute of limitations begin to run at the time of the final judgment and sentence and not at the time of certification of the cost in the case.

Section 3821, R.S. Mo. 1929 reads as follows:

"No parole shall be granted in any case

June 3, 1938

while an appeal is pending, nor shall the action of any court or judge in granting or terminating a parole be subject to review by any appellate court."

In other words, this section shows that the intention of the legislature in passing the act deemed that after judgment and sentence the cause was finally disposed of as far as the crime itself, and that the parole was no part in the trial of the cause nor in any way incident thereto. This Section 3821, supra, was also passed on in State v. Kelly, supra.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the statute of limitations on cost bills in criminal cases in which the state is liable for the cost begins to run from the time of the judgment of conviction and sentence and not from the time that the costs was certified by the prosecuting attorney and criminal judge.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

COUNTY COURTS:

Mandatory for court to order election
to restrain animals when proper petition
is presented.

October 10, 1938

10-11



Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of
September 16, 1938, requesting an opinion as follows:

"Referring to Sec. 12805, R. S.
1929, question of restraining
animals, how submitted. The
following question has been
asked:

'Is it mandatory for the County
Court to put the question of
enforcing the provisions of this
article on the ballot, when the
proper petition has been present-
ed to the County Court on that
proposition?'"

Section 12805, R. S. Mo. 1929, is in part as
follows:

"The county court of any county
in this state, upon the petition
of one hundred householders of
such county, at a general election,
and may upon such petition of one
hundred householders, at a special
election, called for that purpose,
cause to be submitted to the quali-
fied voters of such county the
question of enforcing, in such
county, the provisions of this
article. * * * * *

It will be noticed that the word "may" is used in this statute with respect to what the county court is to do when a proper petition is presented. We have examined all the cases of this state which in any way mention the effect of Section 12805, supra, and find none which had determined whether said section is mandatory or directory. In other words, the question is: Must the county court order the election to be held upon the filing of a proper petition?

In *Steines et al. v. Franklin County et al.*, 48 Mo. 167, a situation somewhat similar to the instant question was before the court. The County Court of Franklin County had appropriated certain money for the improvement of roads without submitting the question to the voters. The statute, at that time, provided that before said expenditure could be made "the county court may for the purposes of information" submit the proposed expenditure to the voters. The court held that submission to the voters was mandatory and quoted from the case of *Leavenworth and Des Moines R. R. Co. v. Platte County*, 42 Mo. 171, the following language:

"* * * 'This (the election) was a necessary condition of the power to subscribe. That all the sections of an act are to be construed together is a well-settled rule of construction. The word 'may' in this clause must be interpreted to mean 'shall.' It is a power given to public officers, and concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner, for the sake of justice and the public good.' Citing cases. This principle is founded in justice, and was declared in an early day, that where the rights of third persons are involved, or the public good requires it, the word 'may' will always be construed to mean 'shall.' * * * * *

October 10, 1938

Under the rule of construction as laid down in the above case, it is clear that the word "may" in Section 12805, supra, must be construed to be "shall" and that the provisions of said section respecting submission of the restraining of animals to the voters is mandatory when a proper petition is filed in the county court. To hold otherwise would authorize the county court, if it so desired, to circumvent the will of the people by refusing to submit the question even though the whole county might desire that animals be restrained from running at large. The power given to the county court by this section concerns the public interests and the rights of third persons.

CONCLUSION

Therefore, it is the opinion of this department that Section 12805, R. S. Mo. 1929, is mandatory and that county courts must, upon the filing of a sufficient petition, submit the proposition of restraining animals from running at large to the voters of the county.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:DA

COUNTY COURTS: A judgment rendered by the county court can be executed the same as a judgment by the circuit court.

November 23, 1938

Honorable Carl E. Williamson
Prosecuting Attorney
Ripley County
Doniphan, Missouri



Dear Sir:

We are in receipt of your letter of November 7, 1938, requesting an official opinion from this department, which reads as follows:

"I desire an opinion from your office on Section 8070, R. S. Mo. 1929.

"A petition was duly circulated for improvement of a public road under Section 8069, and all matters under said section were complied with. Afterward a remonstrance against proposed road was duly signed and presented to the court and after due notice, a hearing was held, and the county court found that there were reasons why the proposed road could not be improved and the cost thereof charged against the lands in the district, ascertained the cost and expense incurred by the commissioners in the preparation of the plans, specifications, estimate, map and profile, in the list of lands, and dismissed the petition, and rendered judgment against the petitioners for costs, including the cost and expense incurred by the commissioners.

"My question now is as to the proper procedure toward collecting the judgment. Is a county court empowered to issue execution on such judgment? Or is it necessary, or proper, for a transcript to be filed in the Circuit Court such as in judgments from a Justice of the Peace Court?"

Section 8070, R. S. Mo. 1929, partly reads as follows:

"If any such protests have been so filed and the court finds after a hearing that such protests have been so filed by owners of a majority of the acres of land in the district that is within one-half mile of said public road or part of a public road; or if sufficient reason should be shown to the court why such public road or part of a public road cannot be so improved and the cost thereof charged against the lands in the district, it shall ascertain the cost and expense incurred by the commissioners in the preparation of such plans, specifications, estimate, map and profile, and said list of lands, and shall dismiss such petition and render judgment against the petitioners for costs, including such cost and expense incurred by said commissioners."

Article VI, Section 36, Constitution of Missouri, reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Section 1826, R. S. Mo. 1929, reads as follows:

"The supreme court of the state of Missouri, the courts of appeals, the circuit courts, the county courts and the probate courts in this state shall be courts of record, and shall keep just and faithful records of their proceedings."

Under Section 8070 as above partly set out, the county court has a special jurisdiction to issue a judgment against the petitioner on a petition for the improvement of a public road being refused. It is a special jurisdiction conferred upon the county court alone and not upon a circuit court. According to your request, the county court dismissed the petition and rendered judgment against the petitioners for costs, including the cost and expense incurred by the commissioners. All of the costs set out in your request are specifically specified in Section 8070 as above set out, and the judgment is proper.

Under Article VI, Section 36, of the Constitution of Missouri, the county court is a court of record in the same manner as a circuit court or other superior courts. The judgment of the county court granted by the court under the special jurisdiction as above set out is subject to execution the same as any other judgment in any other court of record.

Section 1152, R. S. Mo. 1929, reads as follows:

"The party in whose favor any judgment, order or decree is rendered, may have an execution in conformity therewith."

Section 1157, R. S. Mo. 1929, partly reads as follows:

"Any party entitled to an execution from a court of record may have it directed as provided in the preceding section, or, at his option, he may have it directed to any sheriff in the state of Missouri."

The previous section referred to in Section 1157 refers to the date of the return of the execution by the sheriff to the clerk issuing the same.

Section 1158, R. S. Mo. 1929, reads as follows:

"The clerk shall, before delivering any execution issued by him, indorse thereon the debt, damages and costs, or damages

and costs, to be recovered, and shall keep in his office a well-bound book, and enter therein an abstract of all executions issued out of his office, showing the date, the names of the parties, amount of debt, damages and costs, or damages and costs to what officer directed, when made returnable, the return, if any, and a reference to the book and page wherein the judgment or decree whereon such execution issued is entered; and every such clerk shall, moreover, keep a regular index to such abstract of executions, arranged alphabetically, both by the name of the plaintiff and defendant therein."

Under this section, the clerk of the county court may issue an execution the same as the clerk of the circuit court on account of the county court having special jurisdiction to render judgments as set out in that part of Section 8070, supra.

In the case of State v. Fulton, 152 Mo. App. 345, 1. c. 348, the court said:

"It was held in a number of the early cases in this state, among them Strouse v. Drennan, 44 Mo. 289; Gibson v. Vaughan, Adm., 61 Mo. 418, and several cases earlier than these, that the facts necessary to show jurisdiction of probate and county courts must appear from their records, but these cases were expressly overruled in the case of Johnson v. Beasley, 65 Mo. 250, and the principle announced in that case that while the probate and county courts are courts of limited jurisdiction and their power to act is provided by the statute, yet as to such matters as the statute places exclusively within their jurisdiction they stand on the same footing as courts of general jurisdiction, and the same presumptions are to be indulged in favor of the regularity of their proceedings and the validity of their judgments and orders in relation to the matters exclusively

confided to their jurisdiction as are indulged in favor of the judgments and orders of a court of general jurisdiction."

Also, in the case of Bingham v. Kollman, 256 Mo. 573, 1. c. 589, the court said:

"That order or judgment is not open to collateral attack, and no direct attack is made upon it by the pleadings in this case. The county as well as the probate court, is one of inferior jurisdiction, but the rulings of some of the earlier cases as to the absence of any presumption of jurisdiction when the records of those courts do not affirmatively disclose their jurisdiction have been repeatedly overruled. The law is now settled that the orders and judgments of county and probate courts, made in the exercise of their statutory powers over subjects and matters conferred upon them, are entitled to the same favorable presumptions arising, either from the statements or the silence of their records, which are accorded in like cases to circuit courts or others of general jurisdiction. (Johnson v. Beazley, 65 Mo. 250; Desloge v. Tucker, 196 Mo. 1. c. 601, and cases cited; Ancell v. Bridge Co., 223 Mo. 1. c. 227; Macey v. Stark, 116 Mo. 1. c. 494, and cases cited; McDonald v. McDaniel, 242 Mo. 1. c. 176; Covington v. Chamblin, 156 Mo. 574; State v. Fulton, 152 Mo. App. 1. c. 348; Deweese v. Yost, 161 Mo. App. 1. c. 12; Spicer v. Spicer, 249 Mo. 582.)"

CONCLUSION

In view of the above authorities, it is the opinion of this department that when a judgment is rendered against petitioners who have filed a petition for the improvement of a public road under Section 8069, R. S. Mo. 1929, and the county court has dismissed said petition under Section 8070, R. S. Mo. 1929, and assessed the costs of the proceeding against the petitioners by a lawfully rendered judgment, then the county court is empowered to issue execution on such judgment in the same manner and form as a judgment rendered in the circuit court of the State of Missouri. It is further the opinion of this department that it is not necessary to file a transcript of the judgment rendered by the county court in the office of the clerk of the circuit court as is done in judgments before a justice of the peace court.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

RECORDER - Recorder of Deeds is bound to require statutory fees before recording written instruments.

February 4, 1938

OPINION NO. 98

Honorable Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Sir:

We acknowledge your request of February 2, 1938. We also acknowledge copy of letter from Nicholas Mosby, Recorder of Deeds of your county, which was addressed to you.

He states that the Adjutant General for the State of Missouri has in his possession a list of the veterans of the World War by counties, and that he will mail the list to the Clay County Recorder upon condition that the Recorder of Deeds will agree, in writing, to record said list of veterans without expense to any State department.

Section 3955, R. S. Mo. 1929 provides in part:

"It shall be unlawful for the clerk of any court, or his deputy, or any person in his employ, or any person for him, or any other officer of any court, to buy or purchase, or trade for, directly or indirectly, any fee taxed or to be taxed as costs in the court of which he is clerk or officer, or of any other court in this state, or any county warrant, at less than par value, which may be by law due or become due to any person by or through any such court; and it shall be unlawful for any county clerk, circuit clerk, recorder, or any other officer of

February 4, 1938

any court, or his deputy, or any person in his employ, to charge, collect or receive less fee for his services than is provided by law."

Section 3956, R. S. Mo. 1929 provides:

"Any such clerk or officer violating the preceding section shall, upon conviction, be punished by fine of not less than one hundred dollars, and in addition shall forfeit his office, and it shall be the duty of the judge having criminal jurisdiction to give this and the preceding section in special charge to the grand jury."

Section 11547, R. S. Mo. 1929 provides that the Recorder record certain writings delivered to him, and Section 11564, R. S. Mo. 1929 provides a civil liability on his official bond against any Recorder who neglects or refuses to record a writing delivered to him for recording.

As a condition precedent to the duty to record qualified writings, the legal fee must be tendered or paid in advance, otherwise the Recorder can rest on his oar (see Section 11566, R. S. Mo. 1929). The legal fee provided for recording writings is found in Section 11804, R. S. Mo. 1929, which reads in part:

" ** For recording every deed of instrument, for every hundred words...\$.10"

The County Treasury has an interest in fees collected by the Recorder of Deeds, as provided in Laws of Mo. 1937, page 446, Section 11786, and also Section 11568, R. S. Mo. 1929.

53 C. J. page 617, Section 27, reads as follows:

"Under a statute providing that the recording officer shall not be com-

pelled to record an instrument until after tender or payment of the fee, the clerk may refuse to receive an instrument offered for record unless the fees for recording be paid to him in advance, but this must be seasonably or immediately done upon the tender of the instrument for record, and when the clerk receives and retains the instrument in his official custody, the recording is not invalidated because the fees were not prepaid.

"Under a statute requiring that fees for recording be paid when the instrument is left for recording, municipal officers must comply with the statutory mandate as to the payment of fees, and their omission to do so within the time required in the circumstances cannot be excused or condoned."

CONCLUSION

We are of the opinion that under the Missouri statutes, supra, it would be unlawful for any Recorder of Deeds in Missouri to record any written instrument without charging the legal fee provided by law, and he must also account for said fee as provided by law, and any Recorder of Deeds would be throwing himself open to criminal prosecution as well as civil liability on his bond should he fail or refuse to charge and account for fees as provided by law. He also subjects himself to forfeiture of office.

The utility of such a public record proposed by the Adjutant General for recording in each county of Missouri as a memorial cannot be denied, and morally such

#4 - Hon. Conn Withers

February 4, 1938

vital information should be preserved in the county for reference by future generations, but the only lawful way for a Recorder of Deeds to record such a writing is pursuant to the legal fee first being tendered. The Legislature prescribed a fee without making any exception of liability in the circumstances under consideration.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

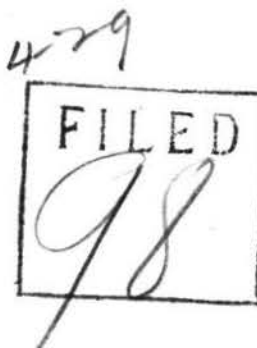
J. E. TAYLOR
(Acting) Attorney General

TAXATION:
RAILROADS, TELEPHONE, ETC,
LIABLE FOR WHAT TAXES:

Railroads and other utilities
similarly taxes owning or holding
property on June 1, including
property acquired on that date are
liable for taxes thereon for the
ensuing year.

February 24, 1938

Mr. Conn Withers,
Prosecuting Attorney,
Clay County,
Liberty, Missouri.



Dear Sir:

This is to acknowledge your request for an official
opinion dated February 8, 1938, which is as follows:

"At the behest of the County Collector
of this county I respectfully request
the opinion of your Department on the
following matter:

Clifford T. Halferty, County Collector,
has been requested by the Public Water
District #1 of Clay County, Missouri,
organized under the Laws of 1935 to be
sue for taxes against certain utilities
which suit he does not believe could be
successfully maintained in which conclu-
sion I am inclined to agree with him.

The manager of the Water District is very
insistent that he bring these actions and
in order that he may be properly guided he
requests this opinion.

I enclose herewith a copy of a letter set-
ting out the facts which was prepared by
the attorney for the Water District and
which the collector and I have carefully
checked and believe to correctly recite
the facts involved.

Under these facts can a suit to collect
from these utilities a tax based on the
assessment of June 1, 1935, being what we
commonly call the 1936 tax, be success-
fully maintained?"

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Included with the request was a statement of facts pertaining to public Water District No. 1, Clay County, Missouri, part of which is as follows:

"Mr. Clifford Halferty
County Collector
Liberty, Missouri.

Dear Mr. Halferty:

Complying with your request for information concerning the steps taken in the matter of the tax levy on the properties of the Southwestern Bell Telephone Company and the Kansas City Power & Light Company, taxes for which levy you have indicated these companies have refused to pay, I submit the following facts:

The completion of the organization of the water district was on the 2nd day of December, 1935. On December 30, 1935, I wrote a letter to the clerk of the county court giving him the information that had been gathered up to that time with relation to the property values in the water district, which included the number of miles of line of the Kansas City Power & Light Company, the Southwestern Bell Telephone Company, American Telephone & Telegraph Company, Great Lakes Pipe Line Company, Q.O. & K.C. Railway Company, K.C.C.C. & St. Joseph Railway Company, and the North Kansas City Bridge & Railway Company. This information had been furnished primarily for the purpose of determining the valuations of property in the district as a basis of the bond issue that was then in contemplation. The information furnished at that time giving the number of miles of wire of the Kansas City Power & Light Company, the Bell Telephone Company, and the American Telephone & Telegraph Company was obtained directly from these companies. I have since checked Mr. Crossett's office and find that this letter was received by him

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in due course of mail.

On January 20, 1936 the water district board passed a resolution in which it estimated the amount of money necessary to be raised for the incidental fund for the district provided for in Sections 5 and 12 of the water district law, appearing respectively on pages 331 and 334, Laws of Missouri 1935. On January 21 the clerk of the board of the water district prepared a certificate giving the facts about the passage of this resolution and I forwarded it to the clerk of the county court on that day.

On April 27, 1936 I furnished the county clerk an itemized list of the real property in the water district subject to taxation and wrote him a letter at that time. He had previously indicated in oral conversation that it was not his duty to find out and list the real estate that was in the water district, and this information was given him in order that he might have it as a basis for the extension of the levy on the tax books. On June 13, 1936, the county court made a levy of 15¢ on the \$100.00 valuation pursuant to the estimate made by the board which was certified to as indicated above and as provided for in Section 12 of the water district law referred to above. * * * * *

Public Water District No. 1 of Clay County, Missouri, was formed on December 2, 1935, by virtue of provisions of the Laws of Missouri, 1935, pages 327 to 337.

Your request indicates that the Southwestern Bell Telephone Company and The Kansas City Power and Light Company which are holders of property in the district, are claiming that the district is not authorized to collect the taxes for 1936 on their properties in the district which are based on the assessment of June, 1935. We assume this position is taken by these companies because of the fact that the water district was not a legal entity at the date of the assessment.

Section 10066, page 422, Laws of Missouri, 1933, provides

that the taxes on such utilities shall be levied and collected in the same manner as railroad taxes, part of which section is as follows:

"* * * and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other chief officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, or express company, or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, or express companies in like manner as the president, or other chief officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property."

For the purpose of assessing taxes on property owned by railroad corporations in this state, the legislature has provided in article 13 of chapter 50 R.S. Mo. 1929, the course to be followed. Broadly speaking, there are two classes of rail-

road property for the purpose of assessment and taxes; the one is what is termed distributable property; the other is all property that is not distributable, it being designated as local property. The distributable property is assessed by the state board of equalization. The local property is assessed by the county assessor as other local property is assessed in the county.

It appears from your request and the facts concerning the formation of the district accompanying your request, that the taxes are sought to be collected for the district by virtue of the provisions of Section 5, page 331 and Section 12, page 334, both of the Laws of Missouri, 1935, which provides as follows:

"The following powers are hereby conferred upon public water supply districts organized under the provisions of this act: * * * * * to certify to the County Court or county courts of the county or counties within which such district is situate, the amount or amounts to be provided by the levy of a tax upon all taxable property within the district to create an interest and sinking fund for the payment of general obligation bonds of the district and the interest thereon, and also to create an incidental fund to take care of all costs and expenses incurred in incorporating the district, and all obligations contracted prior thereto and connected therewith and to purchase equipment and supplies needed in the operation of the water system of the district, provided, however, that the power to create an incidental fund by the levy of a general property tax shall cease after two annual levies therefor shall have been made, and such levy shall not exceed fifteen cents (15¢) per annum on each One Hundred Dollars (\$100.00) assessed valuation of taxable property within the district; to provide for the collection of taxes and rates or charges for water and water service; * * * * *

Section 12, page 334, Laws of Missouri, 1935, is as

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follows:

"For the period and subject to the limitations contained in this act, the board of directors of any district organized hereunder shall, on or before the tenth day of May of each year, make estimates of the amount of taxes required to be levied to provide for the purposes of the district as specified in Section 5 hereof. Such estimates shall thereupon be certified by the clerk of the board and filed with the clerk of the county court or the respective clerks of the county courts of the counties in which the district is situate. Upon the basis of such estimates the county court or respective county courts shall proceed to levy a tax upon all taxable property within the district, sufficient to provide the funds required by such estimates. The clerk of the county court or respective clerks of the county courts shall enter such levies on the tax books of the county in the same manner as school district taxes are entered, for the use of the county collector. The taxes thus levied and extended upon the tax books shall be collected and the payment thereof enforced at the same time and in the same manner as is provided for the collection and payment of taxes levied for state and county purposes and such taxes, when collected, shall be remitted by the collector or collectors of the revenue, to the treasurer of the district."

It also appears from your correspondence that on January 20, 1936, the officers of the water district passed a resolution estimating the amount of money necessary to be levied for the incidental fund and a copy of this resolution was delivered to the County Court of Clay County on January 21, 1936.

And it appears that on April 27, 1936, the district furnished to the county court an itemized list of the property subject to taxation in the district.

By virtue of the provisions of Section 10012 R.S. Mo.

1929 and Section 10066, page 422, Laws of Missouri, 1933, it was the duty of the said utilities through their proper officers to:

" * * * * * furnish to the state auditor a statement, duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks, in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of June in each year, and the actual cash value thereof."

A duplicate of the statement required by said Section 10012 shall be filed by the utility with the clerk of the county court of each county through which such utility extends.

By virtue of the provisions of Section 10014 R.S. Mo. 1929, the county court at the next term after the January term shall examine such statement and determine the correctness thereof as to the description of the property and the valuation thereof. And if found correct, the court shall cause the clerk thereof to certify to the correctness of the statement under the seal of the court and forward the certificate to the state auditor on or before the first of April thereafter.

From the statement of facts with your letter, it appears that the water district did not furnish to the county court the itemized list of property subject to taxation in the district until April 27, 1936.

We are assuming that the county court performed the duties

required of it by said Section 10014 and within the time provided by law. That being the case, the returns made by the district on April 27, 1936, were too late to be included with the report which the county court was to make to the state auditor on or before April 1, 1936. The information which you furnished does not reveal whether or not there were any exceptions to the act of the county court in performing its duties required by said Section 10014 pertaining to the distributable properties of the utilities in the county, cities and subdivisions of the state.

The returns provided for by Sections 10012 and 10014, supra, are to be read before the state board of assessment on the third Monday in April of each year and that board then assesses, adjudges and equalizes the valuation of the distributable properties of the utilities in the state according to the provisions of Section 10017 R.S. Mo. 1929, which provides as follows:

"The state board for the assessment and equalization of railroad property shall be composed of the governor, secretary of state, state auditor, state treasurer and attorney-general, and shall meet annually at the capitol in the City of Jefferson, on the third Monday of April of each year, for the purpose of assessing, adjusting and equalizing the valuation of such railroad property. The said board shall proceed to assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 10012. * * * * *

Then by authority of Section 10022 R.S. Mo. 1929, the said board acting upon the information it has obtained from the utilities, apportions the property of the utilities, so assessed, to the county, municipal township, city or incorporated town in which such utility is located according to the ratio which the number of miles of such utility in such county, municipal township, city or incorporated town shall bear to the whole length to such utility in the state.

It appears from the record of the State Tax Commission that no mileage of these utilities was apportioned to the water district for the assessment of June 1, 1935. Sections 10025,

10026 and 10027 R.S. Mo. 1929, provides the manner in which the local properties of the utilities are to be assessed and taxed.

Section 10028 R.S. Mo. 1929 provides as follows:

"The county court, upon the receipt from the auditor of the certificate of the action of said board of assessment and equalization, the returns of the county assessor and the certificate of cities, towns and villages made under the preceding section, shall, at the regular term of court, if in session at the time, if not, at an adjourned term or at a special term of said court called for that purpose, ascertain and levy the taxes for state, county, municipal township, city incorporated town and village and school purposes, and for the erection of public buildings, and for other purposes on the railroad and the property thereof, in such county, municipal township, city and incorporated town or village, at the same rate as may be levied on other property, except that the rate for school purposes and for the erection of public buildings, and for other purposes, shall be ascertained as prescribed in the next succeeding section, and shall make an entry thereof on the records of said court; and in case the county court has failed or omitted, or may hereafter fail or omit, from any cause whatever, to levy the taxes or any portion of the taxes for any year or years, or in case the taxes or any portion of the taxes for any year or years shall have been illegally or erroneously levied, then said court, at the time of making the regular levy upon railroad property as herein provided, shall, in addition thereto, ascertain and levy the taxes for state, county, municipal township, city, incorporated town or village and school purposes, and for the erection of public buildings and for other purposes, on the railroad and the property thereof,

in such county, municipal township, city and incorporated town and village, which may have been or may hereafter be omitted or illegally or erroneously levied upon the valuation of the railroad and the property thereof, as returned by the state board of equalization for such year or years, at the same rates that were levied upon other property for the year or years for which said taxes were omitted or illegally or erroneously levied: Provided, that in no case shall the levy exceed the constitutional limit; and which taxes, when so levied, shall become due and payable, delinquent and subject to penalty as other railroad taxes now are, and shall be recoverable as hereinafter provided."

It was by virtue of the provisions of the foregoing acts that the county clerk of Clay County made the levies for the 1936 taxes which included the levy for the Water District No. 1 of Clay County, Missouri. At the time the county court made this levy for the water district taxes, it does not appear that the mileage of these utilities had been apportioned by the state taxing board as provided by Section 10022 R.S. Mo. 1929, supra, but the county clerk had attempted to perform this act. In the case of State ex rel. Union Electric Light & Power Co. v. Baker et al, 293 S.W. 399, 1.c. 404, the court said:

"* * * * The apportionment here contemplated was not in the nature of a power conferred upon the board of equalization, but rather a ministerial clerical duty required of that body before the record of its proceedings should be filed with the state auditor. It seemingly marked the completion of the assessment. 3 Cooley on Taxation (4th Ed.) 1171. It is still incumbent upon that body to perform this duty, notwithstanding the power of original assessment has been transferred to the tax commission, * * * * *"

In the case of State ex rel. v. Lesser, 237 Mo., 1.c. 318, the court said:

"* * * * * The sovereign power of the State to require its citizens to pay taxes on all their personal property, or on what they own representing their interests in personal property, within or without the State, may, for the purposes of this case, be conceded. But conceding that the State has the power to tax such interests, it does not follow that such interests are taxed unless the law so declares. It is not left to the tax assessor or tax collector to say what property or what interests in property are to be taxed. Under our system of taxation there can be no lawful collection of a tax until there is a lawful assessment and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose. * * * * *"

Even though the water district is entitled to the tax on the assessment of June 1, 1935, yet we do not think the tax in question is legal for the reason that it was not apportioned by the proper officials and as provided by the statute.

On the question of the district collecting taxes levied on an assessment which was made prior to the date of the formation of the district, we find that Section 9746 R.S. Mo. 1929 provides as follows:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

This section includes all taxes that may be levied on the property during the year following the assessing date. No exception is made as to whether or not such levy is one authorized after the date of the assessment nor is any exception made to a tax levied for a sub-division of the state such as the water district in this case which is created after the date of the assessment.

The organization of the Water District No. 1 of Clay

County, Missouri, appears to have been completed on December 2, 1935. Section 3 of Article X of the Constitution provides that taxes shall be uniform upon the same class of subjects within their territorial limits of the authority levying the tax.

Section 4 of Article X of the Constitution provides that:

"All property subject to taxation shall be taxed in proportion to its value:
* * * * *

Section 5 of Article X of the Constitution provides as follows:

"All railroad corporations in this State, or doing business therein, shall be subject to taxation for State, County, school, municipal and other purposes, on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock."

It also appears from the facts you submitted, that these utilities claim that this tax could not be based upon an assessment made prior to the organization of the district and if it does, it would be in violation of the provisions of Section 15 of Article II of the Constitution which provides as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly."

The act authorizing the levy and collecting of such a tax would not be retrospective and in violation of the provisions of said Section 15, supra, for in the case of *Clark v. Railroad*, 219 Mo. 524, the court in construing the same provisions of the Constitution, said:

"* * * the retrospective laws forbidden by that instrument are laws impairing

existing vested civil rights. The laws must take away such vested right, or it must create a new obligation, impose a new duty, or attach a new disability in respect to gone by transactions, in order to be retrospective and under the constitutional ban."* * *

The owners of property on June 1, 1935, were required to pay the tax for 1936 based on the assessment of June 1, 1935, and they are not deprived of any vested right nor is any new obligation imposed on them for by said Section 9746, they are required to pay all taxes on their property which may be assessed for the ensuing year.

In the case of Cadena v. State ex rel. et al, 185 S.W. 367, we find that the court of civil appeals of the State of Texas in the case similar to the one in question except that the tax payer in that case was not a railroad corporation or other utility in which such returns are required as in Missouri, the Court said:

"The act creating the school district was approved by the governor on March 22, 1915, and went into effect June 19, 1915. The act authorized the levy of taxes by the board of trustees for the issuance of bonds and a maintenance tax. The board of trustees of the district levied a tax of twenty five cents on the one hundred dollar valuation to supply a maintenance fund. The contention is that the district was not in existence on January 1, 1915 (the date of the assessment) and no tax could be levied for that year.

It was evidently contemplated by the legislature that the people of the district should obtain the benefits of its creation immediately.

It could not have been contemplated that instead of the law becoming effective immediately or in ninety days after the adjournment at the farthest, it should

not go into effect until the following year, and yet that would be the logical result if the judgment of the lower court could be sustained. Under that rule if the law had gone into effect on January 2, the tax could not have been levied for that year, because the district was not in existence on January 1, the first of the year.* * * So in this case, if no tax could have been levied for 1915, appellees could not be forced to pay any maintenance tax until 1917 and in the meantime the schools of the district would be without a maintenance fund. * * * * On property owned on the first day of January which is subject to any tax authorized by law, whether such taxes have been authorized theretofore or may be authorized during the year, and can be levied by the body given the power to levy at any time during the year." * * * * *

In the case of Norfolk W. R. Co. v. Supervisors of Smyth County, 12 S.W. 109, in the Supreme Court of Appeals of Virginia, the taxing authorities were attempting to collect school taxes on the rolling stock of a railroad. The act authorizing such school tax to be levied, was passed after the date of the assessment and the court in that case held:

"Under act of Virginia, February 27, 1880 which takes effect from its passage and gives supervisors of a county authority to levy a tax on a railroad property of their county based on the assessment per mile of the same property made by the state for its purposes, such tax could be levied at any time after passage of the act, based on a state assessment made previous to the act." * * * * *

In the case of Blewitt v. Megargel County Line Independent School District et al, 285 S.W. 271, Texas, in passing on the question as to whether or not lands brought into the school district after the time of the assessment are liable for taxes levied for the current year for such district, even though the assessment for taxes for that year was made prior to the time the lands were brought into the district, the Court said:

"* * * * The decision in the case of Cadena v. State (Tex. Civ. App.) 185 S.W. 367, is authority for the proposition that, when an independent school district is created after the 1st of January of a given year, all property within such newly created district, which was owned by the taxpayer on January 1st of that year, 'is subject to any tax authorized by law, whether such taxes have been authorized theretofore or may be authorized during the year, and can be levied by the body given the power to levy at any time during the year.'" * * * * *

In Volume 44 Corpus Juris, page 1292, section 4323 the rule as it applies to the question here involved is stated as follows:

"* * * There is a conflict of authority as to whether the owner of annexed property can be charged with the current year's taxes, the rule in some jurisdictions being that he cannot and in others that he can be held liable." * * * * * (citing cases)

We find only one Missouri case in point holding that such property is taxable for the current year providing it is brought into the district prior to the date of the levy, which case is City of Westport ex rel. v. McGee, 128 Mo. 152.

In this case the taxpayer contended that the date of the assessment fixes the date of the liability for the taxes, and since the property was not within the corporate limits on the date of the assessment, he was not liable for the city taxes for that year and the Court in this case said:

"* * * * A lien is given for municipal taxes, but there is nothing in the statute that justifies the claim that the lien for the city taxes relates to the date of the county assessment. On the contrary the city council must by

ordinance establish the rate of taxes upon the county assessment, and there is no lien until the tax is levied and extended by the city council on its tax books. The question here is, were these lands within the corporate limits when the tax was levied. If they were, they are subject to city taxation. If the lands are brought into the city after taxes have been levied upon the property of the city, the lands subsequently brought in are not subject to that levy. There is nothing in the law requiring the city to levy taxes on a certain day, nor will the fact that the mayor did not obtain the abstract until the twentieth day of May affect the validity of the tax. The time within which he should obtain the abstract was directory, not jurisdictional."*****

Section 12, page 334, Laws of Missouri, 1935, fixes May 10th of each year as the time which the district may have to make its levy for the water taxes and from the information furnished with your request, it appears that the water district had made its levy prior to the 10th of May of 1936.

From the rule in the case of City of Westport, supra, if the telephone company and electric light companies owned property located in the district on or before May 10th, 1936, and after the district was organized, they are liable for the taxes levied for the district for that year even though they were not in the district on the date of the assessment.

If the contention of the utilities in this matter is correct, then the water district would not be able to obtain any taxes for its incidental expenses until October 1, 1937, and that would be twenty one months after the organization of the water district. The water district act went into effect ninety days after its passage and approval which was March 27, 1935.

We are convinced that the lawmakers did not intend that the water district should wait longer than twelve months

for the revenue it was entitled to from taxes and we are further fortified in this view by Section 18 of the act, page 337, Laws of Missouri, 1935, which is as follows:

"During the period of time given the board to levy a tax on property within the district for incidental expenses as that term is used in this Act, the board may issue and sell current revenue bonds to bear interest at not to exceed six per centum (6%) per annum, to meet the current expenses of the district incurred in advance of the revenue to be derived from such incidental tax levy, and to be paid out of such current revenue when accrued.

Such bonds may be for six (6), nine (9), or twelve (12) months and shall not exceed in the aggregate one-half of the revenue for the fiscal year for which they are issued." * * * * *

From the holding of the courts in the two cases cited above, and in view of said Section 18 of the act, it seems that the levy can be made even though the assessment is dated prior to the date of the law authorizing the levy or prior to the decree incorporating the water district for which the levy is made. There is no doubt of this being the rule which applies to taxes on local property of the utilities which are taxed by virtue of the provisions of said Section 10025, supra.

This leaves one question in the way, and that is that the utilities make their distributable property returns on a mileage basis in the various sub-divisions of the state, and since they have made their returns and in proper time which showed that on June 1, 1935, they had no property in the water district and since their returns were not appealed from or corrected or amended, then is the water district entitled to taxes for the ensuing year.

We do not think there is any doubt of the authority of the water district to collect the taxes on the local properties belonging to the utilities in the district which were assessed as of June 1, 1935, and under the uniformity provision of the

Constitution cited, supra, Section 3 of Article X, the distributable property of the utilities should be included if there is any way provided by statute to make the assessment. Under the rule that all property should bear its portion of the taxes, if the local property of the utilities and other real and personal property in the water district are liable for the taxes of 1936 based on the 1935 assessment, then the tax on the distributable properties of these utilities in the district should be paid for the same year. Section 10021 R.S. Mo. 1929 provides as follows:

"The state board of assessment and equalization shall have the power to assess, adjust and equalize the property hereinbefore specified of any railroad company, in whole or in part, for any year or years since March 10, 1871, for which it has been or for which it may hereafter be omitted from assessment, adjustment and equalization, and to reassess, adjust and equalize any such railroad property, in whole or part, as the case may be, for any year or years for which it may have been heretofore or in which it may hereafter be assessed, adjusted and equalized, but which assessment, adjustment and equalization, for any cause has been or which may hereafter be held by the courts to be irregular or void."

By the provisions of the foregoing section, the board of assessment and equalization has authority to place on the tax books the property of the railroad or the utilities which may have been omitted from assessment and it is by the provisions of this section that we think the legislature intended to correct an omission such as has happened in the case of water district taxes. The assessing and equalization board of the state now has authority to apportion the mileage of these utilities in said water district for the 1936 taxes based on the valuation and returns of such utilities for June 1, 1935.

CONCLUSION

This office is, therefore, of the opinion that the dis-

Mr. Conn Withers

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February 24, 1938

tributable property taxes for 1936 based on the assessment of June 1, 1935, of the said utilities in Water District No. 1, Clay County, Missouri, are void for the reason that the clerk of the county court had no authority to apportion the mileage of the utilities in the district.

This office is further of the opinion that these utilities are liable for the 1936 taxes levied on their properties in said water district which were based on the assessment of June 1, 1935, and if they have not been properly assessed and apportioned, this may yet be corrected by the board of assessment and equalization under the provisions of said Section 10021 hereinbefore cited.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

STATE TREASURER:

State auditor cannot surrender original documents, drafts or vouchers, but must be preserved in his office.

May 14, 1938

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Honorable Robert W. Winn,
State Treasurer,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated May 11, 1938 for an official opinion which request is as follows:

"We have filed in our office 105 drafts drawn on the State Treasurer representing \$9,980.49, these being the drafts forged by Virgil L. Medling.

The National Surety Corporation has paid the State of Missouri and the money has been deposited in the State Treasury. They are now asking that we turn these original drafts over to them.

I made an assignment to the National Surety Corporation in the amount of these drafts and also turned over photostatic copies of each draft to them.

I am asking an opinion from you as to whether I should turn these original drafts over to the National Surety Corporation as per their request or keep them here in my files."

Section 11419, R.S. Mo. 1929 reads as follows:

"All accounts, vouchers and documents settled or to be settled by the auditor

shall be preserved in his office; and copies thereof, authenticated by his official seal, shall be given without charge, to any person, county, city or town interested therein, that may require the same for the purpose of being used as evidence in the trial of a cause, and like copies shall be furnished to any corporation or association requiring the same, upon tender of the fees allowed by law. Provided, that, during each biennial session of the general assembly, the state auditor shall, in the presence of a joint committee of the house of representatives and senate, destroy by burning or by any other method satisfactory to said joint committee all paid accounts, vouchers and duplicate receipts of the state treasurer which may have been on file in the office of the state auditor for a period of eight (8) years or longer, and all automobile and air-craft license and title receipts which have been on file in the office of the state auditor for a period of two years or longer, except such accounts, vouchers and documents as may at the time be the subject of litigation or dispute. Said joint committee to consist of four (4) members of the house of representatives, to be appointed by the speaker of the house of representatives and two (2) members of the senate, to be appointed by the president of the senate."

According to this section all accounts, vouchers and documents settled or to be settled by the auditor shall be preserved in his office. The section also provides for the proper authentication of any such papers which can be used as evidence in any trial. The section also provides as to the method and manner of disposing of such papers.

In construing any statute one must take into consideration the intention of the legislature in passing any

act. In Section 11419, supra, the fact that the legislature provided that all papers shall be preserved in the office of the auditor, and also provided for the manner in which the papers should be disposed of, it is compulsory on the part of the state auditor, which is a part of the treasury department, to follow the manner of keeping and disposing of such papers and not follow any other manner.

In the case of Dietrich v. Jones, 53 S.W. (2d) 1059, the court in passing upon the duty of a probate court to follow the statute, said:

"The probate court is a court of limited jurisdiction, possesses only such power as is conferred upon it by statute, and can exercise its jurisdiction only in the manner prescribed by statute."

The court also said that:

"Whenever statute prescribes that a thing shall be done in a particular form, it necessarily prohibits the doing of it in any other form."

Section 11419, supra, sets out a specific manner of the preservation of papers belonging to the treasury department, and also specifically sets out the manner of the disposal of such papers after a certain time, and cannot be disposed of in any other manner.

According to 25 Corpus Juris, 220, note 16 (c) it was said:

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise."

When the treasury department assigned to the National Surety Corporation in the amount of the drafts questioned, it assigned the debt itself but not the drafts which are merely evidence of the debt. In view of the statute, Section 11419, supra, in providing for the use of photostatic copies of the draft for the purpose of being used as evidence in

Honorable Robert W. Winn

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May 14, 1938

any trial of the cause, the photostatic copies are sufficient evidence for the National Surety Corporation in any trial that may be had in the controversy.

CONCLUSION

It is the opinion of this department that the treasury department would be violating Section 11419, supra, if it should turn the original drafts over to the National Surety Corporation for the reason that the treasury department in making the assignment of the debt itself and also the photostatic copies of the draft, it has sufficiently complied with the law.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

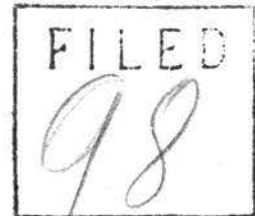
WJB:DA

CHARITABLE TRUST: Eleemosynary Board authorized to accept
gift in trust for use of inmates at State
Hospital Number 3.

October 7, 1938

10-7

Hon. Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Sir:

This department is in receipt of your opinion request of September 30, 1938, which reads as follows:

"One Gertrude Cross died a resident of Clay County, Missouri, leaving an estate and in the fifth paragraph of her will provides as follows:

"Fifth. Remembering the kindly care of my stepfather, Albert S. Batchelder, I give, devise and bequeath absolutely unto Missouri State Hospital Number 3, situated at Nevada, Missouri, all the balance of my property of whatever description, whether real, personal or mixed, and wheresoever situated. This to be used in establishing or adding to a library for said institution."

"The Public Administrator in charge of her estate has inquired of me as to whom this residue should be paid for the purpose mentioned in said will.

"Will you please give me the opinion of your Department concerning the answer to that question?"

From the facts submitted, you have a testamentary gift for a charitable use which specifies State Hospital Number 3 as the trustee, to take and administer the balance of the fund according to the terms of the will.

October 7, 1938

In such cases, Section 8574, R.S. Missouri, 1929, provides:

"The board of managers of the eleemosynary institutions shall have the care and control of the property, real and personal, owned by the state and used in connection with the several institutions, and the title to all real estate or personal property now owned by said eleemosynary institutions or by the state for their use or that may hereafter be purchased by, or donated to such institution, shall be vested in the board of managers for the use and benefit of said institution; or in the event of a gift or donation to the use and benefit to either of said institutions as may be designated by the donor. The board of managers of said institutions shall not sell or in any manner dispose of any real estate belonging to either of said institutions without an act of the general assembly authorizing such sale or disposal of such real estate."

Section 8591, R.S. Missouri, 1929, requires the Eleemosynary Board to appoint a steward for State Hospital Number 3 and Section 8592, R.S. Missouri, 1929, provides "the steward shall be the custodian of all the property of every kind and description belonging to the institution for which he has been appointed steward".

Section 300, R.S. Missouri, 1929, gives a public administrator the powers and duties of an executor and provides:

"In addition to the provisions of this article, he and his securities shall have the same powers as are conferred upon, and be subject to the same duties, penalties, provisions and proceedings as are enjoined upon or authorized against executors and administrators, guardians and curators by articles 1 to 13, inclusive, of this chapter, so far as the same may be applicable. * * * * *

Section 251, R.S. Missouri, 1929, provides that distribution of assets of an estate be made under order of the Probate Court and reads:

October 7, 1938

"When any order shall be made by the court directing the sale of personal property for distribution, as provided by articles 1 to 13, inclusive, of this chapter, it shall be the duty of the executor or administrator of the estate to which such property belongs, to sell the same and distribute the proceeds of such sale according to the order of court, and he and his securities shall account on his official bond for any failure to apply the proceeds of such sale according to such order.

CONCLUSION

Where a donor, as in this case, selects a class from the public to be benefited, where the purpose is a charitable one, the gift is a charitable trust.

On the facts submitted, we are of the opinion that the public administrator should turn over the assets shown as the "balance" in the 5th paragraph of the will, after order of the Probate Court to that effect, to the State Eleemosynary Board at Jefferson City, Missouri, in trust for the purchase of library books and library equipment, for the use of the inmates at State Hospital Number 3 at Nevada, Missouri. The Board of Managers in turn are legally bound to execute the trust when accepting said gift.

Respectfully submitted,

APPROVED By:

WM. ORR SAWYERS
Assistant Attorney General

J.E. TAYLOR
(Acting) Attorney General

WOS:VAL

STATE TREASURER:) Depository of State funds.
) State Treasurer without authority to settle
BANKS & BANKING:) and compromise State's claim against
) failed bank.

October 14, 1938

10-20

FILED
98

Honorable Robert W. Winn
State Treasurer
Jefferson City, Missouri

Dear Mr. Winn:

This is to acknowledge your letter of recent date relative to the State Treasurer's deposit in the Wells-Hine Trust Company, Savannah, Andrew County, Missouri, in which you request the opinion of this Department. Your letter is as follows:

"Enclosed please find a copy of a release given me by the Commissioner of Finance for the State of Missouri in which he asks me to accept deeds for five farms from the Wells-Rine Trust Company.

"The Wells-Hine Trust Company of Savannah, Andrew County, failed and turned all their affairs over to the Commissioner of Finance on November 13, 1929 for the purpose of liquidation. At that time the State of Missouri had on deposit \$125,000.00, taking as collateral certain bonds, real estate mortgages and other securities.

"The \$125,000.00 has been liquidated down to \$41,946.51. Mr. R. W. Holt, Commissioner of Finance for the State of Missouri is asking me to

Oct. 14, 1938

accept deeds for five farms now owned by the bank on which the State of Missouri holds mortgages and is also asking me to sign a release in full for all claims against said bank.

"I am asking your opinion as to whether or not I, Robert W. Winn, State Treasurer, have a right to sign this said release and accept the deed for each of the five farms from the Commissioner of Finance."

We note fully what you say in your letter relative to the deposit of \$41,946.51, now remaining in said trust company. Our information is that to secure the deposits made by the State Treasurer you have notes secured by deeds of trust on real estate aggregating \$57,000, which were pledged with the state treasurer prior to the failure of said bank, namely, November 13, 1929.

Your question is, whether or not you may compromise and settle with the Commissioner of Finance in Charge of the Wells-Hine Trust Company, said claim of \$41,946.51, by accepting deeds from the Wells-Hine Trust Company to the State of Missouri as grantee. The Wells-Hine Trust Company, as we are informed, is the holder of the title to all of this real estate, subject to the notes secured by deeds of trust which you hold as collateral to secure the deposit as aforesaid.

Section 11469, R. S. Mo. 1929, provided at the time these particular real estate notes were pledged to secure the state deposits, which were made prior to November 13, 1929, that notes held by said banks or banking institutions, secured by first mortgages or deeds of trust on Missouri real estate, could be pledged to secure the deposits aforesaid in lieu of bonds mentioned in the preceding part of Section 11469, supra. This section further provides the procedure that shall be taken by the State Treasurer in the event that such bank or banks or banking institutions of

deposit shall fail to pay such deposits, or any part thereof, on the check or checks of the State Treasurer. In this particular case the depository failed and closed its doors and was taken over for the purpose of liquidation by the Commissioner of Finance, and thereby necessarily was unable to pay checks drawn by the State Treasurer upon demand. Upon such failure to pay said checks upon demand, the statute provides as follows:

"* * *, then it shall be the duty of the state treasurer to forthwith convert such bonds into money and disburse the same according to law, upon the warrants drawn by the State Auditor upon the funds for which said bonds are security. * *"

The same procedure under the statute shall be taken in the event real estate notes shall have been pledged, as in the case of bonds. Therefore, you would have authority to convert such real estate notes into money and disburse the same according to law.

We are of the opinion that this statute should be followed by you and the securities held by you sold and applied on the debt due the State of Missouri from the Wells-Hine Trust Company. However, since we understand the title to all of the real estate, on which you have a first lien by reason of the real estate notes secured by deeds of trust, is in the Wells-Hine Trust Company, as a practicable matter we think that you would be authorized to accept these deeds and sell the real estate and account for the proceeds, giving the Wells-Hine Trust Company credit for the amounts received. Of course, at the time you sell the real estate in question, you would in effect and for all practicable purposes be selling the real estate notes which were pledged to you as aforesaid as security. We are informed that the notes and interest thereon, which you hold on the particular farms, far exceed the value of the farms.

Oct. 14, 1938

It is our further opinion that you would be without authority to cancel the entire indebtedness due from the Wells-Hine Trust Company to the State of Missouri in consideration of the Commissioner of Finance delivering to and conveying to you the title to this real estate. Since the State of Missouri is the owner of the securities and their face value far exceeds the value of the farms, we do not think there would be any consideration for the compromise under these circumstances. Your duty is outlined by the statute and you have no greater authority than is given you by Section 11469, supra, and you, as State Treasurer, would be without authority to compromise and settle the State's claim in any such manner.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

COLLECTORS: Collectors may retain 2% collected on delinquent taxes in addition to regular fees.

December 7, 1938

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FILED
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Honorable Conn Withers
Prosecuting Attorney
Liberty, Missouri

Dear Sir:

We have received your letter of November 23, 1938, which is as follows:

"We are in some confusion here, and as the Prosecuting Attorney of Clay County, Missouri, I would appreciate and do hereby request the opinion of your Department upon the construction of paragraph 15 of Section 9935 as found on pages 551 and 552 of the Acts of the Missouri legislature of 1937, concerning the following particular:

"Will the County Collector, elected to take office, the first of March, 1939, be allowed to retain, in addition to his regular deductible commission the 2% collected from the taxpayer and the fees for licenses and fees from the back tax book?"

Section 9935, as amended and contained in the Laws of Missouri, 1937, page 548, provides in part as follows:

"The collector, except in counties where the Collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:

"1. In each county in this state wherein the whole state, county, bridge, road, school and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year amount to five thousand dollars or less, a commission of ten per cent on the amount collected.

"2. In all counties wherein the total amount of all such taxes and licenses levied for any one year is over five thousand dollars and less than ten thousand dollars, a commission of ten per cent of the first five thousand dollars collected and six per cent on whatever amount may be collected over five thousand dollars. * * *

Subsections 3 to 13, inclusive, of said section are in the same wording as subdivision 2, quoted above, except for different commissions on different amounts of taxes and licenses levied.

Subsection 14 is a long subdivision starting with the amount the collector may receive in counties or cities where such taxes and licenses levied exceed two million dollars for any one year. Further, this subsection provides:

"On all back taxes and all other delinquent taxes, he shall be allowed a commission of two per cent which shall be added to the face of the tax bill and collected from the party paying such tax as a penalty in the same manner as other penalties are collected and enforced, which commission the collector shall be entitled to retain as compensation for additional services rendered in collecting delinquent taxes and the amount of said commission shall not be included in computing the maximum salary allowed the collector. * * *

Subsection 15 reads in part as follows:

* * * * Provided, that no collector, except as provided in subdivision fourteen

herein, shall be allowed to retain commissions and fees in any one year in excess of the following amounts: in any county coming within the provisions of subdivisions one to seven, inclusive, hereof not more than \$2,500.00; in any county coming within the provisions of subdivision eight, not more than \$3,000; * * * and all fees and commissions coming into the hands of any collector from any source whatever in excess of the amounts herein specified, except as provided in subdivision fourteen, shall be paid into the city, county and state treasuries in proportion to the amount received on taxes collected for each; * * * provided, that the limitation on the amount to be retained as herein provided shall apply to fees and commissions on current taxes, but shall not apply to commissions on the collection of back and delinquent taxes * * *."

Section 9969, as amended and contained in the Laws of Missouri, 1933, page 429, relative to the collection of delinquent taxes, provides in part as follows:

"Fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in such cities, two per cent on all sums collected; in such cities, two percent on all sums collected--such per cent to be taxed as cost and collected from the party redeeming. * * *"

The same question you ask was passed upon by the Supreme Court in connection with two statutes almost identical with Sections 9935 as amended and 9969 as amended. In the case of State ex rel. Shannon County v. Hawkins, 169 Mo. 615, 1. c. 619, the court said:

"The only question remaining is whether the collector was and is entitled to retain the commission of four per cent, amounting to \$203, on back taxes collected in 1898.

"Section 7640, Revised Statutes 1889 (section 9260, Revised Statutes 1899) provides: 'The collector shall receive as full compensation for his services in collecting the revenues, except back taxes, the following commissions.' The section then fixes the rate according to the amount of revenue collected, and as already said, Shannon county fell in the fifth subdivision, which fixed his commission at five per cent.

"When defendant's final settlement for the taxes of 1898 came on for approval, he claimed a credit of \$203, or five per cent on the amount of the back taxes collected by him in 1898. The county court, under the advice of the prosecuting attorney, refused to allow him this five per cent on back taxes. He refused to pay that amount into the treasury and the county brought this suit. The circuit court adjudged that he was entitled to said commission, and the county appealed.

"The contention of the county is that the fees allowed collectors for services rendered under the back-tax law of 1877 (sec. 9309, R. S. 1899, sec. 7688, R. S. 1889) are in lieu of all other compensation, and that the collector is not entitled to any commission from the State or county, but must get his compensation out of the fees which the law requires the delinquent taxpayer to pay.

"The question is one of construction entirely. Plaintiff construes section 7640, Revised Statutes 1889, or 9260, Revised Statutes 1899, as excluding back taxes altogether from its provisions, whereas defendant gives it the much more natural construction that the commissions therein provided shall be 'full compensation' for his services in collecting the revenues 'except back taxes' for which he is allowed certain other compensation as costs

which the delinquent taxpayer must pay to recompense the collector for the various extraordinary steps he is required to take to collect delinquent or back taxes.

"Reading the two sections together, as we must to arrive at the intention of the Legislature, it seems to us that section 9260 deals alone with the commissions to be retained by the collector out of revenues collected. Section 9309 deals with the costs allowed him for his extra services in addition to his commissions, and these are to be paid by the delinquent, and the collector is allowed only four per cent. Otherwise we would have the result in Shannon county that the State freely allows the collector five per cent for merely receiving and paying over taxes which the taxpayer tenders, but allowing him nothing by the State or county for collecting delinquent taxes at the end of a lawsuit, and after making out various delinquent lists and performing other duties in enforcing payment.

"Under appellant's construction, collectors whose commissions are fixed at five per cent and over would get less for collecting back taxes, with all the extra labor imposed by the statute, than they would receive for current taxes, a result we can not believe the Legislature ever intended. The general policy of the State, from 1871, at least, to this time, has been to offer collectors extra compensation as an inducement to bring in delinquent taxes.

"This is so in any event as to those collectors whose commissions, under section 9260, are less than four per cent, as they get more for back taxes even as costs than they do for current taxes.

Dec. 7, 1938

"Another reason suggested by counsel for defendant is quite persuasive, and it is this: the State and county allow the collector commissions at different rates of per cent in proportion to the amount collected, and this merely for receiving and paying over the taxes, but when we come to these costs and fees, they are at the same rate, whether the amount is one thousand dollars or one million--which we think demonstrates that this fee is allowed for extra labor and not in lieu of that commission which the State has agreed to allow her collectors out of all taxes which they collect, whether current or back taxes.

"So far as the State is concerned, she pays no more and no less on either kind, but she visits upon the delinquent a penalty and allows that in addition to the collector who must necessarily render extra services.

* * * * *

"We think the circuit court correctly ruled that the commissions allowed by section 9260, Revised Statutes 1899, should be full compensation for collecting all taxes, except back taxes, and as to the latter they should receive the extra fees which their extra labors and duties imposed upon them."

For the purpose of comparison, Section 9260, R. S. Mo. 1899, which is almost identical with Section 9935, reads in part as follows:

"The collector shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:

"I. In each county in this state wherein the whole state, county, bridge, road, school and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year, amount to five thousand dollars or less, a commission of ten per cent. on the amount collected.

"II. In all counties wherein the total amount of all such taxes and licenses levied for any one year is over five thousand dollars and less than ten thousand dollars, a commission of eight per cent. on the amount collected."

Also, Section 9309, R. S. Mo. 1899, which is almost identical with Section 9969, as amended, Laws of Missouri, 1933, page 429, reads in part as follows:

"Fees shall be allowed for services rendered under the provisions of this chapter as follows: To the collector, except in such cities, four per cent. on all sums collected; in such cities two per cent. on all sums collected--such per centum to be taxed as costs and collected from the party redeeming. * * *"

CONCLUSION

The commissions allowed to collectors by Section 9935, as amended, Laws of Missouri, 1937, page 548, should be considered full compensation for collecting all taxes "except back taxes," but as to back taxes the collector should be allowed, in addition to the commissions allowed by Section 9935, certain other extra fees prescribed by

Hon. Conn Withers

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Dec. 7, 1938

Section 9969, as amended, Laws of Missouri, 1933, page 429, as costs, which the delinquent taxpayer must pay to recompense the collector for the extra labors and duties which the collection of delinquent taxes imposes.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA:HR

ELECTION BOARD: Contract made by old Board for printing is binding
on new Board.

February 4, 1938

Mr. J.E. Woodmansee, Chairman
Board of Election Commissioners
Kansas City, Missouri

Dear Sir:

This department is in receipt of your request
for an opinion which reads as follows:

"The Board of Election Commissioners of Kansas City desires your opinion upon the following question:

"On April 23, 1937 the then existing Board of Election Commissioners of Kansas City signed an alleged contract with the Vile-Goller Printing Company for the printing of the printed list of voters and supplemental lists to be prepared and distributed for the city election 1938 and certain subsequent elections. The contract is dated April 23, 1937 but is effective as of April 1, 1937. A copy of this contract is marked 'Exhibit A' and attached hereto.

"The price stated in that contract is 5½¢ per name. Mr. Shapiro, who represents the Vile-Goller Printing Company, states that this price was quoted because at that time the CIO was causing the printers some trouble and since that trouble has now been cleared up the printing company will reduce this price to 4.95¢ per name.

"Our search discloses that no minute was made by the old board of any action at all upon such contract.



February 4, 1938

"At the time this contract was entered into the Legislature at Jefferson City was considering a bill for permanent registration. This bill was later passed and was approved by the Governor under date of June 30, 1937.

"Under the law existing April 23, 1937 the terms of the Board of Election Commissioners for Kansas City acting at that time had expired but their successors had not been duly appointed and qualified.

"All these facts were at the time of signing the contract well known to the Vile-Goller Printing Company and its representatives.

"At an executive Board meeting held last Saturday it was shown, and it appears, that on the strength of this contract the printing company purchased ten tons of linotype metal. They have done previous work for the Board. In the fulfillment of previous contracts they used rented linotype machines. On the strength of this contract so entered into, they have purchased some machines, and are fully equipped and capable of readily performing this contract.

"The Board desires your legal opinion whether this alleged contract entered into at that time is valid and binding as against this board, under the Permanent Registration Act applicable to Kansas City, Missouri, approved June 30, 1937, Laws of Missouri 1937, page 294 ff."

February 4, 1938

This contract was entered into on April 23, 1937, by the then existing Board of Election Commissioners of Kansas City. Although the office of election commissioner had expired January 15, 1937, still the commissioners were holding over until their successors were appointed and qualified. (Section 10567, R.S. Missouri, 1929) This board was operating under authority of Chapter 61, Article 17 of the Revised Statutes of Missouri, 1929, and it was not until June 30, 1937, that the law repealing Chapter 61, Article 17 was passed and approved by the Governor. It will, therefore, be seen that the legality of the action by the board must be determined under the laws then in effect, i.e. Chapter 61, Article 17, R.S. Missouri, 1929.

As was said in 59 C.J. 170, "A contract made by state officers under statutory authority binds the state notwithstanding the subsequent repeal of the statute authorizing it".

Section 10567 provides in part as follows:

"Said four election commissioners shall hold their office until January 15, 1935, and until their successors are appointed and qualified. Successors shall be appointed in like manner for terms of four years, and until their successors are commissioned and qualified."

Section 10570, R.S. Missouri, 1929, provides as follows:

"Such board shall provide all necessary ballot boxes and all registry books, poll books, tally sheets, ballots, blanks and stationery of every description, with printed headings and certificates, and other equipment necessary and proper for the registry of voters and the conduct of such elections, and for every incidental purpose connected therewith. (Laws 1921, p. 330, para. 6)"

Boards have two classifications of powers -- governmental or legislative, and proprietary or business. In the exercise of governmental or legislative powers, a board in the absence of statutory provision, cannot make contract

extending beyond its own term. But in the exercising of business or proprietary power, a board may contract as any individual unless restricted by statutory provision to the contrary. Illinois Trust and Savings Bank v. Arkansas City, 76 Fed. 271; Omaha Water Co. v. Omaha, 147 Fed. 1 (Appeal dismissed 270 U.S. 584); Indianapolis v. Indianapolis Gas, Light and Coke Co., 66 Ind. 396; Valparaiso v. Gardner, 97 Ind. 1; First National Bank v. Emmetsburg, 157 Iowa 55; Westminster Water Co. v. Westminster, 98 Ind. 551; Kerlin Bros. Co. v. Toledo, 20 Ohio C.C. 603; Jacobberger v. School District, 122 Or. 124; McCormick v. Hanover Twp., 246 Pa. 169.

As was said in Omaha Water Co. v. Omaha, supra, through Circuit Judge Sandborn:

"A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their offices because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances."

Therefore, it becomes important to ascertain the power to be exercised by a board to determine the binding effect of a contract. 70 A.L.R. 795.

The contract binding a board for printing falls within the category of the business power of the board and

as such, the board may contract as any individual since there is no statutory provision to the contrary. The classification of this function of the board is especially pointed out in order to differentiate the situation here from that which existed in *Tate v. School District*, 23 S.W. 2nd 1013, and *Aslin v. Stoddard County*, 106 S.W. 2nd 472. These cases hold that if the board is a continuing body - that is, if all the members do not go out of office at the same time, but at different times - then such board may contract beyond the term of some of its members, but if all go out together, they cannot contract beyond their term. Those cases involve contracts for personal services and they fall within the classification of governmental or legislative power.

In the case of *Liggett v. Kiowa County* (1895) 6 Colo. App. 269, 40 Pac. 475, it appeared that a board of county commissioners contracted for the county printing with the plaintiff for a year, that a majority of the board went out of office a few days later, and that the new board, holding the contract to be a nullity, let the printing go to another person. In an action for breach of the contract with the plaintiff, the court said:

"The board was in office; it had full authority to act with reference to all matters which legitimately came before it at that time; and, in the absence of any proof showing fraud and collusion, or that the agreement must of necessity be so vitally injurious to the public's interests as to render the agreement void as against public policy, the contract cannot be adjudged invalid because it was to be completed after the term of the majority of the board as it then existed should have expired."

In *Picket Publishing Co. v. Carbon County*, 36 Mont. 88, 92 Pac. 524, the board of county commissioners were authorized to contract for the county printing. A contract was made for such printing which would extend beyond the term of office of some of the members of the board. The Supreme Court of Montana held that the contract was binding in absence of fraud in its making, unless the contract was void as against public policy. The court said:

"The power to make the contract is specifically granted; but the time when such power shall be exercised is not limited or prescribed. Therefore we say that the proposition is incontrovertible that it may be exercised at any time during the term of the board, when a prior contract of such work has expired or is about to expire, and, so far as the power of the board is concerned, it is just as ample and complete the last week of the board's official existence as at any time prior thereto. The making of such a contract at a time near the close of the official career of an outgoing board may, in some instances, savor of bad faith or even of fraud; but there is not any charge of bad faith or fraud in this instance. The board having the power to make a printing contract any time during its term
* * * * *
it was valid and binding upon the new board as upon the old one (Board of Commissioners of Jay County v. Taylor, above), in the absence of fraud in its making, unless the contract is void as against public policy."

In the instant case we presume that the price was fair and the contract was entered into without fraud or collusion. The Supreme Court of Missouri in *Aslin v. Stoddard County* at 106 S.W. 2nd 472 said: "Fraud is not presumed. Contra, right rather than wrong action is presumed, if presumption may be indulged in. So far as concerns plaintiff alone, that contract certainly cannot be said to indicate bad faith on the part of the court".

As to whether the duration of the contract represents an unreasonable time as would avoid the contract seems to be entirely a question of fact and we cannot say as a matter of law that such a time is unreasonable.

The second question presented is whether the failure of the board to enter the contract in the minutes would invalidate or nullify the contract. It seems to be the rule in relation to boards that where the mode and manner of contracting is not prescribed, nor the persons or agents by

February 4, 1938

and with whom contracts are to be made, the boards may make contracts in all matters necessarily pertaining to them in the same manner as individuals. 15 C.J. 552; 59 C.J. 175. Therefore, the failure to record the contract in the minutes of the board would not invalidate the contract, since there is written contract in existence signed by the parties.

CONCLUSION

It is, therefore, the opinion of this department that boards may, in exercising their business or proprietary power, make contracts extending beyond the terms of its members. In the absence of any showing of fraud and collusion, such a contract is a valid one and binds the subsequent board. The failure of the board to enter such contract in its minutes does not in any way vitiate the contract because a board in exercising the business power may contract as an individual.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

AO'K:VAL

MOTOR VEHICLES: Exemption of taxicabs from control by
Public Service Commission.

February 14, 1938.

2-15

Honorable Claude T. Wood,
Prosecuting Attorney,
Waynesville, Missouri.



Dear Sir:

We are in receipt of your request under date of
January 31, 1938, relative to motor vehicles, which is as
follows:

"I should like to have your official
opinion upon the following proposition:

"A yellow taxicab operating in Springfield, Missouri, transports two passengers for hire, to-wit: ten cents per mile, along highway #66 from Springfield to Rolla, Missouri, through Pulaski County, Missouri. Present information and for the purpose of the question in hand, only one such trip was made. Subject had no certificate of convenience and necessity nor a permit as a contract hauler.

"Does the subject come within the exemption of section 5265 R. S. Missouri, 1929, as amended by laws of 1937, page 439, or does the subject under the above circumstances come in conflict with the prohibitions of Article 8, chapter 33, R. S. Mo. 1929, as amended by Laws of Missouri, 1931, pages 304 to 316 inclusive."

I.

Section 5265, Laws of Missouri, 1937, page 439, is as follows:

"The provisions of this act shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; nor to any motor vehicle owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this act shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This act shall not apply to trucks used in work for the state or any civil subdivision thereof."

Section 5264, subsection (d), Laws of Missouri, 1931, page 305, is as follows:

"The term 'taxicab,' when used in this act, shall mean every motor vehicle designated and/or constructed to accommodate and transport passengers, not more than five in number, exclusive of the driver, and fitted with taximeters and/or using or having some other device, method or system, to indicate and determine the passenger fare charged for distance traveled, and the

principal operations of which taxicabs are confined to the area within the corporate limits of cities of the state and suburban territory as herein defined."

Your letter does not state whether or not you know in fact that the taxicab mentioned is of the character and construction and has the equipment required by said subsection (d) of Section 5264, or whether or not the principal operations of the taxicab in question are confined to Springfield and adjacent suburban territory. However, for the purpose of this opinion, we will assume that the above facts exist.

Based upon the above assumption of facts, under the statute Section 5265, taxicabs which come under the definition as prescribed by subsection (d) of Section 5264 are exempt and do not come under or within the control of the Public Service Commission, so as to require a taxicab, under such circumstances, to procure a certificate of convenience and necessity.

II.

However, it is possible that a constitutional question could be raised, respecting the right of exemption allowed taxicabs by the above statute, as to whether or not such exemption is discriminatory and hence invalid.

We find no Missouri cases dealing with the exemption allowed taxicabs under the above statute. However, a case of interest to the case herein concerned is Bacon Service Corporation v. Huss, 248 Pac. 235, wherein the court said, 1. c. 239:

"The respondent next contends that the exemption of 'taxicabs, drays, transfer vehicles, and other like city vehicles which do not run over regular routes' is such an exemption as disturbs the required uniformity of the act. It is apparent that this exemption and the further exemption of hotel busses meeting trains, cars, or boats were intended to apply to those who are engaged in the business of

operating such motor vehicles for hire within the limits of incorporated cities. As such, they may be properly so separately classified for the reason that highways within municipalities are usually not maintainable directly at the expense of the state but from municipal revenues derived from the exercise of municipal powers of license and taxation, and it must be assumed that the Legislature had this distinction in mind in limiting the license to the use of highways maintainable by the state and for whose maintenance municipalities are not responsible.

"In providing for the exemptions heretofore considered, we are of the opinion that the Legislature has not acted arbitrarily nor without reason in making such classifications. We do not intend to hold, however, that the exemptions provided for in section 9 of the act would apply to operators therein mentioned who are engaged also in the business of transporting passengers or property for hire outside of incorporated cities as the fact in each case may appear."

It is to be noted that where taxicabs operating in Missouri cities (and in adjacent suburban territory) confine such operation to such territorial limits, the above case would apparently sustain the validity of the exemption in question here. On the other hand, the concluding paragraph (although probably dictum) in the case, to-wit:

"In providing for the exemptions heretofore considered, we are of the opinion that the Legislature has not acted arbitrarily nor without reason in making such classifications. We do not intend to hold, however, that the exemptions provided for in section 9 of the act would apply to operators therein mentioned who are engaged also in the business of trans-

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porting passengers or property for hire outside of incorporated cities as the fact in each case may appear."

might, or could be used in argument, at least, that the exemption as to taxicabs under the Missouri statute, (although the operations of a taxicab outside of the territorial limits defined in the statute constituted the minor part, or even were less than such minor part, of such operations,) was discriminatory in favor of taxicabs, and hence invalid as unconstitutional.

CONCLUSION.

Assuming that the taxicab in question is of the character and has the equipment as set forth and provided for in the aforesaid subsection (d) of Section 5264, and confines its principal operations to Springfield and adjacent suburban territory, then, unless or until the whole, or that part of said Section 5265 relating to the exemption allowed taxicabs should be held unconstitutional, it is our opinion that such taxicab is not required to procure a certificate of convenience and necessity from the Public Service Commission of Missouri, because its operations are not under the control of the Commission.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR

ELECTIONS: Several questions on registration of voters in St. Louis.

February 17, 1938.

Howard
Board of Election Commissioners
For the City of St. Louis,
208 South Twelfth Boulevard,
St. Louis, Missouri.



Gentlemen:

This will acknowledge receipt of your letter of the 8th instant, which reads as follows:

"The Board of Election Commissioners respectfully requests an opinion from you regarding the case of a registered voter who has moved to a new address in the same voting precinct and who offers to vote without having been transferred, under the provisions of Section 18 of the Registration Act of 1937 (Laws of 1937, Page 235).

"Your office rendered an opinion regarding this matter under the former Registration Act, on October 1, 1928, and again on January 15, 1931. The Board desires a ruling under the provisions of the Act of 1937.

"The pertinent provisions of the Act seem to be Sections 12, 17 and 24, also Section 10178 of the Revised Statutes of Missouri, 1929. There are two situations to be considered, one in which the voter has moved too late to transfer his registration under Section 18, the other, in which he has had ample time to transfer his registration but has not done so. In the latter case, it would seem to make a difference whether the registration still remains standing on the precinct register or has been canceled by the Board. In that case, the voter would have had notice under the provisions of Section 25.

"The Board desires also to be advised regarding the right of appeal to the Circuit Court provided under Section 27 of the Act of 1937. Under the corresponding section of the former law, Section 10597 R.S. Missouri, 1929, voters who had moved to a new address outside the precinct from which they were registered claimed and exercised the right to appeal to the Circuit Court from adverse decisions of the Board, even on the day preceding an election, and sometimes the Board was ordered by the Circuit Court to register a voter after the time provided for registration under the law had expired.

"The new section differs from the old one in one important respect, which seems to be intended as a limitation of this right of appeal. The old section provided for an appeal 'in all cases where any person is denied registration.' The new section adds the words 'who makes application to register within the time fixed by this Act,' which would exclude last minute appeals, except in cases wherein the Board had canceled a registration within the week preceding an election. The voter is allowed three days in which to appeal from an adverse decision of the Board (Section 27).

"The Board will appreciate your ruling with reference to these problems arising under the Act of 1937."

As we read your letter, you make two inquiries, and we shall answer them in order. The first question is: "Is a registered voter who has moved to a new address in the same voting precinct, but who has not had his registration transferred, entitled to vote?" The answer to this question necessitates an interpretation of the Act governing registration and elections in your city, same being found at pages 237 et seq. Laws of 1937.

In interpreting election laws, as was said in Nance v. Kearbey, 251 Mo. l.c. 382:

"It is right well in setting out to remind ourselves of some fundamentals, viz: While the right to vote is not a vested, natural right in a strict sense, yet it is a constitutional right in those citizens possessed of enumerated constitutional qualifications. (Constitution, art. 8, sec. 2.) It may be regulated by statute but not lightly denied or abrogated. (Gass v. Evans, 244 Mo. l.c. 350; Bowers v. Smith, 111 Mo. l.c. 55.).* * *"

Again in the same opinion, l.c. 383, the court said:

"Election laws must be liberally construed in aid of the right of suffrage.* * *"

Turning to the provisions of the law to see who is entitled to vote, we find the following: (Section 10178).

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: * * *."

Section 12, page 244, 245, Laws of 1937:

"Every citizen of the United States, including occupants of soldiers' and sailors' homes, who is over the age of twenty-one years, who has resided in the State one year immediately preceding the election at which he offers to vote, and during the last sixty days of that time shall have resided in the city where such election is held, shall be entitled to vote at all elections by the people, if properly registered, unless he comes within the following exceptions: * * *"

Section 13, page 245, Laws of 1937:

"The vote of no one shall be received by said judges whose name does not appear upon said registers as a qualified voter in the precinct where such person offers to vote."

Therefore, the voter you inquire about would be entitled to vote if his name appears upon the registers "as a qualified voter in the precinct" where he offers to vote.

The question then is "When is a voter properly registered?" Turning to Section 2 of the Registration Act, we find a registered voter defined as follows:

"'Registered Voter', except where otherwise clearly stated, shall mean the person whose name appears on the registration records as a qualified voter."

It would seem, therefore, that the voter you inquire about in the foregoing question is, at the time he offers to vote, a registered voter, and his name does appear upon the registers as a qualified voter in the precinct where he offers to vote.

You mention in your inquiry Section 18 of the Act, which relates to the transfer of registration, said Section 18 reading in part as follows:

"Any registered voter who changes his address within the city may at any time until five days preceding any election transfer his registration by sending to the Board a signed application for transfer or by appearing in person at any office of the Board and making application for transfer.* * *"

It will be seen that Section 18 provides that a voter who has changed his address may apply for transfer of his registration to his new address, but nothing is said as to the effect of his failure to make such application. The law does not say he shall be deprived of his vote unless he avails himself of this privilege of transfer. We think that in considering this section we should follow the rule announced in *Nance v. Kearbey*, supra, l.c. 383, which is in the following language:

"The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction.* * * Again (pp.61-2): 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. (*Ledbetter v. Hall* (1876), 62 Mo. 422). In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will.* * *'"

The same rule was followed in the case of *State ex rel. v. Brown*, 33 S.W. (2d) 104, wherein the Supreme Court in discussing the failure of a voter to comply with certain directions of the law said:

"* * *The statute does not prescribe the consequences of the failure of an applicant either to file his application not later than the fourteenth day preceding the election or to appear before the election commissioners on Monday, Tuesday, or Wednesday of the first week prior to the election; it does not declare that a failure of an applicant in either of the two respects mentioned shall preclude his right to be registered. Now every person having the qualifications prescribed by the Constitution has the right to vote, and the sole objective of the statute is to determine the individuals who possess those qualifications and make a public record thereof.* * *"

If the voter changes his address very long before election the matter will probably come to the attention of the Board, so that the proceedings provided for in Sections 24 and 25 of the Act will be called into play. It will be observed, however, that even by these latter two sections the penalty for failure of the voter to heed the notices of the Board to apply for transfer of his registration is cancellation of his registration.

If the Board calls upon a voter to apply for transfer of his registration and the voter ignores the notices and requests of the Board, his registration will be cancelled, and, therefore, when on election day he offers to vote, his name will not be found upon the registers as a qualified voter in the precinct where he offers to vote. He could, therefore, not vote because not properly registered in that precinct; but if such cancellation of his registration has not taken place, he would be registered as a qualified voter in the precinct where he offers to vote, and hence he would be entitled to vote under Sections 12 and 13 of the Act, as well as under Section 10178 R. S. Mo. 1929.

The Legislature has given the Board authority to compel voters to transfer their registration by giving such Board authority to cancel their registration if they refuse to apply for transfer after certain notices and requests have been given them, and thus the Board has power

to keep registration lists up to date. However, the Legislature has not said that if registrations are not transferred when voters change their addresses, such voters shall lose their votes. It may be the Legislature provided the method set out in Section 18 for the voter to voluntarily apply for transfer of his registration, in order that he might have his registration transferred in a more simple manner than by waiting for the action of the Board under Sections 24 and 25. At any rate, the Legislature has not said that failure to make such voluntary application for transfer will deprive the voter of his right to vote. On the contrary, the Legislature has said that if on election day the voter is registered as a qualified voter in the precinct at which he offers to vote, he is entitled to vote.

CONCLUSION.

It is, therefore, the opinion of this office that a registered voter in the City of St. Louis, who has moved to a new address within the precinct where he is registered, but whose registration has not been transferred, is entitled to vote in such precinct.

II.

Your second question, as we interpret your letter, is, "Does a person who has been denied registration by the Board have the right of appeal unless his application for registration was made within the time fixed by the Act within which voters may apply to be registered?"

It is axiomatic that there is no right of appeal at common law, and that the right of appeal is purely statutory, as was said in *Turr v. Terminal Railroad*, 277 Mo. 1.c. 238:

"Since appeals are matters which are wholly governed by statute, it follows that where there is no statute allowing an appeal, no appeal will lie."

Section 27 gives the right of appeal to a person who has applied for registration within the time fixed by the Act, and who has been denied registration. To that class of applicants the statute has given the right of appeal, but it has not given the right of appeal to any applicants other than those who make application to register within the time fixed by the Act.

CONCLUSION.

It is, therefore, the opinion of this office that a person in the City of St. Louis who applies for registration after the time fixed by the Registration Act, page 237, Laws of 1937, and is denied registration by the Board of Election Commissioners, does not have the right of appeal to the circuit court. We do not mean to hold that such a voter might not, under certain circumstances, have other remedy, but we merely say he would not have the right of appeal.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

HHK/LMD

ELECTION -- Inmates of certain homes and shelters in
St. Louis not disqualified to vote; from what
address such persons should be registered.

March 8, 1938 3/10

Board of Election Commissioners
For the city of St. Louis
208 South Twelfth Blvd.
St. Louis, Missouri



Gentlemen:

This will acknowledge your letter of March 1,
1938 requesting an opinion from this department, which
letter reads as follows:

"On September 25, 1937, the Board of
Election Commissioners requested an
opinion from you regarding qualifica-
tions as voters of persons residing
in certain homes and shelters conducted
and maintained, either in whole or in
part, by the City of Saint Louis;
namely, a shelter for white women at
913 Aubert Avenue, a shelter for
colored women at 2728 Pine Street, a
home for men at 2207 Chestnut Street,
and a shelter known as the Ozanam
Shelter for Men, 3225 Montgomery
Street. The first three are homes
maintained by the City and the fourth
is mainly maintained by the Organized
Catholic Charities with the aid of a
contribution from the City. The in-
mates of the first three institu-
tions are furnished lodgings free
by the City and at the expense of
the City, and in the first two, meals
are furnished by the City, at City
expense, and in the third, the in-
mates are furnished with food tickets
by the City, at City expense, when
requested. About one-half of the in-
mates have been asking for and re-
ceiving these food tickets.

"As the matter was urgent at the time the letter above referred to was written, you were requested to render an opinion by telegram, which you were kind enough to do. You stated definitely that these institutions were not poorhouses within the meaning of the Constitution and Laws of Missouri.

"The question arises again under the provisions of the Act of 1937, Laws of 1937, Page 235, and the Board is anxious to obtain a further statement of your opinion in this matter. Is it your opinion that under the new Law the status of these institutions remains unchanged?

"Your telegram states 'Copy of opinion to Mrs. W. H. Henton, Doniphan, Missouri, follows'. This opinion is missing from our files. Could we have another copy?

"A further question arises regarding the proper manner of registering such residents, assuming that they are otherwise qualified. Section 16 (2) provides that the address of each applicant for registration shall be entered, 'including floor or apartment or room number'. Some of the institutions have numbered beds but do not have numbered rooms or apartments, and as the guests are largely transients, they are not assigned to a particular bed or floor for a longer period than two weeks.

"Would the status of these people be similar to that of boarders or roomers in a privately operated home?

"Is it sufficient to list such residents by stating the house number only?"

March 8, 1938

The persons to vote in this State are enumerated in Article VIII, Section 2, Constitution of Missouri, which reads as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

It is apparent from your letter that the persons you inquire about are qualified to vote in all respects unless the fact that they are inmates of the homes and shelters you mention brings them within the constitutional exception of being "kept in a poor-house at public expense." This leads us to a determination of what is a poor-house.

It should be observed that there was no provision in the Constitution of 1865 which disqualified persons kept in poor-houses at public expense from voting. That provision was voted into the Constitution of 1875 by the people, as appears in Article VIII, Section 8. In 1924, the provisions of said Section 8 were incorporated into Article VIII, Section 2 heretofore quoted.

In construing the language of the Constitution, we think that the general and ordinary meaning of words as they are understood by the people voting said Constitution, should be inquired into. Such rule of construction has been stated thus:

"Words must be understood in their general and popular sense, as the people who voted on the Constitution understood them, and we should not go beyond this meaning unless the language is so ambiguous that we need to ascertain the mischief to be remedied. *Busser v. Snyder*, 282 Pa. St. 440, 128 Atl. 80."

"It is a cardinal rule of construction that the language of a State Constitution, more than that of any other of the written laws, is to be taken in its general and ordinary sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and words employed therein have meaning as the generality of the people understand them. *Bronson v. Syverson*, 88 Wash. 264, 152 Pac. 1039."

It should therefore be helpful to trace the history of registration regarding "the poor" in this State. The care of the poor has been a matter of governmental concern in this State ever since it has been a State. By an act of the General Assembly of the Territory of Missouri, approved January 2, 1815, found at p. 340, Vol. 1, Missouri Territorial Laws, the people of this State defined "poor persons" and provided for their support in the following language:

"Each and every county in this territory shall relieve, support and maintain its own poor, such as the lame, blind, sick and other persons, who from age and infirmity are unable to support himself or herself, and who have no sufficient estate of their own, and who has resided nine months next preceding the time of any order being made respecting such persons, in the county, and who has not moved

from any other county for the purpose of imposing the charge of keeping such poor person in the county where he or she may have last lived for the time aforesaid.

"2. The courts of common pleas in their respective counties, on the information of any justice of the peace of the county where any poor person may have resided for the space of time in the first section of this act mentioned, or on the knowledge of the judges of said court, or any of them, that such person is lame, blind or sick and thereby unable to support himself or herself, or from age and infirmity unable to support him or herself, and has no sufficient estate for that purpose. -- And on such court being satisfied of the truth of such information, it shall be their duty from time to time, and as often and for as long a time as it may be necessary to provide at the expense of the county, for the support and maintenance of such poor person, and to order from time to time the defraying of such expense by drawing orders on the treasury of such county.

*** "

The foregoing territorial law was repealed (p. 500, Sec. 13, R. S. Mo. 1825) and in the revision of 1825 a new act was included (p. 618, R. S. Mo. 1825) which used the same language as the territorial act except that it referred to counties of the State instead of the counties of the territory. So far as the definition of "the poor" is concerned, this later act is identical with the territorial act aforesaid. By an act of the General Assembly, approved January 29, 1835, found at p. 448, R. S. Mo. 1835, the same definition of "the poor" is carried forward.

This act of 1835 is identical with the act of 1825 insofar as matters pertinent to our discussion are concerned. In 1845 the General Assembly, by an act found at p. 798, R. S. No. 1845, distinctly defined "the poor" in the following language:

"Sec. 2. Aged, infirm, lame, blind or sick persons, who are unable to support themselves, shall be deemed poor persons."

The act of 1845, supra, also provided that the county court could erect a poor-house, and provided that:

"Sec. 9. Whenever such poor-house is erected, the county court shall have power to appoint a fit and discreet person to superintend the same, and the poor who may be kept thereat, and to allow such superintendent a reasonable compensation for his services. **

"Sec. 11. The county court shall have power to make all necessary and proper orders and rules for the support and government of the poor kept at such poor-house, and for supplying them with the necessary raw materials, to be converted by their labor into articles of use, and for disposing of the products of such labor and applying the proceeds thereof to the support of the institution."

The foregoing definition found in the Laws of 1845 was carried forth in the revision of 1855, and similar provisions as to the poor-house were likewise carried forth (P. 1154, R. S. No. 1855). In 1865, by an act found at p. 232, R. S. No. 1865, the General Assembly adopted the following definition for "the poor":

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

Likewise, the revision of 1865 carried forward the provisions as to the poor-house and the management thereof.

The definition of "poor persons", as found in the revision of 1865, supra, has been carried forward in all revisions of the statutes from that time to the present time, and now appears as Section 12951, R. S. Mo. 1929, and likewise the provisions as to the poor-house have been carried forward in substantially the same form through succeeding revisions, and now appear in R. S. Mo. 1929 as Section 12958, 12960.

It will be seen from the forgoing history of the legislation regarding poor persons, that the people who voted the Constitution of 1875 generally understood the term "poor-house" to mean the place where the aged, infirm, lame, blind or sick persons who were unable to support themselves" were kept at public expense. The "poor-house" had been an established institution for many years before the Constitution of 1875 was voted, and we must assume that when the people voted the provisions into that Constitution, that persons "while kept at any poor-house at public expense" could not vote, they understood "poor-house" to be the well established institution known in each county of the State, or at least a place where "aged, infirm, lame, blind or sick persons who are unable to support themselves" are kept. As the Constitution spoke the language of the people, then the ordinary meaning of the term "poor-house", which had been established and recognized through the years prior to 1875 by all of the Legislatures of the people, must be accepted as the meaning of that term in the Constitution.

March 8, 1938

From the description of the shelters and homes contained in your letter, we do not believe these places are poor-houses in the eyes of the law, and especially as mentioned in Article VIII, Section 2 of the Constitution of Missouri. There is nothing to indicate that the inmates are "aged, infirm, lame, blind or sick persons." We assume that the inmates are people who are out of employment and are without means of support at the present time, but we do not believe that the places where these people are kept qualify as poor-houses, as that term is understood in our law.

In the case of *Hale vs. Stimson*, 198 Mo. 134, Judge Lamm, in passing on whether old soldiers kept in the Soldiers' Home at St. James, Missouri, were being "kept in a poor-house at public expense" said: (l.c. 163)

"The statutes and constitution of such a State must not be construed as ungrateful or unpatriotic, and it would be a pitiable incentive to patriotism to hold up before its decrepit defenders deserted by fortune, the picture of being regarded for their sacrifices and valor, with the brand of a pauper under the roof of a poorhouse, where, in the language of the statutes regulating such institutions (R. S. 1899, sec. 9002) the superintendent thereof 'shall have power to cause persons kept in such poorhouse who are able to do useful labor, to perform the same by reasonable and humane coercion'."

We think the foregoing quotation clearly shows that the Supreme Court understood the term "poor-house" to be the poor-house referred to in Article IV, Chapter 90, R. S. Mo. 1929, which is the outgrowth of the poor-house first established in 1845, as heretofore pointed out.

Your next inquiry is regarding the address from which these persons should be registered. Section 16 (2),

March 8, 1938

p.247, Laws Mo. 1937, provides that the "address, including floor or apartment or room number;" shall be entered on the application for registration. It seems to us that a substantial compliance with this provision would be a listing of the street address where the party resides, together with the number of the room or floor in the building at such address, if such rooms and floors were numbered, but if the party has no definite room or floor number, then the street address would be sufficient. It would seem to us that the people inquired about would be similar to roomers at privately operated homes, and that registration by house number only would be sufficient.

CONCLUSION

It is, therefore, the opinion of this office that the inmates of the shelter for white women at 913 Aubert Avenue, the shelter for colored women at 2728 Pine Street, the home for men at 2207 Chestnut Street and the shelter known as the Ozanam Shelter for Men, 3225 Montgomery Street, all in the city of St. Louis, are not disqualified from voting by reason of their being kept at these places at public expense, since these places are not poor-houses. It is also our opinion that where such inmates do not have a definite room or floor in such shelters and homes, their registration application should show the address of the home itself, and that the showing of such an address would be a substantial compliance with the registration law governing your city.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

ELECTIONS -- Board of Election Commissioners of St. Louis have
five whole days immediately preceding any election within
which to make transfers of registration.

March 9, 1938. 3/10

Board of Election Commissioners
For the city of St. Louis
208 South Twelfth Blvd.
St. Louis, Missouri



Gentlemen:

This will acknowledge your letter of March 1,
1938, which reads as follows:

"The Board of Election Commissioners respectfully requests your opinion concerning the proper interpretation of the words 'until five days preceding any election' occurring in Section 18 of the Act relating to registration in the City of Saint Louis, (Laws of 1937, Page 235).

"Is this section to be construed as giving the Board five whole days immediately preceding any election within which to make such transfers or as giving to the applicant for a transfer all of the fifth day preceding such election?

"To take a concrete illustration, the date of the election to determine the School Tax Rate in the City of Saint Louis is April 5, 1938. Which is the last day upon which a registered voter can be transferred, March 30th or March 31st?"

The provision of the law (Sec. 18, p. 249, L. 1937) which contains the words you desire our interpretation of reads as follows:

"Any registered voter who changes his address within the city may at any time until five days preceding any election transfer his registration by sending to the Board a signed application for transfer or by appearing in person at any office of the Board and making application for transfer. *** "

A determination of your question requires consideration of the meaning of the word "until."

The general rule for determining whether the word "until" is a word of inclusion or exclusion has been stated thus:

"No general rule can be laid down to determine whether the word 'until' is a word of inclusion or exclusion. A strictly literal definition would doubtless make it one of exclusion, but popular use is quite as likely to give it an inclusive as an exclusive sense. The use of the word in particular instances may be such as to leave no doubt as to the meaning, and, in such cases, the court will give it the meaning intended. Thus, if a lease is given until the 1st of April, there could be no question that it would expire with March; while, on the other hand, if a lender told a borrower that he could have the money borrowed until the 15th of the month, few people would doubt that repayment on the 15th would comply with the agreement."

The Supreme Court of Missouri, in the case of Jewell Realty Company vs. Dierks, 18 S. W. (2d) 1.c. 1047, has announced the following rule for determining the construction to be placed upon the word "until":

"A strictly liberal definition of the word would, no doubt, make it a word of exclusion, but we think it should be construed in relation to the subject-matter and intent of the instrument in which it is used, and from such construction determine whether or not the connection in which it is used indicates an intent to include or exclude the date named."

The general rule, therefore, seems to be that the word "until" is a word of exclusion, unless the context wherein it is used clearly indicates the opposite meaning. Following this general rule, we think that the phrase "until five days preceding any election" means excluding the five days preceding any election. Had the phrase read "until the FIFTH day preceding any election", there might be argument for saying that the voter had all of the fifth day before election within which to transfer his registration, but reading as it does, we think that the Legislature clearly had in mind to give the voter up to the end of the sixth day before election to transfer his registration.

CONCLUSION

It is, therefore, the opinion of this office that a voter in the city of St. Louis cannot transfer his registration on the fifth day before any election, and that for the approaching election of April 5,

Board of Election Comm.

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March 9, 1938

1938, the voter will have only until the end of the day of March 30, 1938 to transfer his registration.

•
Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

INTERMEDIATE REFORMATORY -- No provision in law for prosecuting inmates for escaping from this institution; Sec. 3913 not applicable.

March 9, 1938

3/10

Honorable Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Mo.



Dear Mr. Wymore:

We have your letter of March 2, 1938, which reads as follows:

"Do you have an approved Information to be used in the case of an escape from Algoa Reformatory? I have been filing on these cases under section 3913 R. S. 1929, but the question has been raised in Court several times as to whether or not the escapes can be prosecuted under that section or any section at all."

We have made a diligent search of the statutes and we are unable to find any statute under which inmates of the Intermediate Reformatory at Algoa may be prosecuted for escaping from that institution.

You mention in your letter that you had been filing on such cases under Section 3913, R. S. Mo. 1929, which reads as follows:

"If any person confined in the penitentiary for any term less than life shall escape from such prison, or, being out under guard, shall escape from the custody of the officers, he shall be liable to the punishment imposed for breaking prison."

March 9, 1938

We do not believe this section covers the escape of inmates from the Intermediate Reformatory, because it distinctly refers to any person "confined in the penitentiary." The penitentiary is a separate and distinct institution governed by Article 5, Chapter 44, R. S. Mo. 1929, while the Intermediate Reformatory at Alcoa is likewise a separate and distinct institution established and governed by Article 6, Chapter 44, R. S. Mo. 1929.

Section 8467 of said latter chapter reads:

"The intermediate reformatory for young men shall be under the management of the department of penal institutions, but it shall be established separate and apart from the Missouri penitentiary and also the Missouri reformatory now located at Boonville."

Section 3913, supra, was on the statute books many years prior to the establishment of the Intermediate Reformatory, and it clearly applies to the escape of inmates of the penitentiary. Criminal statutes must be strictly construed. In the case of State vs. Owens, 268 Mo. 481, the Supreme Court had before it a case where a prisoner of a county jail had been convicted of escaping from the custody of the Street Commissioner of a town, in whose custody he had been placed by order of the court.

The prosecution was based upon the section of the statute which made it an offense for any person confined in any county jail upon conviction for any criminal offense, or held in custody going to such jail, to break such prison or custody. In passing upon the case, the court said: (l.c. 484)

"It will be noted that the above section limits the violation to a breaking and escaping from a 'county jail' or from 'custody going to jail', and the statute in no manner undertakes to prescribe a penalty for escaping from a street commis-

sioner into whose custody he is placed for the purpose of being worked upon the streets, as charged in the present indictment. Our attention has not been called to a statute nor have we been able to find one making the acts charged in the present indictment a criminal offense. As much is virtually conceded by the brief of the learned Attorney-General. This being true, we need not determine whether the information sufficiently charges a lawful custody in said street commissioner.

"It is a well established rule that criminal statutes must be strictly construed. Very appropriate to the discussion here is the language used by the Kansas Supreme Court in discussing a section (182) of the Kansas Code which appears to be almost an exact duplicate of section 4381, Revised Statutes 1909. The court said:

'Section 182 has reference to persons confined in a county jail or held in custody going to such jail. As a rule, penal statutes must be strictly construed, and they cannot be extended beyond the grammatical and natural meaning of their terms, upon the plea of failure of justice. (Remington v. State, 1 Ore. 281; State v. Lovell, 23 Iowa, 304; Gibson v. State, 38 Ga. 571.)

'We are not at liberty to interpolate into the statute "city prison" nor can we ju-

dicially determine that a "city prison" is a "county jail." It is therefore our opinion that the matters charged in the information do not constitute any offense within the statute. The omission is one for which the Legislature is responsible. It is probably a casus omis-sus, which the Legislature may, but the court cannot, supply.' (State v. Chapman, 33 Kan. 134.) "

The foregoing case was quoted from with approval in the later case of State vs. Betterton, 317 Mo. 307, wherein the court held that a convict who escaped from a penitentiary farm could not be prosecuted under the statute making it an offense to escape from the penitentiary. In this later case the court also said:(l.c. 310)

"Keeping pace with the changing conditions in the supervision of offenders against the law and profiting by experience, our General Assembly has defined in separate and distinct sections of the statutes various kinds of escapes of prisoners from different places of confinement and from the lawful custody of officers of the law, with and without force, both before and after conviction. With such ample protection for society in these separate and distinct provisions of the law there should be no inclination on the part of our courts to extend any particular section of the statute beyond its proper limits, and we find no such inclination in the previous rulings of this court."

Hon. Carl F. Wymore

-5-

March 9, 1938

In the light of the foregoing authorities, we do not think that Section 3913 can be held to make it a crime for inmates of the Intermediate Reformatory to escape from said institution.

CONCLUSION

It is, therefore, the opinion of this office that inmates of the Intermediate Reformatory at Algoa who escape therefrom cannot be prosecuted under Section 3913, R. S. Mo. 1929, and that there is no statute under which inmates escaping from said institution can be prosecuted.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

LOTTERIES: Doctor Quizzer is a lottery.

March 15, 1938

3-16

FILED
99

Hon. Claude T. Wood
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Sir:

We have your request for an opinion which reads as follows:

"A local theater proposes a gift enterprise in connection with his show, known as "Dr. Quizzer", which said enterprise as I understand it, is about as follows:

The manager of the theater will advertise that \$40.00 or some other stated amount of money will be given away to some patron of the theater on a certain night. During the evening's program, the manager will propound a group of questions to his patrons, similar to "MAN-ON-THE-STREET" radio programs. He will award 50¢ or one dollar to the person who first responds with a correct answer to each question. He will proceed in this manner until about Ten dollars has been given away. When this has been done, the manager then propounds his "CAPITAL QUESTION" (one of unusual difficulty). If any person present gives the correct answer to the "Capital Question" he is awarded the grand prize of \$30.00 or some such stated amount. If no one present answers the capital question, the grand prize is held until the next "Dr. Quizzer" program and is pyramided for each successive "Dr. Quizzer" program until some one present at such a program answers the Capital Question. No enrollment is required. No increase in price of admission. In order to participate, an admission ticket must be purchased and the party must be inside the theater.

March 15, 1938

We note that the participants must buy a ticket and must be inside the theater. This constitutes consideration.

We note from your request that prizes ranging from fifty cents to thirty dollars in cash are given away. This constitutes the prize.

The third and final requirement for a lottery is the element of chance. It is apparent that the sponsors of "Dr. Quizzer" have attempted to eliminate any element of chance and reduce it to a game of skill.

We call your attention to the pronouncement of the Supreme Court in State vs. Globe Democrat Publishing Company, 110 S.W. (2) 705, wherein Judge Ellison speaking for the entire court, l. c. 713, said:

"Hence a contest may be a lottery even though skill, judgment or research enter thereinto in some degree, if chance in a larger degree determines the result."

The Doctor Quizzer contest turns upon what is called the "correct answer". This does not relieve it of the element of chance. The contest is open to all persons, varying from the child, the uneducated, to the mature individual and the highly educated individual. To propound a question, the answer to which is worth thirty dollars in cash, directly injects the element of chance into the result. It is therefore an unequal contest, and it would be a mere matter of chance for a small child to guess the correct answer. In the Globe Democrat case *supra*, this exact situation was commented upon as follows, l. c. 718:

"Obviously, if some abstruse problem comparable to the Einstein theory were submitted to the general public in a prize contest on the representation that no special training or education would be required to solve it, the contention could not be made, after contestants had been induced to part with their entrance money, that the element of chance was absent because there were a few persons in the world who possessed the learning necessary to understand it."

There is no yardstick by which the correct answers to many debatable questions can be definitely ascertained. The selection of the correct answer is therefore left to the uncontrolled discretion of some person or persons. This phase of lotteries is briefly summed up in 45 Harvard Law Review, page 1212, as follows:

"It is somewhat surprising to find a fairly large number of decisions involving the award of prizes in the uncontrolled discretion of a judge. All of them agree that the contest is a lottery."

CONCLUSION

It is therefore the opinion of this office that the contest known as "Doctor Quizzer" is a lottery in violation of the criminal code of this state.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM

ELECTIONS:

Secretary of State not required to
notify Board of Election Commissioners
of St. Louis of candidates for primary
who receive their votes solely in the
City of St. Louis.

April 28, 1938

of record

Board of Election Commissioners,
For the City Of St. Louis,
208 South Twelfth Blvd.,
St. Louis, Missouri.



Gentlemen:

This will acknowledge receipt of your request dated
April 26, 1938, for an official opinion from this office
which request is as follows:

"The Board is in receipt of notice from
the Honorable Dwight H. Brown, Secretary
of State, sent in accordance with Section
10255 R.S. Missouri, 1929, giving the
offices for which candidates are to be
nominated at the Primary Election to be
held on August 2, 1938. This notice
does not specifically call attention to
the following offices, which according
to the records of this office are to be
voted for at the same Primary:

Judge, Probate Court, City of
St. Louis.
Prosecuting Attorney for the
St. Louis Court of Criminal
Correction.
Clerk, Circuit Court, Eighth
Judicial Circuit.
Clerk, Circuit Court for
Criminal Causes, Eighth
Judicial Circuit.
Clerk, St. Louis Court of
Criminal Correction.
License Collector for the
City of St. Louis.

April 28, 1938

Recorder of Deeds for the City
of St. Louis.
Collector of the Revenue for the
City of St. Louis.
Eleven Justices of the Peace.
Eleven Constables.

The notice concludes with the following:
'Such State, county and township offices
as become vacant by expiration of term,
by death, or resignation of incumbent
or vacant for any cause, and which, under
the law, should be filled at the November
Election, 1938'.

The Board asks if this office should be
officially informed as to the specific
offices listed herein for which candidates
are to be nominated at the August 2, 1938,
Primary, and included in the list sub-
mitted by the Secretary of State, dated
April 19, 1938."

Section 10255, R.S. Mo. 1929 reads as follows:

"At least ninety days before the time of
holding such August primary the secretary
of state shall prepare and transmit to
each county clerk a notice, in writing,
designating the office for which candidates
are to be nominated at such primary."

In interpreting Section 10255, R.S. Mo. 1929, Section
10260, R.S. Mo. 1929 should be read in connection therewith.
Section 10260, supra, reads as follows:

"No person shall file more than one
written declaration indicating the
party designation under which his name
is to be printed on the official ballot,
and all declaration papers shall be
filed as follows: 1. For state officers,

April 28, 1938

representatives in congress, courts of appeals and circuit judges, and those members of the senate and assembly whose districts comprise more than one county, in the office of the secretary of state. 2. For officers to be voted for wholly within one county or in the city of St. Louis, in the office of the county clerk of such county or the office of the election commissioners of the city of St. Louis."

As noted, paragraph 2 of Section 10260, supra, sets out:

"For officers to be voted for wholly within one county or in the city of St. Louis, in the office of the county clerk of such county or the office of the election commissioners of the city of St. Louis."

The courts in the cases of State ex rel. v. Roach, 258 Mo. 541, 167 S.W. 1008, and in State ex rel. v. Drabbelle, 258 Mo. 568, 167 S.W. 1016, held that candidates for the nomination of circuit judge in the eighth judicial district comprising the city of St. Louis, must file their declaration of candidacy with the secretary of state.

As stated in your request, I am presuming that you were notified that the circuit judges would be up for election at the primary election to be held on August 2, 1938. Also the offices which you complain of as not having been certified by the secretary of state are all offices which are filled solely within the city of St. Louis. The court in the above cited cases held that in as much as the first subdivision of Section 10260, supra, held that circuit judges must file their declaration with the secretary of state, although the circuit judges are elected solely in the city of St. Louis, they should file with the secretary of state their declaration of intention to run for that office.

When Section 10255 is read in connection with Section 10260, supra, it is evident that the purpose of said Section 10255 is to provide the county clerk, or the Board of Election Commissioners in St. Louis, with information as to what offices nominations are to be made for, as shown by the records of the office of the Secretary of State, so that in publishing the notice required by Section 10256, the county clerk, or Board of Election Commissioners of St. Louis, will have that additional information which they would otherwise not have. They would already have the list of offices for which nominations are to be made of a local nature by the records of their own offices, and when they get a certificate from the Secretary of State required by Section 10255, they would then have the complete list of offices to be voted upon at the coming election, and they could accordingly publish a complete notice.

Likewise, Section 10261 requires the Secretary of State to certify to the county clerk a list of those candidates who have filed their declarations in his office so that the county clerk, or the Board of Election Commissioners in St. Louis, can publish the list of candidates required to be published by Section 10262.

Taking all of the foregoing sections together, it is evident that the Secretary of State is required to furnish to the county clerk, or Board of Election Commissioners in St. Louis, such information as the records of his office show, touching offices to be voted upon, and candidates who have filed declarations for the forthcoming primary election as shown by the records of his office, so that said county clerk or Board of Election Commissioners of St. Louis can publish the notices of election required to be published.

CONCLUSION.

It is, therefore, the opinion of this office that it is not necessary for the Secretary of State to notify

April 28, 1938

a county clerk, or the Board of Election Commissioners, of the city of St. Louis as to which offices are to be voted for at the primary election to be held on August 2, 1938, where such offices are voted upon solely in the city of St. Louis, except as to candidates for the office of circuit judge.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

ELECTIONS:

Candidates for unexpired terms
should declare and file for the
particular unexpired term to
which they aspire to be elected.

May 3, 1938

5-4

Board of Election Commissioners,
City of St. Louis,
208 South Twelfth Blvd.,
St. Louis, Missouri.



Gentlemen:

This is in reply to yours of April 26, 1938, requesting an official opinion from this department based on the following letter:

"In the declarations to be filed by candidates for the offices for Judges of the Circuit Court for the Eighth Judicial Circuit, now held by Judges Coleman and Anderson serving the unexpired terms of former Judges McAfee and Douglas, the terms of each of said offices to be voted on at the Primary Election, August 2, 1938, run to the first Monday of January, 1941.

Should each written declaration and filing state the names to be printed on the official ballots (a) for the unexpired term ending the first Monday in January, 1941, vice Judges J. Wesley McAfee, resigned; (b) for the unexpired term ending the first Monday in January, 1941, vice James M. Douglas, resigned; or (c) should the names of all candidates who file for the two unexpired terms ending the first Monday in January, 1941, be so listed on the official ballots under captions 'Vote for Two'?

The Board would appreciate your prompt advice."

May 3, 1938

Section 32 of article VI of the Constitution of Missouri provides as follows:

"In case the office of judge of any court of record become vacant by death, resignation, removal, failure to qualify, or otherwise, such vacancy shall be filled in the manner provided by law."

Your request indicates that on the account of the resignations of Judges McAfee and Douglas, there will be two vacancies in the offices of circuit judges in the City of St. Louis to be filled at the next general election. In this particular case the unexpired terms for which the vacancies are to be filled are the same, however, we do not think this would alter the rule as to filing for the unexpired term where a vacancy occurs. Section 10216, R.S. Mo. 1929, provides as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election:" * * * * *

Board of Election
Commissioners

-3-

May 3, 1938

This section provides that in case of a vacancy in office, a person shall be elected at the next general election after such vacancy occurs to fill the unexpired portion of the term for which such vacancy exists.

We fail to find where a question like the one you have submitted has been passed on by the courts, but applying the language of the statutes in its ordinary meaning, we think the names of candidates to fill each vacancy should be filed separately; that is, the candidate should only declare and file for the unexpired term of either Judge McAfee or Judge Douglas.

CONCLUSION

Therefore, this office is of the opinion that each candidate in his declaration and filing for the unexpired term of circuit judge should state and it should be so written on the ballot that he is a candidate for the unexpired term ending on the _____ day of _____ of which- ever judge he seeks to succeed; and that the names of all candidates who file for the two unexpired terms ending the first Monday in January, 1941, should not be listed on the official ballots under caption "Vote for Two".

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

COSTS:

State is not liable for costs
where a conviction or acquittal
was ~~not~~ had on a graded felony.

May 12, 1938
9/18



Mr. Claude T. Wood,
Prosecuting Attorney,
Pulaski County,
Waynesville, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated
March 16, 1938, for an official opinion from this office
which request is as follows:

"You will probably recall the above
entitled case as the one in which
you did some work and which you
planned to help me try had the de-
fendant not escaped from jail.

I am enclosing herewith a fee bill
on same, together with a letter from
the State Auditor and a copy of the
information. This is, I believe,
self-explanatory.

Under date of March 27, 1937, you
furnished me with an official
opinion holding that #4461 (the
habitual criminal act) was appli-
cable to a prosecution under #7786
(a) (larceny of motor vehicle).
This being the case, and you will
note from the information that the
defendant is charged under both
above sections, it would seem to
me that the ruling of the state
auditor in connection with this fee

May 12, 1938

bill must be erroneous. You will note that the auditor refuses to pay this fee bill for the reason the crime charged is not punishable 'solely by imprisonment in the penitentiary'. But since the defendant is charged under the two above sections, as I understand it, he would have to be either acquitted or given 25 years in the penitentiary. A copy of the information was sent to the auditor with the fee bill."

Section 3826, R.S. Mo. 1929 reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant." * * * * *

Under this section, Curtis Locke may be apprehended and convicted and still the state would not be liable for the costs for the reason the defendant will be able to pay the costs. According to the information in your case, the charge is larceny of an automobile under Section 4065, R.S. Mo. 1929, which reads as follows:

"Persons convicted of grand larceny shall be punished in the following cases as follows: First, for stealing an automobile or other motor

May 12, 1938

vehicle, by imprisonment in the penitentiary not exceeding ten years;"

* * * * *

It is also brought under Section 4461, R.S. Mo. 1929 which reads as follows:

"If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceed-

ing five years."

This section is commonly called the "second offense act" and should not be confused with the "habitual criminal act". Section 4428, R.S. Mo. 1929, which is the "habitual criminal act" only provides for a life sentence on the last or fourth conviction and each of his previous convictions must be for a crime committed with a pistol or deadly weapon.

According to the fee bill, the return states that the cause was continued generally and does not show a conviction or an acquittal.

Section 3828, R.S. Mo. 1929 provides as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

This section should be strictly construed. In the case of State ex rel. Clarke, v. Wilder, Auditor, 197 Mo. 27, the court said:

"1. No costs can be taxed in any court except such as the statute in terms allows.

2. Even if the State Auditor in his return to the alternative writ of mandamus gives an insufficient reason for not paying the fee bill in a

criminal case, if he was justified in not allowing such fees because the statutes do not allow them to be charged against the State, the writ of mandamus compelling him to pay them cannot go.

3. Where imprisonment in the penitentiary is not the sole punishment that may be inflicted upon a boy under sixteen years of age charged with murder in the second degree, the State is not liable for costs upon his acquittal."

In your case there was not a conviction or acquittal according to the information on the fee bill.

Section 4065, R.S. Mo. 1929, provides for punishment of not exceeding ten years in the penitentiary, but Section 7786, R.S. Mo. 1929 which was enacted in the section Extra Session of 1921, assessed the punishment for larceny of an automobile at imprisonment for a term of twenty five years in the state penitentiary down to a fine or county jail sentence or both.

It is true that in most felony cases where the original charge provides only and solely for a penitentiary offense, the state must pay the costs on an acquittal or conviction if the defendant is unable to pay the costs, but under Section 7786, supra, the punishment in the case of larceny of an automobile is a graded felony. It has been held that where the information by the charge itself is punishable by imprisonment solely in the penitentiary and the defendant is acquitted, the state is liable for the costs even though the court instructed on a lesser offense such as manslaughter in the first degree murder charge. It was so held in State ex rel. Timberman, Sheriff, v. Hackmann, State Auditor, 257 S.W. 457. In your case the only charge set out was a graded felony under Section 7786, supra, and the second offense charge in the information only went to the punishment. The jury could have found him guilty under Section 7786, supra,

and not under the second offense Section 4461, supra, and assess a jail sentence or fine, or both.

There is no question but that Section 4065, R. S. Mo. 1929 was repealed by Section 7786, R.S. Mo. 1929 and it was so held in State v. Liston, 318 Mo. 1222. In that case the court held at l.c. 1232 as follows:

"In his motion for a new trial, appellant attacked the State's instruction numbered 1, on the ground that it misdirected the jury as to the range of punishment prescribed for the offense charged. This complaint must be sustained. Section 3329 of the Revised Statutes of 1919, on which this prosecution is based, provides that any person convicted of this offense shall 'be punished in the manner prescribed by law for stealing property of the nature or value of the article so embezzled, * * *' Section 3313 deals with three different classes of property in fixing the punishment for grand larceny, and, in the first of such classifications, says that the stealing of an automobile or other motor vehicle shall be punished 'by imprisonment in the penitentiary not exceeding ten years.' Obviously, the trial court followed this statute, as the instruction complained of so advised and so directed the jury as to the range of punishment in this case. Section 29 of the Motor Vehicle Act of 1921 provides that any person who shall be convicted of feloniously stealing any motor vehicle, or any part thereof, of a value of \$30 or

May 12, 1938

more, 'shall be punished by imprisonment in the penitentiary for a term not exceeding twenty-five years or by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars (\$1000) or by both such fine and imprisonment.' (*Italics ours.*) Moreover, Section 31 of said act provides that all laws or parts of laws contrary to, inconsistent or in conflict with any of the provisions of said act are repealed, and the repeal of such laws is properly referred to and covered by the title of said act. (Laws 1921, 1 Ex. Sess., pp. 76, 105, 106.) Thus, it plainly appears that the jury was improperly instructed as to the range of punishment for this offense, as prescribed by law at the time in question, and that appellant was thereby deprived of a substantial right; that is, the right to have the jury consider a less severe punishment than the minimum punishment fixed by the instruction mentioned. In this connection, it should be noted that the jury assessed appellant's punishment at the lowest mark fixed by said instruction."* * * * *

Section 3313, R.S. Mo. 1919 is now Section 4065, R. S. Mo. 1929 under which you assume you filed your information. Section 29, Motor Vehicle Act of 1921 is now Section 7786, R.S. Mo. 1929.

It is true that if the jury found the defendant guilty of larceny of a motor vehicle under the "second offense act" the verdict must be for imprisonment for a term of twenty

five years in the penitentiary and no less. It has been repeatedly held that the "habitual criminal act" or "second offense act" is not part of the charge but for the purpose of additional punishment. In the case of State v. Collins, 180 S.W. 866, 1.c. 867, the court said:

"Loose and misleading language sometimes used in opinions which have dealt with the statute prescribing punishment in cases of second convictions seemingly is the basis of appellant's error. This statute creates no offense, and in no manner authorizes a conviction on a charge of being an habitual criminal, or anything else. It is not even a part of the article on 'Offenses,' but is incorporated in the article on 'Miscellaneous Provisions and Definitions.' It only prescribes a punishment, and provides that in case of a second conviction the penalty shall be severer 'because by his persistence in the perpetration of crime he has evinced a depravity, which merits a greater punishment.' People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; State v. Moore, 121 Mo. 519, 26 S.W. 345, 42 Am. St. Rep. 542, and cases cited. As said in People v. Raymond, 96 N.Y. loc. cit. 39:

'The first offense was not an element of or included in the second and so subjected to added punishment, but is simply a fact in the past history of the criminal, which the law takes into consideration when prescribing punishment for the second offense. That only is punished.'

The punishment is merely enhanced from the

character of the criminal and is inflicted for the last offense committed. Howard v. State, 139 Wis. loc. cit. 532, 121 N.W. 133; McIntyre v. Commonwealth, 154 Ky. 149, 156 S.W. 1058; Commonwealth v. Hughes, 133 Mass. 496. In some jurisdictions it is not even necessary to charge the previous conviction, this being considered only by the court in passing sentence. State v. Hudson, 32 La. Ann. 1052."* * * * *

Also in the case of State v. Citius, 56 S.W. (2d) 72, l.c. 73, the court said:

"* * * * * Sections 4461 and 4462, R.S. Mo. 1929 (Mo.St. Ann. Sections 4461, 4462), form what is commonly called the Habitual Criminal Act. These statutes do not create an offense nor authorize a conviction upon the charge of being an habitual criminal. They only provide that, in case of a second conviction, the penalty to be imposed upon the defendant shall be more severe 'because by his persistence in the perpetration of crime he has evinced a depravity which merits a greater punishment.' State v. Collins, 266 Mo. 93, 180 S.W. 866, loc. cit. 867, citing and quoting People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401, and other cases. Under this statute no conviction can be had and no punishment assessed, unless the jury first finds the defendant guilty of the particular offense charged."* * * * *

May 12, 1938

CONCLUSION

In conclusion will say it is the opinion of this department that in view of the fact that a conviction was not obtained on a felony in compliance with Section 3826, R.S. Mo. 1929, and an acquittal was not returned in compliance with Section 3828, supra, under a charge solely punishable with a term in the penitentiary, the state is not liable for the costs in this case.

It is also further the opinion of this department that if a conviction had been obtained resulting in a jail sentence or fine, even though the information charged larceny of a motor vehicle under the "habitual criminal act" or "second offense act", the state would not be liable for the reason that the offense as charged was a graded felony and the "second offense act" or "habitual criminal act" was not a part of the offense but for the purpose of added punishment. We are basing our opinion in this respect on State v. Collins, supra, and State v. Citius, supra.

It is further the opinion of this department that Section 4065, supra, has not only been repealed by implication by the latter enactment of Section 7786, R.S. Mo. 1929, but was so held in the case of State v. Liston, supra.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA

ELECTIONS: Judges and clerks of election in St. Louis are not employees of the Board of Election Commissioners, and the Board of Election Commissioners cannot, by resolution, designate Judges and Clerks of election as registration officers.

May 28, 1938 5/31

Handwritten:
Board of Election Commissioners
City of St. Louis
208 South Twelfth Boulevard
St. Louis, Missouri.



Gentlemen:

We acknowledge yours of the 19th, which reads as follows:

"Please refer to your opinion of November 4th last relative to appointment of Deputy Election Commissioners to act as registration officers.

"The Board has ordered a general registration to be conducted in each of the seven hundred eighty-three precincts of the City on June 21, 1938, and requests an opinion (a) whether the Board may, by suitable resolution, designate the Judges and Clerks who are now commissioned to serve as such until September 6, 1940, to act as registration officers on June 21, 1938, to take registrations and administer the oath required at the time of such registration, or on any day the Board may order registrations; (b) will it be necessary for the Board to require the Judges and Clerks to subscribe to new oaths and issue new commissions to designate them to act as registration officers; and, (c) are Judges and Clerks considered employees of the Board?

"For your information, there is enclosed copy of Oath of Election Official and the Commission issued."

May 28, 1938.

The Registration Act for the City of St. Louis is found at page 235, Laws Mo. 1937. The Act being lengthy, only pertinent parts will be referred to in this opinion. Section 3 provides in part as follows:

" ** The Board shall appoint a Chief Clerk and they shall also have under their supervision as many employees, evenly divided, as is necessary in the opinion of the Board to accurately perform the work. Said Board shall have the right to employ such assistants from time to time as may be necessary to promptly and correctly perform the duties of the office, under the direction of the Board. ** "

Section 14 provides in part as follows:

"The Chief Clerk and other employees designated by the Board are hereby authorized to act as registration officers, to perform any of the duties and to exercise any of the powers of registration prescribed by this act. ** "

It therefore appears that registration officers are those employees of the Board who are designated by the Board for that purpose. The question then is, - are Judges and Clerks of Election employees of the Board? In 20 C. J. 1241, we find the following meanings of the word "employee":

"In its broad signification the term is used to designate one who is employed; 'one who works for an employer or master;' 'one who works for wages or a salary;' a person hired to work for wages as the employer may direct; a person in constant and continuous service, for however brief a period of time; one whose time and skill are occupied in the business of his employer; any one who renders labor or services to another."

It will be seen that the word "employee" indicates a person who is hired by another person to render services to such other person. Employees of the Board of Election Commissioners are those persons who are hired by the Board to render services to or for the Board. Their duties are set out by the Board and they are under complete supervision of the Board.

Judges and Clerks of Election are not hired by the Board, nor do they render services to the Board. They are public officers provided for by law. The offices of Judge and Clerk of elections are distinct statutory offices. The duties of those offices are set out by statute. Those who occupy these offices do not render service to the Board of Election Commissioners, but they perform certain definite services to the public which are set out by law. It is true the Board of Election Commissioners selects the Judges and Clerks of Election, but such Board does not prescribe their duties. Those duties are defined by statute.

In the case of State ex rel. vs. Maroney, 191 Mo. 531, the court, after discussing what constituted a public office, said (l.c. 546) :

"It is a part of the functions of State government to provide elections for public officers, and to furnish suitable officers for putting in operation such provisions. We have in this cause the relators who have been duly appointed judges and clerks of election in their respective precincts, occupying positions created and conferred by law. Their right and authority to perform the duties incumbent upon them emanates from the legislative branch of the State government. The duration of their terms definitely fixed; their duties plainly marked out, which are of great public importance and clearly for the benefit of the public. The emoluments of the offices held by them, as well as certain privileges and immunities, such as exemption from jury service, are fully provided for; hence it is apparent that in the

May 28, 1938

positions occupied by relators, there are embraced 'the ideas of tenure, duration, emolument and duties,' which are essential requisites in order to constitute the position of judges and clerks of election 'an office,' within the well-understood meaning of that term."

Therefore, we must conclude that Judges and Clerks of Elections are public officers and are not employees of the Board of Election Commissioners. As pointed out above, Section 14 of the Act provides that "the Chief Clerk and other employees designated by the Board are hereby authorized to act as registration officers, to perform any of the duties and to exercise any of the powers of registration prescribed by this act."

CONCLUSION

It is, therefore, the opinion of this office that Judges and Clerks of Election in St. Louis are not employees of the Board of Election Commissioners, and that therefore the Board of Election Commissioners cannot, by resolution, designate the Judges and Clerks of Election as registration officers.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:FE

ELECTIONS:) Last day for candidates to file for August Primary -
PRIMARY:) June 3, 1938.

June 7, 1938.

Honorable Claude T. Wood
Prosecuting Attorney
Pulaski County
Waynesville, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of June 4th in which you request the opinion of this Department on the question therein submitted. Your letter is as follows:

"I should like to have your official opinion upon the following proposition:

"Section 10257, R. S. 1929, enacts that:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, etc."

"Section 10254 provides that the primary shall be held at the regular polling places in each precinct on the

first Tuesday in August, 1910 and biennially thereafter. Hence under this section, the primary will be held on August 2, 1938.

"In this county, several candidates filed their declaration of intention on Friday June 3, 1938. Have these candidates complied with the provisions of section 10257 supra? And are they entitled to have their names printed upon the official ballot? In short, what is sixty days prior to August 2, 1938?"

Section 10254, R. S. Mo. 1929, provides:

"The primary shall be held at the regular polling places in each precinct on the first Tuesday of August, 1910, and biennially thereafter, for the nomination of all candidates to be voted for at the next November election."

Section 10257, R. S. Mo. 1929, provides in part as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate,
* * *"

The general rule is, that where a statute requires that an act be performed a fixed number of days previous to a specified day, the last day should be excluded and the first day included in making the computation. The primary elections will be held on Tuesday, August 2, 1938. It will, therefore, according to the above rule, be

June 7, 1938

necessary for all candidates to have their declarations filed with the proper officials before midnight, Friday, June 3, 1938. Those candidates, therefore, who duly filed their declaration of intention before midnight, Friday, June 3, 1938, are entitled to have their names placed upon the official primary ballot for the Primary to be held August 2, 1938.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

ELECTIONS: Ordinance inconsistent with statutes is void.

June 20, 1938

6-21



J. H. Anderson
Board of Election Commissioners
For the City of St. Louis
208 South Twelfth Boulevard
St. Louis, Missouri

Gentlemen:

We acknowledge receipt of your letter of June 15, 1938, which reads as follows:

"We quote below a letter received from the Board of Aldermen, dated June 9, 1938:

'I am transmitting herewith certified copy of Board Bill No. 45 (now ordinance No. 41,333) entitled,

An ordinance providing for and directing the submission to the qualified voters of the City of St. Louis at the primary election to be held in said City on Tuesday, August 2, 1938, two Propositions for the incurring of indebtedness and issuance of bonds of the City of St. Louis, as follows: Proposition No. 1 in the amount of Seven Hundred and Fifty Thousand Dollars (\$750,000) for the construction of fire engine houses and the acquisition of land therefor and for the purchase of fire department equipment, and Proposition No. 2 in the amount of Seven Hundred and Fifty Thousand Dollars (\$750,000) for the purpose of providing relief work for needy unemployed citizens of said city through cooperation with any agency or agencies

of the Federal Government on public improvement projects for said city; providing for the publication of notice of said election and directing the Board of Election Commissioners to conduct the same, specifying the form of ballot to be used, and containing an emergency clause.

This is in accordance with the provisions of Section Seven of attached ordinance.'

We also quote Section 3 of Ordinance 41,333 referred to:

'Notice of the submission of the foregoing propositions at said primary election shall be given jointly by the said Board of Election Commissioners and the City Register of the City of St.Louis, by publication of this ordinance in the City Journal once each week for four weeks, and in the St.Louis Globe-Democrat, the St.Louis Post-Dispatch, the St.Louis Star-Times, the Westliche Post, the St.Louis Argus and the St.Louis American also once each week for four weeks, the first publication in each instance to be at least twenty-one (21) days before, and the last publication within two (2) weeks of the date of said election. Proof of the publication of said notice shall be made by affidavits of the publishers of said newspapers, with copy of such publication attached thereto, and such affidavits shall be duly filed with the City Register.'

The Board asks for an opinion as to whether it should follow the said ordinance by publication of the notice for the Special Election in the papers specified, in view of Section 34 of the law pertaining to registration in cities of 600,000 or more inhabitants, reading:

'Notice of time and place of registration and election to be given. - It shall be the duty of such Board to give ten days' notice, by one publication only, unless otherwise provided by law, in three newspapers of such city, if possible, published in the English language of the time and place of election in each precinct of the city/.'

Section 34 to which you refer is part of

"An Act to provide for the permanent registration of voters and for the holding of elections, including primary and special elections, in all cities of this state which now contain or may hereafter contain a population according to the last decennial census of the United States of 600,000 or more inhabitants* * *".

The same was passed by the Fifty-Ninth General Assembly and appears in the Laws of Missouri 1937, pages 235, 278.

Section 2, Subsection "D" of said Act, page 237, defines the term "Election" thus:

"(d) 'Election' shall mean any general, special, municipal and primary election unless otherwise specified, and shall include a submission to a vote of the people of any amendment, law or other public act, or proposition."

The term "Election" having been defined by the Legislature to include a "proposition", the question to be determined is whether in the submission of the latter to the people the ordinance or the statute is to be followed with respect to the provision for notice.

June 20, 1938

McQuillan on Municipal Corporations, 2nd Edition,
Volume 2, Section 683, Page 562, declares that:

"Ordinances inconsistent with the statutes
and general laws of the State are void."

In the case of City of St. Louis vs. Dreisoerner,
147 S.W. 998, 1. c. 1000, 243 Mo. 217, 1. c. 223, the Court
said:

"In the exercise of such powers a municipal
corporation can enact no ordinance which
violates the Constitution of the State or
the United States, or which contravenes the
statutes and decisions of this State."

The provision for notice in the proposition to be sub-
mitted to the people as contained in the ordinance being incon-
sistent with the statutory provision, we are of the opinion that
the Board of Election Commissioners for the City of St. Louis
must follow the provision for notice as contained in Section
34 of the Laws of Missouri 1937, page 258.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:MM

ELECTIONS: What constitutes filing of declaration of
candidates.

June 21, 1938

Forward
Board of Election Commissioners
208 South 12th Boulevard
St. Louis, Missouri



Gentlemen:

This will acknowledge receipt of your letter of June 15, 1938, enclosing copy of an opinion by the Honorable E.H. Wayman, City Counselor, St. Louis, Missouri, and your supplemental letter of June 17, 1938, enclosing a transcript of testimony taken by the Board of Election Commissioners concerning Senator Percy Pepoon's declaration as candidate for State Senator from the 30th Senatorial District on the Democratic ticket, a copy of a sworn statement by Louis J. Adamie, Manager of the office of the Democratic Central Committee of the City of St. Louis, a copy of the declaration of Senator Percy Pepoon declaring himself as candidate for State Senator in the 30th Senatorial District, an excerpt from the case of O'Malley v. Lesauer, 103 Mo. 262, and a copy of the receipt from the Treasurer of the Democratic State Committee showing payment of the filing fee by Senator Pepoon.

Upon these documents, you ask this department's opinion as to whether Senator Pepoon's name should be placed on the official primary ballot as candidate for State Senator on the Democratic ticket from the 30th Senatorial District.

We are accepting the facts as presented and assuming that there is no dispute concerning them. These facts tend to show that on May 2, 1938, Senator Pepoon lodged a declaration, in proper form and accompanied by his receipt showing he had paid his filing fee to the Democratic State Committee, with the Clerk of the Board of Election Commissioners of the City of St. Louis. This was done by and through the Manager of the office of the Democratic Central Committee of St. Louis City. The declaration was signed by Senator Pepoon. This declaration has not been found among the papers of the

June 21, 1938

Election Board, nor does any employee in said office recall having received the same. A duplicate original of this declaration was mailed to the Secretary of State by Mada Wood for Senator Pepoon.

The steps which a candidate for State Senator from a district lying wholly within the City of St. Louis must follow in order to have his name placed on the primary ballot are as follows:

(1) \$25.00 must be deposited with the Treasurer of the State or County Central Committee of the political party upon whose ticket he proposes as a candidate, and a receipt taken therefor. Section 10258, R.S. Missouri, 1929.

(2) A written declaration must be filed at least 60 days prior to the primary election substantially in the form as provided by Section 10257, R.S. Missouri, 1929.

(3) The candidate must file the receipt of the State or County Central Committee of the political party upon whose ticket he proposes as a candidate, showing he has paid his filing fee, along with the declaration. Section 10258, R.S. Missouri, 1929.

(4) The receipt and declaration above mentioned must be filed in the office of the Election Commissioner of the City of St. Louis. Section 10260, R.S. Missouri, 1929. State ex rel. v. Roach, 258 Mo. 541, State ex rel. v. Remmers, 30 S.W. 2nd 609.

It would seem that Senator Pepoon, under the facts as presented, has undoubtedly complied with each of the steps above set forth except, perhaps, as to filing his declaration and receipt with the Board of Election Commissioners in the City of St. Louis. From the facts, it appears that Mr. Louis J. Adamie took the declaration and receipt of Senator Pepoon and deposited the same with the Clerk of the Board of Election Commissioners of the City of St. Louis on May 2, 1938.

In view of this, it appears the only question which is presented is, whether the depositing of the declaration of candidacy by an agent of the candidate, in the office of the Board of Election Commissioners of the City of St. Louis, is

sufficient filing thereof, when it is not actually marked "filed" and has been misplaced.

We think the case of *State ex rel. v. Turner et al.*, 177 Mo. App. 454, is decisive of this question. The matter for determination in this case was what constitutes the filing of a bill of exceptions. The bill of exceptions was properly prepared and signed by the judge and ordered, over his signature, to be filed as part of the record in the case. The bill was, within the time granted by the court, actually delivered to the Clerk of the Circuit Court in his office with request and directions to file the same. It was received by the clerk for such purpose and deposited and retained in his office, but not actually stamped and marked "filed".

This case reviews a number of decisions in this state on this question. The court said at l.c. 461:

"The case of *Grubbs v. Cones*, 57 Mo. 83, is the leading case on this subject and the question there arose as to the time of filing a mechanic's lien notice in the clerk's office on which depended the validity of the lien sought to be enforced. The court declared the law thus: 'The filing is the actual delivery of the paper to the clerk without regard to any action that he may take thereon. If the clerk commits a clerical error, or makes a mistake in reference to the time at which he received the paper, that will not make any difference. He may indorse upon it the wrong date, or an impossible date, and still the real date of the filing will be the same. Whilst the indorsement made by the clerk will be prima facie evidence of its truth, still it is competent to show that he erred in the matter of date; and if that fact clearly appears, it is within the province of the court to make the correction. The rights of an innocent party will not be sacrificed to a mere mistake, committed by a ministerial officer'."

June 21, 1938

The other cases reviewed in the Turner case, supra, are to the same effect. This case was certified to the Supreme Court and affirmed in 270 Mo. 49 and the ruling has been cited with approval in Carter v. Burns, 332 Mo. 1.c. 1140.

Based on these cases, we think the rule in Missouri is that where an instrument is delivered to the proper officer in proper time with directions to file the same, it is filed regardless of the fact that the officer does not mark the instrument "filed".

The declaration of Senator Pepoon appears to be properly executed by him and within the time required, actually delivered to the Clerk of the Election Commission in his office along with Senator Pepoon's receipt for the filing fee. While nothing appears in the facts you have presented to the effect that the clerk was requested to file the declaration, undoubtedly, the clerk understood what was to be done with each declaration presented to him and needed no express request. Also, if said declaration was actually delivered to the Clerk of the Election Commission, then we assume he received it and subsequently, misplaced it.

CONCLUSION

Therefore, it is the opinion of this department, based upon the facts you have presented and those we have assumed, that the declaration of Senator Pepoon as candidate for State Senator in the 30th Senatorial District was properly filed when lodged or deposited with the Clerk of the Election Commission on May 2, 1938, even though said declaration was not marked "filed" and has subsequently, been misplaced.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED BY:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAL

ELECTIONS: Names of candidates of Socialist party must be printed in newspaper notices.

June 22, 1938

A. H. Howard
Board of Election Commissioners
208 South 12th Boulevard
St. Louis, Missouri



Gentlemen:

This department is in receipt of your request for an official opinion which reads as follows:

"There is enclosed herewith a list of the candidates who have announced themselves for the offices to be voted for at the Primary Election to be held on Tuesday, August 2, 1938. Please note the candidates on the Socialist ticket.

"There is also enclosed draft of notice of the Board, for publication, for the holding of the Primary Election, August 2, 1938, on which, following past custom, appears the notation relative to the Socialist ticket.

"The Board asks for an opinion as to whether the notation referring to the Socialist names should again be included; or will publication in three local papers for the three consecutive weeks prior to the Primary of the names and addresses of all the other candidates who have filed be in compliance with Section 10262."

The notation referred to in your request is as follows:

"Following are the names and postoffice addresses of candidates for nomination

Board of Election Commissioners

June 22, 1938

on the Democratic and Republican party tickets, to-wit:

"No other party tickets will be voted upon at the Primary Election.

"There being no contests on the Socialist ticket for any offices, the candidates will not be voted upon at the Primary Election, but will be declared automatically nominees thereafter to be voted upon at the General Election to be held Tuesday, the 8th day of November, 1938, to-wit:

Socialist Ticket."

Section 10262, R.S. Missouri, 1929, provides as follows:

"Such clerks shall, upon receipt thereof, publish, under the proper party designation, the title of each office, the names and addresses of all persons who shall have filed declaration papers, giving the name and address of each, the date of the primary, the hours during which the polls will be opened, and that the primary will be held at the regular polling places in each precinct. It shall be the duty of the county clerk to publish such notice for three consecutive weeks next prior to said primary."

Section 10263, R.S. Missouri, 1929, is as follows:

"Every publication required in this article shall be made in not less than

Board of Election Commissioners

June 22, 1938

two newspapers of general circulation in such county; one of such newspapers shall represent the political party that cast the largest vote in such county at the preceding general election, and one of such newspapers shall represent the political party that cast the next largest vote in such county at the preceding general election. In any case where the publication of notice cannot be made as hereinbefore required, it may be made in any newspaper having a general circulation in the county in which the notice is required to be published."

Section 10267a, Laws of Missouri, 1933, page 238, provides as follows:

"Whenever any person shall have filed as a candidate for nomination upon a party ticket which, at the last preceding election for Governor, shall have cast less than 5 per cent of the total vote cast for Governor in such election, and when not more than one person shall have filed as a candidate for any office on such party ticket, no ballot shall be printed for the primary election as herein provided unless upon petition of at least 10 per cent of the voters voting in the county at said preceding election for Governor. When no ballots are printed as hereinbefore provided, the candidates filing declarations and who are unopposed shall be certified, as by this chapter provided, as the nominees of such party casting less than 5 per cent of the vote of the State."

The question presented is whether the names of the candidates of the Socialist party shall be printed in the newspapers, since there is no contest for the nominations among such candidates.

Board of Election Commissioners

June 22, 1938

In the last gubernatorial election in 1936, the Socialist party polled 2,807 votes out of a total of 1,817,596.

Therefore, the candidates of such party fall within the provisions of Section 10267a, supra, which provides that a person who has filed upon the party ticket which cast less than 5 per cent of the total votes cast for Governor at the last preceding election, and when not more than one person shall have filed as candidate for any office, no ballot shall be printed at the primary election. However, although no ballot has to be printed for such candidates, still the provisions of Sections 10262 and 10263, supra, are entirely different in their purpose and intent. These two provisions provide for the publication in the newspapers of "the names and addresses of all persons who shall have filed declaration papers". The purpose of these statutes was to apprise the voters of the candidates and to enable them to predetermine their choice for the forthcoming election.

As was said in *Fitzgerald v. Smith*, 174 Pac. 660 (Cal.), in which the court had before it statutes similar to those of Missouri: "The direct primary law requires for the purpose of acquainting the electors with the names of the offices for which candidates may file nomination petitions and be voted for at the primary election, that certain notices shall be given".

Moreover, if the names of the candidates of the Socialist party are not published or made known until before the general election, then many voters, being unaware of who such candidates are, might vote in the primary election for the candidates of one of the two major parties and thereby bring themselves within the scope of Section 10271, R.S. Missouri, 1929, which provides that a person attempting to vote other than the ticket of the party with which he is known to be affiliated, when challenged at the primary election, must obligate himself by oath to support the party nominees of the ticket he is voting.

Board of Election Commissioners

June 22, 1938

CONCLUSION

It is, therefore, the opinion of this department that the names of the candidates of the Socialist party must be printed in the notices required by Sections 10262 and 10263, R.S. Missouri, 1929, but that the same do not have to be placed upon a ballot at the primary election.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

AO'K:VAL

MORTGAGES: Section 865, R.S. Mo. 1929 applies to
SCHOOL FUND MORTGAGES: school fund mortgages. School fund
STATUTE OF LIMITATIONS: mortgage which has expired on account
RENEWALS: of statute of limitation may be re-
newed by the maker and will be supported
by sufficient consideration.

June 22, 1938



Mr. Claude T. Wood,
Prosecuting Attorney,
Pulaski County,
Waynesville, Missouri.

Dear Sir:

In reply to yours of June 18th requesting an official opinion from this department based upon the following letter:

"The county court of this county would like to have your official opinion upon the following question, to-wit:

'Does the general statutes of limitations apply to School Fund Mortgages to a county and is Section 865 R.S. Mo. 1929 applicable to such instruments?'

It is my opinion that both the general statutes of limitations and section 865 would apply to such an instrument (Section 888 R.S. Mo. 1929) (223 Mo. l.c. 495; 120 Mo. l.c. 595); and that after the lapse of twenty years from the date of the last maturing obligation on the face of a school fund mortgage--except the required affidavit be filed within the twenty years--the debt would be absolutely barred, could not be revived by payments and that any subsequent foreclosure would pass no title to the purchaser at the fore-

closure sale (Utz vs. Dormann, 328 Mo. l.c. 264).

Will you please favor me with your opinion on the above matters? And in the event that you agree with the conclusions in the last paragraph, would you give me your opinion on an additional proposition, to-wit:

'Suppose that more than twenty years had elapsed since the date of the last maturing obligation on a school fund mortgage; that the present owner of the land would execute a new mortgage to the county covering the total balance of the indebtedness, would such a new mortgage be supported by sufficient consideration?' (the old mortgage to be released upon the execution of the new mortgage.)"

Section 9250, R.S. Mo. 1929 provides that capital school funds are under the custody of the county courts. Section 9251, R.S. Mo. 1929 provides:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; and no loan shall be made to any person other than an inhabitant of the same county, nor shall any person be accepted as security who is not at the time a resident householder therein, who does not own and is not assessed on property in an amount equal to that loaned, in addition to all the debts

for which he is liable and property exempt from execution. In all cases of loan, the bond shall be to the county, for the use of the township to which the funds belong, and shall specify the time when the principal is payable, rate of interest and the time when payable; that in default of payment of the interest, annually, or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal. But before any loan shall be effected, the borrower shall file with the county court an abstract of title at the time he files his bond and mortgage to the real estate which is to be mortgaged."

Section 9252, R.S. Mo. 1929 provides as follows:

"Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mort-

gaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction foreclosing the mortgage. In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

Section 9254, R.S. Mo. 1929 provides as follows:

"Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

It will be noted from these sections that the county court is required to take a mortgage on the premises upon which it loans the school funds. By Sections 9252 and 9254, supra, a manner is prescribed by which such loans may be foreclosed in case of default in the payment of the principal and interest.

We are of the opinion that school fund mortgages come

within the same class of conveyances as mortgages and deeds of trust which are given to secure loans to private individuals or private corporations. Section 865, R.S. Mo. 1929 provides as follows:

"No suit, action or proceeding under power of sale to foreclose any mortgage or deed of trust, to secure any obligation to pay money or property, shall be had or maintained after such obligation has been barred by the statutes of limitation of this state; nor in any event after the lapse of twenty years from the date at which the last maturing obligation secured by the instrument sought to be foreclosed is due on the face of such instrument, unless such termination of said period falls within two years after the passage of this act, or has heretofore happened, in which event such suit, action or proceeding may be begun within two years after the passage of this act without regard to the date of the instrument or the maturity of the obligation, unless otherwise barred under the provisions of the general statutes of limitation, unless before the lapse of said twenty years the owner of the debt thereby secured or some person for him shall file an affidavit duly verified, or file an instrument in writing acknowledged as deeds are required to be acknowledged in order to entitle them to record in this state, showing the amount due and owing thereon."

In the case of *Utz v. Dormann*, 328 Mo. 1.c. 264, the court in discussing this section which was Section 1320 in the 1919 statutes, said:

"* * * It is evident, we think, that Section 1320, as amended, means that

a deed of trust may not be foreclosed in any event after a lapse of twenty years from the date the last maturing obligation secured by it is due on its face, provided that the holder of the obligation had two years from the date the statute became operative to file a suit, an action or to proceed under power of sale, and provided further that before the lapse of said twenty years the owner of the debt or some one for him may file a verified affidavit or an acknowledged instrument showing the amount due and owing thereon. The section interdicts and precludes the foreclosure of a deed of trust in any event after a lapse of twenty years, saving that the owner of the debt was granted by the statute two years in which to bring a suit or an action or proceed to foreclose under power of sale and saving that the owner or some one for him may file the requisite verified affidavit or acknowledged instrument, thus tolling the statute." * * * *

In the case of County of St. Charles v. Powell, 22 Mo. 525, the court held:

"The rule of the common law, embodied in the maxim 'nullum tempus occurrit regi,' and adopted generally in this country, applies only to the state at large, and not to the political subdivisions thereof. The statute of limitations runs against the municipal corporations and other authorities established to manage the affairs of the political subdivisions of the state, as against private individuals. The immunity was at common law an attribute of sovereignty only."

From this case it appears that statute of limitations apply to counties as well as to individuals and therefore

the provisions of Section 865, supra, would apply to counties. Section 859, R.S. Mo. 1929 provides as follows:

"Nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this state."

In the case of Dunklin County v. Chouteau, 120 Mo. 577, 1.c. 595, the court said:

"* * * * * These swamp lands would not come within the terms of that section, and hence the statute of limitations would run in favor of one in adverse possession, even as against the county. Delay on the part of a county will not ratify an act of its officers, where the county had no power under any circumstances or condition of things to do the particular act."* * * * *

Section 861, R.S. Mo. 1929 provides as follows:

"Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for."

While Section 865, supra, will apply to the school fund mortgage it will not apply to the bond for which such mortgage is given to secure. Said Section 861 governs the limitations on the bond.

CONCLUSION

We are, therefore, of the opinion that the statute of limitations, that is, Section 865, supra, applies to counties in matters pertaining to school fund mortgages and foreclosures of same and that after the lapse of twenty years from the date of the last maturing obligation as shown on the face of the mortgage, if no affidavit is filed as is required by said Section 865 the lien of the mortgage would expire and the county's right to foreclose would be lost and in case the county attempted to foreclose under such a mortgage it could pass no title by such proceedings.

We are also of the opinion that payments on the bond which is secured by the mortgage would not toll the statute of limitations as to the mortgage, however, if payments have been made on the bond, then the limitations will not run against the bond until ten years after the date of the last payment.

II.

Assuming that the school fund mortgage has expired because of the running of the statute and there is yet an indebtedness, then you inquire as to whether the new mortgage executed by the present owner of the premises to the county covering the total balance of indebtedness would be such a contract as is supported by a sufficient consideration.

In the case of Loewenstein v. Insurance Company, 227 Mo. 100, l.c. 120, the court said:

"* * * * When the Statute of Limitation runs on a note it does not render the note void, on the contrary the note still has sufficient legal vitality to constitute a consideration for a new promise to pay;"* * * *

Volume 13 Corpus Juris, page 315, section 150, the rule is stated as follows:

"It may be laid down as a general rule,

in accordance with the definition given above, that there is a sufficient consideration for a promise if there is any benefit to the promisor or any loss or detriment to the promisee. It is not necessary that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction.* * * *

If the statute of limitations has run against the bond, then by the ruling in the Loewenstein v. Insurance Company case supra, it yet has sufficient legal validity to constitute a consideration for the new promise to pay, and for the giving of the mortgage to secure the payment of the bond. We think that the same rule would apply to the consideration for the renewal of the mortgage that applies to the renewal of the note in the Loewenstein case, and that the mortgage would have sufficient legal validity to constitute a consideration for the giving of a renewal mortgage to secure the payment of the bond.

CONCLUSION

Therefore, we are of the opinion that if the debtor wishes to give to the county a renewal school fund mortgage and bond to take the place of the one which has expired on account of the running of the statute of limitations against it, that the old mortgage and bond have sufficient legal validity to constitute a sufficient consideration for the giving of the renewal mortgage and bond.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB DA

Elections:

Supplemental opinion to St. Louis Board
of Election Commissioners.

June 25, 1938 6-25

Board of Election Commissioners
for the City of St. Louis
208 South 12th Boulevard
St. Louis, Missouri



Gentlemen:

Under date of June 15, 1938, you advised this department that two propositions would be submitted to qualified voters of the City of St. Louis at the primary election to be held in said city on Tuesday, August 2, 1938, for the incurring of indebtedness and issuance of bonds. You requested our opinion as to whether you should follow your ordinance or Sec. 34 of the Laws of Missouri, 1937, page 258 relating to notice of time and place of registration and election in cities of six hundred thousand (600,000) inhabitants. The provision for notice in the ordinance being inconsistent with the statutory provision, we held that you must follow the latter.

You now state that the propositions are to be submitted in accordance with Sec. 7218, R. S. Mo. 1929, and call our attention to the fact that the ordinance is based on said Statute and in harmony therewith.

Sec. 7218, R.S. Mo. 1929 provides as follows:

"For the purpose of testing the sense of the voters of any incorporated city, town, or village upon a proposition to incur debt as authorized in the preceding section, the council, board of aldermen or trustees, as the case may

be, shall order an election to be held of which they shall give notice signed by the city clerk. Such notice shall be advertised by publication once a week for three consecutive weeks in a newspaper published in the city or village, as the case may be. If there be no newspaper published in the city, town or village, then in a newspaper published in the county wherein is situate such city, town or village. If there are one or more daily newspapers published in such city, town or village which shall have been published continuously for fifty-two weeks next before publication of the notice is required to begin and shall have a bona fide circulation or sale therein of at least one thousand copies, such notice shall be published in at least one of such newspapers. The first publication of the notice shall be made at least twenty-one days before, and the last shall be within two weeks of the date of the election. Such election shall be held and judges thereof appointed as in case of other elections in such municipalities, except that the board of election commissioners of said city (if there be such a board) or other proper authorities having charge of such election shall provide at least one voting place in each ward of the municipality conducting such election (if there be more than one ward) and for that purpose they may combine as many election precincts in each ward as in their judgment may be proper. The judges and clerks of the precinct in which a voting place is located shall act as the judges and clerks of such election for such combined precinct. Except as herein provided, such election shall be conducted in the same manner and by the same election commissioners (if there be such election commissioners) judges and clerks and other officers and employes as other elections are conducted."

Board of Election Commissioners -3- June 25, 1938

Section 34 supra provides in part that: "It shall be the duty of such Board to give ten days' notice, by one publication only, unless otherwise provided by law * * *."

The Legislature having specified the manner of giving notice for the submission of propositions to incur debt in a manner other than Sec. 34 supra, we are of the opinion that the Board of Election Commissioners for the City of St. Louis must follow the provisions for notice of election as contained in Sec. 7218 R. S. Mo. 1929.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW/w

ELECTION - It is proper in the City of St. Louis to set a date between the 10th and 20th day prior to primary election after which names of candidates cannot be withdrawn or any further changes made in the official ballot.

July 1, 1938

Handwritten: 21

Board of Election Commissioners
for the City of St. Louis
208 S. 12th Blvd
St. Louis, Missouri



Gentlemen:

We have received your letter of June 15th,
which reads as follows:

"The board having set, tentatively, July 19, 1938, as the last date on which names of candidates for offices to be voted for at the August 2, 1938, Primary could be withdrawn, would like an opinion as to whether this date or another date be fixed as the time for making such withdrawals.

"The Board's calendar calls for July 22, 1938, for publication of Form of Official Ballot."

We note in the calendar which you enclosed in your letter that the Board of Election Commissioners for the City of St. Louis is performing all of the duties referred to in Sections 10255, 10256, 10261, 10262 and 10265 of the Revised Statutes of Missouri 1929. These sections all impose certain duties on the "county clerk".

Section 10265 provides as follows:

"At least twenty days before the August primary in any year, when a primary election is held, each county clerk shall prepare sample official ballots, placing thereon alphabetically, under the appropriate title of each office and party designation, the names of all candidates to be voted for in

the precincts of his county. Such sample ballot shall be printed upon tinted or colored paper, and shall contain no blank endorsement or certificate. Such clerk shall forthwith submit such ticket of each party to the county chairman thereof, and mail a copy to each candidate to his postoffice address, as given in his declaration paper, and he shall post a copy of each sample ballot in a conspicuous place in his office. On or before the 10th day before the holding of any primary election the county clerk shall correct any errors or omissions in the ballots, cause the same to be printed and distributed, as required by law in the case of ballots for the general election, except that the number of ballots to be furnished to each precinct shall be one and a half times the number of votes cast by any party in the last preceding election and having nominees and tickets at such primary election."

For the purposes of this opinion we are assuming that a candidate has a legal right to withdraw his name after he has properly filed his declaration and before the primary.

Section 10265 above states that the county clerk shall submit the sample official ballots at least twenty days before the primary election date, to the county chairman, mail a copy to each candidate and also post a copy in his office. Further, that on the 10th day before the primary election the county clerk shall correct any errors or omissions in the ballots and cause the same to be printed and distributed. In the city of St. Louis these duties, required to be performed by Section 10265, fall on the board pursuant to Section 10290 Revised Statutes of Missouri 1929, which provides as follows:

"Any duty required of or power given to county clerks by this article shall, in the city of St. Louis, be performed by or vested in the board of election commissioners for said city, or a majority of said board."

July 1, 1938

We have, therefore, arrived at the conclusion that the board can set any date it desired between the 10th and 20th day prior to the date of the primary election, at which time the ballot shall assume its final form and after which no names can be withdrawn or revisions made. Section 10265 provides that it shall be in final form on the 10th day prior to such election.

July 19th, the tentative date set to accomplish this purpose is within the 10th and 20th day prior to August 2nd the primary date and, in our opinion, it is proper that such a date be set. The legislature very apparently intended that a reasonable time, within the prescribed limits, should be taken in advance of the said ten day period to prepare the final draft of the ballot.

Section 34, at page 258, Laws of Missouri 1937, provides that, the board shall give ten days notice, by one publication only, in three newspapers "of the time and place of election in each precinct of the city". This section apparently does not require the printing of the final ballot by the board at the same time. This also leads us to the conclusion that Section 10265 is the only applicable statute which throws any light on the particular question you have asked and that under the terms thereof a time can be set before the ten day period and within the said twenty day period for the purpose of completing the final form of the ballot and sending the same to the printers.

CONCLUSION

We are of the opinion, therefore, that a time can arbitrarily be set between the 10th and 20th day prior to the primary date, after which names of candidates cannot be withdrawn from the ballots nor any further changes made in the same.

Respectfully submitted

APPROVED:

J. F. ALLEBACH
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney-General

JFA:LB

ELECTIONS: Board of Election Commissioners of City of St. Louis required to print on the official ballot the name of any candidate transmitted to them by the Secretary of State. Candidates have no right to make any change in their names given at the time of filing declaration after their names have been published as required by statute.

July 15, 1938

Board of Election Commissioners
For the City of St. Louis
208 S. 12th
St. Louis, Missouri



Gentlemen:

This will acknowledge receipt of your request for an opinion, reading as follows:

"The Board requests your opinion as to the following:

1. On the certified list of candidates received from the Secretary of State appears (a) James V. (Josh) Billings as Democratic candidate for nomination for Judge of the Supreme Court, Division No. One (Unexpired term of John Caskie Collet, resigned, ending 1944); (b) Dr. Charles H. Phillips, Jr., as Republican candidate for nomination for Representative in Congress for Missouri, Eleventh District. Shall the Board place these two names on the respective ballots exactly as they appear in the certificate of the Secretary of State?
2. Has the Board the right to make any change in the names given by candidates in their Declarations at the time of filing? To illustrate: (a) Lawrence J. Kickam who filed, as such, for Clerk of the Circuit Court for Criminal Causes for the Eighth Judicial Circuit, has requested that his name appear on the ballot - L. J. (Larry)

July 15, 1938

Kickham; (b) Nicholas Blassie who filed, as such, for Justice of the Peace, has requested that his name appear on the ballot - Nicholas Martin Blassie; (c) Arthur Curry who filed, as such, for Constable, has requested that his name appear on the ballot - Arthur Lee Curry; (d) Geo. L. Vaughn who filed, as such, for Justice of the Peace, has requested that his name appear on the ballot - George L. Vaughn.

"The Board has fixed July 19, 1938, as the last day for withdrawals and the ballot must go to press on that date. May we hear from you promptly."

We invite your attention to a consideration of applicable statutes. We may make the observation that any person may become a candidate for any state office or for representative in Congress, if such person file his declaration of candidacy in the office of Secretary of State. Section 10260 R. S. Mo. 1929. We assume, however, that the person is qualified for the office for which he files. This declaration must, among other things, be filed sixty days before any primary and state the "full name" of the candidate. Section 10257 R. S. Mo. 1929. Fifty-five days before any primary the duty is imposed upon the Secretary of State to transmit to the respective county clerks a certified list containing the names and addresses of all persons entitled to be voted for at the primary. Section 10261 R. S. Mo. 1929. Thereafter the county clerks are required to publish the lists thus transmitted. This particular Section 10262 R. S. Mo. 1929, reads as follows:

"Such clerks shall, upon receipt thereof, publish, under the proper party designation, the title of each office, the names and addresses of all persons who shall have filed declaration papers, giving the name and address of each, the date of the primary, the hours during which the polls will be held at the regular polling places in each precinct. It shall be the duty of the county clerk to publish such notice for three consecutive weeks next prior to said primary."

Under the provisions of Section 10264 R. S. Mo. 1929, "the names of all the candidates for the respective offices, who shall have filed declaration papers * * * shall be printed thereon".

Section 10265 R. S. Mo. 1929 provides, in part, as follows:

"At least twenty days before the August primary in any year, * * * each county clerk shall prepare sample official ballots * * *. On or before the 10th day before the holding of any primary election the county clerk shall correct any errors or omissions in the ballots, cause the same to be printed and distributed * * *."

We make the observation that any duty required of or power given to any county clerks, with respect to primary elections in the City of St. Louis, shall be performed by or vested in the Board of Election Commissioners. Section 10290 R. S. Mo. 1929.

It shall be noticed from the statutes above considered that the word "shall" has been used numerous times with respect to certain duties being performed by county clerks. It is believed that the frequent use of the word "shall", in the manner in which the word is used, indicates to us that these statutes are mandatory in character and must be obeyed. This construction is fortified by a consideration of Section 10291 R. S. Mo. 1929 relating to the penalty imposed upon any person for violating any of the provisions or requirements of the article from which the statutes above noticed are a part. As was said in the case of Ousley vs. Powell, 12 S. W. (2nd) 102:

"When a statute provides what results shall follow the failure to comply with its terms, it is mandatory and must be obeyed." (Italics ours)

We further observe, as was said in the case ex rel. Stevens vs. Wurdeman, 295 Mo. 566 - 568, that:

"Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute".

From these considerations of the statutes, which we believe to be mandatory in character, the Board of Election Commissioners has no alternative other than to print on the official primary ballot the name of all persons transmitted to them, which names of candidates and their addresses are to be published three consecutive weeks next prior to any primary election.

July 15, 1938

We further make the observation that the duties imposed on the county clerks or Board of Election Commissioners is ministerial and involves no exercise of discretion.

(a) In view of the above, it is our opinion that the name JAMES V. (JOSH) BILLINGS must be printed by the Board of Election Commissioners on the official ballot as was transmitted to the Board of Election Commissioners from the Secretary of State.

(b) In view of the above, it is our opinion that the name DR. CHARLES H. PHILLIPS, JR., is to be printed by the Board of Election Commissioners on the official primary ballot, as transmitted from the Secretary of State.

II.

Further consideration of Section 10257 indicates that when a person has filed his written declaration to be a candidate and has stated his full name in such declaration, he warrants that this is his full name, and that thereafter such person declaring himself to be a candidate has no right to change his name from that of the name appearing in the declaration. This observation is fortified by a consideration of the statutes before noticed, Sections 10261 and 10262, supra, with respect to the publication of the persons' names who have filed for certain offices. It is fundamental in the construction of the statutes that the object and purpose underlying their enactment is to be considered in determining the legislative intent. *State vs. Toombs* 25 S. W. (2nd) 101; *Bowers vs. Missouri Mutual Association* 62 S. W. (2nd) 1058. With this principle in mind, it is believed that the very object and purpose of Section 10262 with respect to the publication of the names and addresses of all persons who have filed declaration papers giving the name and address of each, the date of the primary, the hours during which the polls will be open, etc., for a period of three consecutive weeks next prior to the primary is to acquaint the electors in the respective election districts of not only the primary, but the names of all persons who have filed as a candidate for particular offices. If a person has filed his declaration as a candidate for a particular office, under a particular name, and thereafter attempts to change such name prior to the printing of the official ballot it would seem to render nugatory the provisions of the statutes before considered.

Board of Election Com.

-5-

July 15, 1938

In view of the above, it is the opinion of this department that the Board of Election Commissioners has no right to make any change in the names given by candidates in their declarations at the time of the filing after such names are published.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RCS:LB

ELECTIONS:

Board of Election Commissioners should
send out absentee ballots immediately
upon receipt of the printed ballots.

July 23, 1938

7-23



Hoover
Board of Election Commissioners,
City of St. Louis,
St. Louis, Missouri.

Gentlemen:

This will acknowledge receipt of your telegram of
this date which reads as follows:

"The board requests a formal ruling
as to voting absentee ballots (a)
Can a qualified voter who is in another
state on election day cast an absentee
ballot (b) Does a qualified voter
have to be within the state on election
day to cast an absentee ballot (c)
When is the board required to send the
applicant the absentee ballot.

Board of Election Commissioners."

In answer to the first two questions contained in
the foregoing telegram, we enclose herewith copy of an
opinion rendered by this office under date of July 24, 1936,
addressed to Honorable H. D. Allison, County Clerk of
Buchanan County, St. Joseph, Missouri, which we think
fully covers both of said questions.

In answer to the third question contained in your
telegram, we direct your attention to Section 10183,
page 219, Laws of Missouri, 1933, which reads in part as
follows:

"* * * Provided, that no county clerk,

July 23, 1938

board of election commissioners or other proper official charged with the duty of furnishing such ballots after examination of the records, or otherwise ascertaining the right of such person to vote at such election shall be required to furnish any ballot or ballots to any person desiring to vote as by this act authorized who is not lawfully entitled to vote, and if the applicant for ballot or ballots is entitled to receive same, the county clerk or the board of election commissioners, if any, or other official charged with the duty of furnishing such ballots immediately upon receipt of the printed ballots shall send by registered mail postage prepaid, or deliver in person an official ballot or ballots if more than one are to be used and voted at said election to such applicant.* * *

It will be seen from the foregoing that it is the duty of the Board of Election Commissioners immediately upon receipt of the printed ballots to forward to qualified applicants for absentee ballots the proper ballots to be used by such absentee voters.

CONCLUSION

It is, therefore, the opinion of this office that absentee ballots should be mailed to qualified applicants for same immediately upon receipt of the printed ballots by the Board of Election Commissioners.

Yours very truly,

APPROVED:

HARRY H. KAY
Assistant Attorney General

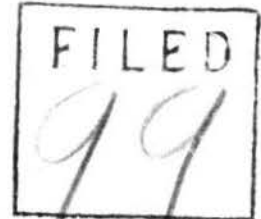
J. W. BUFFINGTON
(Acting) Attorney General

HHK:DA

ELECTIONS: Temporary appointees appointed by judge or clerk of elections in St. Louis City to fill vacancies until a judge or clerk is appointed by the Board of Election Commissioners is not entitled to compensation for his services.

September 7, 1938

Handed over
Board of Election Commissioners
208 South Twelfth Boulevard
St. Louis, Missouri



Gentlemen:

This will acknowledge receipt of your inquiry of recent date which reads as follows:

"In the law for the permanent registration of voters, approved June 30, 1937 (Laws of Missouri, 1937) -

Section 5, at Page 241, reads in part ' * * * and they must not hold any office or employment under the United States, the State of Missouri, or under the county or city in which such election is to be held'; and,

Section 38, at Page 259, reads in part 'If any judge or clerk shall not be present upon the expiration of fifteen minutes from the time to open the polls, or he is disqualified or refuses to act, the judge or judges present, and if none are present, then the clerk present, representing the same political party as the person causing the vacancy, shall immediately fill, for the time by the selection of a member of their party, the place of such absent judge or clerk, and notify the Board of the substitution * * *'.

At the Primary Election, August 2, 1938, the Board ruled W.P.A. employees came under the bans of Section 5. This

September 7, 1938

ruling, together with the usual run of vacancies on election mornings because of illness and for other reasons, developed approximately one hundred fifty vacancies, and from one to six hours elapsed before the complement of judges and clerks were in all the precincts. These vacancies were reported by telephone to the Board, and the message was answered by a return telephone instruction in nearly every case, to the Special Deputy Election Commissioner (a Democrat and a Republican being assigned to each precinct) to serve until relieved, or until the Board's regular substitute appointees arrived. The Board's budget provided for \$36.00 per precinct for this election (four judges and two clerks at \$6.00 each), which amount has been paid to the Board's appointees, six in number.

The Board asks your opinion (1) are these temporary appointees to be viewed in the light of 'party' appointments and not compensated by the Board? (2) is the Board obligated to compensate these temporary appointees; if so, shall the time be calculated on a pro rata day basis and how shall it be calculated, or do these temporary appointees come within the provisions of Section 81?"

In the City of St. Louis, the Board of Election Commissioners appoints judges and clerks of election for definite terms. The law applicable to elections in the City of St. Louis is embodied in an act found in the Laws of 1937, beginning at page 235. Reference hereafter to certain sections refers to sections of said act.

Section 5 of said act provides as follows:

"Said board of election commissioners shall at least sixty days prior to each presidential election thereafter select

and choose four electors as judges of election, for each precinct in such city. They must be citizens of the United States and entitled to vote in the city at the next general election, and they must be men or women of good repute and character who can speak, read and write the English language, and be skilled in the four fundamental rules of arithmetic, and they must be of good understanding and capable. They must reside or be employed or have a place of business in the ward for which they are selected to act; and they must not hold any office or employment under the United States, the state of Missouri, or under the county or city in which such election is to be held, and they must not be candidates for any office at the next ensuing election. Two clerks of election for each precinct shall be selected within the same time by said board, and shall possess the same qualifications as the judges. Being a notary public shall be no disqualification for judge or clerk. No person shall be appointed nor serve as judge or clerk in any election or registration who has been convicted of an offense punishable by imprisonment in the penitentiary, or who has been confined in any county jail, workhouse, penitentiary or house of correction within five years prior to such appointment. Said judges and clerks shall be appointed for a term ending sixty days prior to the next presidential election after the election at which they were appointed to serve, and shall, during said term, serve as judges and clerks at all special, local, municipal, primary and general elections."

Section 6, after providing the method of selection of judges and clerks, provides as follows:

" * * * * and the persons thus selected shall be appointed and commissioned by the board, if qualified and confirmed by the board."

Section 7 provides for the holding of examinations for those selected as judges and clerks and provides that "No person shall be compelled to serve as judge or clerk for two years after the expiration of his term of service."

It will be seen from the foregoing sections that judges and clerks of election are selected by the Board of Election Commissioners, that they must possess certain specified qualifications and that they serve for definite terms of office. When persons are once qualified and commissioned as judges and clerks, they are available for service at all elections held during a definite term. They thus become regular election officials with definite terms of office.

Section 81 provides for compensation of election officials provided for by the act. Said section reads in part as follows:

" * * * Precinct judges and clerks shall receive as pay six (\$6.00) dollars for each day or part of day while on duty, except pay shall be allowed only for those days mentioned in this Act."

We think it is clear that when the Legislature enacted Section 81 it had in mind providing for regularly selected election officials. It is true that Section 38 provides for the appointment of temporary appointees to fill in for absent judges and clerks until a judge or clerk could be selected by the authority having the power of appointment of judges and clerks, to-wit, the Board of Election Commissioners. Said Section 38 reads in part as follows (underscoring ours):

"If any judge or clerk shall not be present upon the expiration of fifteen minutes from the time to open the polls, or he is disqualified or refuses to act,

the judge or judges present, and if none are present, then the clerk present, representing the same political party as the person causing the vacancy, shall immediately fill, for the time by the selection of a member of their party, the place of such absent judge or clerk, and notify the Board of the substitution. And one of the judges or a clerk, if all the judges be absent, shall administer to such temporary appointee the oath as required of the judge or clerk originally appointed, and blank forms shall be sent out by the Board for such purpose, which oath shall be preserved and returned to the Board and such appointee shall be subject to the same punishment and penalty as any other judge or clerk. The Board upon receiving the notice of the vacancy, shall appoint to fill the same, a judge or clerk of the same political party as the judge or clerk causing the vacancy. Such judge or clerk so appointed shall take the same oath as provided for a regular judge, or a regular clerk, before the Board, or the Chief Clerk, or any assistant of the Board, who are hereby authorized to administer such oaths, or one of the remaining judges and replace the temporary appointee and assume the duties of the position as speedily as possible. Such judge or clerk so appointed shall be subjected to the same punishment and penalties as any other judge or clerk."

It will be noticed that the foregoing section refers to the person selected by the judges or the clerk to fill the vacancy temporarily as the temporary appointee. It does require that the regular oath be administered to such temporary appointee, but at no place does the section refer to the temporary appointee as a judge or clerk. He is merely a temporary appointee to fill the place of such absent judge or clerk. He might properly be referred to

as temporary judge or temporary clerk. The section provides that the Board, upon receiving the notice of the vacancy, shall appoint to fill the same a judge or clerk and that the judge or clerk appointed shall take the oath of a regular judge or clerk. The person appointed by the Board to fill the vacancy is referred to as the judge or clerk so appointed. The Board is the body which has authority under the law to appoint judges and clerks of election.

Neither Section 81 nor any other section of the act makes provision for compensation to the temporary appointees above referred to. Compensation is provided for judges and clerks of election, but not for those who may in an emergency be called upon to fill the place of a judge or clerk for an hour or so. The rule as to compensation for public officers has been laid down in the case of Sanderson v. Pike County, 195 Mo., l.c. 605, in the following language:

"It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it. (State ex rel. v. Adams, 172 Mo. 1-7; Jackson County v. Stone, 168 Mo. 577; State ex rel. v. Walbridge, 153 Mo. 194; State ex rel. v. Brown, 146 Mo. 401; State ex rel. v. Wofford, 116 Mo. 220; Givens v. Daviess Co., 107 Mo. 603; Williams v. Chariton Co., 85 Mo. 645; Gammon v. Lafayette Co., 76 Mo. 675.)"

Construing Section 81 strictly, as we are required to do by the foregoing rule, we must conclude that the compensation therein provided is for judges and clerks of election and not for temporary appointees selected by judges or clerks of election to fill temporarily the place left vacant by an absent judge or clerk.

CONCLUSION

It is, therefore, the opinion of this office that temporary appointees selected by judges or the clerk of an election precinct in the City of St. Louis to fill, for the time being, the place of an absent judge or clerk until the Board of Election Commissioners can select a judge or clerk and qualify him to fill such vacancy, is not entitled to compensation for such temporary services.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

HHK:VAL

COUNTY COURTS:
WIDENING OF ROADS:

The County Court shall follow procedure prescribed by Section 7840, R. S. Mo. 1929, for the widening of the right-of-way of a road.

September 9, 1938

Honorable Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of recent date requesting an official opinion from this department based upon the following letter:

"I would like to request an opinion on the following state of facts: The County of Cole has received a W. P. A. grant to be used in building new county roads and improving old roads and one of the requirements thereof is that the roads be not less than 40 feet in width. The County in rebuilding one road which is now 30 feet in width is unable to obtain the additional 10 feet of right of way from two property owners. I would like to know the correct procedure in which the County may acquire this additional right of way. The County has started work on part of this new road, and I would greatly appreciate a reply as soon as possible."

I take it from your request that the road which the county court desires to widen is one which is not included in the county highway system or the state highway system; in other words, it is a road over which the county court has exclusive jurisdiction. It also appears from the statement that a part of the present road is only 30 feet wide and that the county court desires to widen that portion

to the width of 40 feet, and the question is whether or not the county can proceed under the general statute for condemning lands for public roads for the purpose of widening a road.

The Legislature has provided that the minimum width of a public road in this state shall be 30 feet. (Section 7825, R. S. Mo. 1929.)

Section 7840, R. S. Mo. 1929, provides the manner for the taking of private property for road purposes. This section is as follows:

"The right of eminent domain is vested in the several counties of the state to condemn private property for public road purpose, including any land, earth, stone, timber, rock quarries or gravel pits necessary in establishing, building, grading, repairing or draining said roads, or in building any bridges, abutments or fills thereon. If the county court be of the opinion that a public necessity exists for the establishment of a public road, or for the taking of any land or property for the purposes herein mentioned, it shall by an order of record so declare, and shall direct the county highway engineer within fifteen days thereafter to survey, mark out and describe said road, or the land or material to be taken, or both, and to prepare a map thereof, showing the location, courses and distances, and the lands across or upon which said proposed public road will run, or the area, dimensions, description and location of any other property to be taken for the purposes herein, or both, and said highway engineer shall file said map and a report of his proceedings in the premises in the office of the county clerk. Thereupon the county court shall cause to be published in some newspaper of general circulation in the county, once each week for three consecutive weeks, a notice giving the width, beginning, termination, courses and distances and sec-

tions and subdivisions of the land over which the proposed road is to be established, or the location, area, dimensions and descriptions of any other land or property to be taken, or both, and that said land or property is sought to be taken for public use for road or bridge purposes. If within twenty days after the last day of said publication no claim for damages for the taking of any of such land or property be filed in the county clerk's office by the owner of said property, or by the guardians or curators of insane persons or minors owning said property, then the claim of any such owner shall be forever barred, and the county shall be authorized to enter upon and appropriate said lands or other property; and the court shall make an order accordingly. If any claim for damages be filed, the same shall be heard on the first day of any regular or adjourned term of the county court after the expiration of the twenty days last aforesaid. If the county court and the land or property owner be unable to agree on the amount of the damages, the county court shall make an order reciting such fact, and cause a copy of same to be delivered to the judge of the circuit court of that county, and a transcript of the record and the original files in said cause shall be transmitted by the county clerk to the circuit clerk of the county. Upon receipt of the copy of the order of the county court last aforesaid by the circuit judge, the circuit court, or the judge thereof in vacation, shall make an order setting the cause for hearing within fifteen days, and if the order fixing the date of said hearing be made by the judge in vacation, it shall forthwith be filed in the office of the circuit clerk. The court, or judge in vacation, shall cause to be empaneled a jury of six freeholders not interested in the matter or of kin to any member of the county court, or to any landowner in interest. Said jury shall view the land, or other

property, proposed to be taken, and shall hear the evidence and determine the question of damages under the direction of the court or judge. Five of said jury concurring may return a verdict, and in case of a disagreement another jury may be empaneled. The public necessity for taking said property shall in nowise be inquired into by the circuit court, and the judgment of the circuit court, or judge thereof in vacation, in said cause shall not be reviewed on appeal or by writ of error."

Section 7841, R. S. Mo. 1929, also provides:

"The words 'established' and 'establishing,' as used in this article in relation to public roads, shall be held to embrace the locating, relocating, changing or widening of roads, and the word 'road' shall include bridges and culverts."

By this section the lawmakers left no doubt as to the question of whether or not Section 7840, supra, would apply to a case where a road is widened by the proper county authorities. They have included the word "widening" in the definition of the word "establishing." Therefore, the same procedure for widening a road is followed that is used for the purpose of establishing or opening a new road.

The proceedings for the opening, establishing and vacating of public roads are of early origin. In the case of Wooldridge v. Rentschler, 62 Mo. App. 591, in which a road had been widened by the county court by authority of statutes similar to Section 7840, supra, the court, in discussing the procedure for the widening, said, l. c. 594:

"It appears from the record that this case originated from a difficulty about a road, which, it appears, some persons in its neighborhood concluded had been encroached upon by plaintiff. How the road was originally acquired by the public, or what its original width was, does not

appear. It does appear, though, that proceedings were instituted, before the county court, to widen it. These proceedings appear to be such as would be proper for widening a road that was found to be too narrow as originally laid out. That process seems to have been invoked, as a means of setting plaintiff's fences off of the road, already of a proper width as a road, but which had been encroached upon by the alleged unwarranted acts of plaintiff. Notice of the presentation of the petition was regularly given, and the county court ordered a survey by the surveyor. The survey was made and duly reported to the county court. Plaintiff was then notified by proper notice to remove his fence to the limit as established by the survey. Having refused to do so, the county court issued an order to defendant, as road overseer, which was duly delivered to him, to proceed to open the road and report his action to the court. It was in executing this order that defendant committed the acts for which the suit was begun."

And at l. c. 595 of said case the court further said:

"The county court has general jurisdiction to open or widen public roads.
* * * *"

The court further said:

"The order of the court delivered to defendant recited that the court had ordered the road widened according to the survey made by the county surveyor, and directed defendant to 'proceed to widen said road within thirty days from the date of this order, as the same was surveyed by the county surveyor and ex officio commissioner of roads and bridges, and report to this court at its next regular term.'"

September 9, 1938

CONCLUSION

From the foregoing, it is the opinion of this department that the county court, for the purpose of widening a public road, should follow the procedure prescribed in Section 7840, R. S. Mo. 1929, hereinabove quoted.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:HR

ELECTIONS: Qualified voter does not lose residence by joining the Navy unless the intention shows otherwise.

October 11, 1938



Board of Election Commissioners
City of St. Louis
208 S. 12th Boulevard
St. Louis, Missouri

Gentlemen:

This is to acknowledge receipt of your letter of October 3, 1938, requesting an official opinion from this department, which is as follows:

"The Board would like your opinion on the following case:

"One Edward John Jones, aged twenty-four years, whose parents, so he states, have lived at 3838 South Broadway for the past sixty-five years, made application today to register. Mr. Jones states he entered the Navy in the Bureau of Medicine Surgery when he was sixteen years of age, with his parents' consent, and was discharged five months ago, returning to the home of his parents. He also stated he has never before made application to register.

"We at first were inclined to pass him because of the Constitutional provision (Article 8, Section 7), but this seems to apply to voting only and presupposes one having been registered. In the affidavit of registration however, he would be asked to swear that he has resided in the State of Missouri one year (Section 16, New Permanent Registration Law)."

Article VIII, Section 7, of the Missouri Constitution reads as follows:

"For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service either civil, or military, of this state, or of the United States; nor while engaged in the navigation of the waters of the State, or of the United States, or of the high seas, nor while a student of any institution of learning, nor while kept in a poor-house or other asylum at public expense, nor while confined in public prison."

Section 12, Session Laws of 1937, page 244, sets out the qualifications of voters in cities of the population of 600,000 or more, which applies to the City of St. Louis. This section reads as follows:

"Every citizen of the United States, including occupants of soldiers' and sailors' homes, who is over the age of twenty-one years, who has resided in the State one year immediately preceding the election at which he offers to vote, and during the last sixty days of that time shall have resided in the city where such election is held, shall be entitled to vote at all elections by the people, if properly registered, unless he comes within the following exceptions:

- (1) If he is an idiot or insane person.
- (2) If he has been convicted of a felony, or of a crime connected with the exercise of the right of suffrage and has not been granted a full pardon therefor.
- (3) If he is confined to any public prison.
- (4) If he is kept at any poor house at public expense.
- (5) If he has been convicted a second time of a felony, or of a crime connected with the exercise of the right of suffrage."

A voter does not lose his residence by being away temporarily either to an institution or as a member of the Navy. As in all election laws, the intention of the voter must be determined. Under the state laws, a member of the Navy is not entitled to vote, but at the same time he does not lose his residence by reason of becoming a member of the Navy.

In the case of *Goben v. Murrell*, 190 S. W. 986, 1. c. 987, the court said:

"Now in this case the students, having been allowed to vote by the election officers, are presumed to be legal voters. *Gass v. Evans*, 244 Mo. 329, 344, 149 S. W. 628. It is not enough to destroy such presumption to show that the voter was a student going to school in the city where he voted (*Gumm v. Hubbard*, 97 Mo. 311, 320, 11 S. W. 61, 10 Am. St. Rep. 312), for the fact that one goes into a city only for the purpose of going to school does not conclude the question whether he is a legal voter. He may intend to reside at such place. It is a question of intention, not, however, determined conclusively by his testimony. *Hall v. Schoenecke*, 128 Mo. 661, 31 S. W. 97; *Seibold v. Wahl* (Wis.) 159 N. W. 546. The onus of showing that he was not a qualified voter is on the contestant. *South Mo. Land Co. v. Combs*, 53 Mo. App. 298; *State, to Use, v. Hudson*, 86 Mo. App. 501, 510; *Gilliland v. Railroad*, 19 Mo. App. 411, 419; *Appleman v. Sporting Goods Co.*, 64 Mo. App. 71.

"In this view of the law, has the contestant, through the agreed statement, clearly shown that the students who voted for the contestee were not legal voters? We think he has. He has shown by that statement that they left their places of residence and 'came to Kirksville for the sole purpose of becoming students at the American School of Osteopathy, an institution of learning

located at said city, with the intention of remaining in said school three years and of then locating at places elsewhere for the practice of osteopathy; * * * and that said persons have never altered their intentions of leaving the city of Kirksville as soon as their course of study at said school shall have been completed.' That is to say, they came to Kirksville not to 'reside', as that word is understood in its application to the qualification of voters, but for a temporary purpose, which, when accomplished, was to end their presence there. Residence must have some connection or identification with the community. One's stay should at least be indefinite and not, as shown here, for the mere temporary purpose of attending school and then immediately leaving to locate in a permanent home elsewhere."

Also in Fry's Election Case, 71 Pa. 302, 310, 10 Am. Rep. 698, the court said:

"The stated case expressly declares that the students referred to in it came to Allentown from other counties for no other purpose than to receive a collegiate education, but intended to leave after graduating. It is evident that the college was not their true and permanent home; their stay there was not to be indefinite, as the place of a fixed abode, until future circumstances should induce them to remove. Their purpose was indefinite (definite) and temporary, and when accomplished they intended to leave. They retained their original domicile, for the facts stated show that they never lost it. On this point the authorities are in entire accord."

In the case of Chomeau v. Roth, 72 S. W. (2d) 996, 1. c. 999, the court said:

"The fact that the challenged voters were students is in and of itself not at all decisive of the case. Our Missouri Constitution provides in article 8, section 7 (Const. art. 8, sec. 7, p. 677, Mo. St. Ann.), that for the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or to have lost it by reason of his absence, while a student of any institution of learning. So the Constitution leaves the student much as it finds him, permitting him either to retain his original residence for voting purposes, or to take up a residence wherever his school is located if he so elects. In other words, mere physical presence at the school is not enough either to gain for him a voting residence at the school, or to cause him to lose his existing voting residence at his home; the whole question, as in all similar situations, being largely one of intention, to be determined not alone from the evidence of the party himself, but in the light of all the facts and circumstances of the case. Hall v. Schoenecke, 128 Mo. 661, 31 S. W. 97; Goben v. Murrell, 195 Mo. App. 104, 190 S. W. 986, 197 S. W. 432.

"The two cited cases, and particularly the former, control this case in all essential respects. As they announce the law, it is entirely possible for a student to gain a residence at the place where he is attending school, although he may have gone there for no other purpose than to attend school; the question of whether a change of residence is effected depending upon the intention with which the removal from the former residence was made. A temporary removal for the sole purpose of attending school, without any intention of abandoning his usual residence, and with the fixed intention of returning thereto when his purpose has been accomplished,

will not constitute such a change of residence as to entitle the student to vote at his temporary abode. But conversely, an actual residence, coupled with the intention to remain either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, is sufficient to work a change of domicile. *Nolker v. Nolker* (Mo. Sup.) 257 S. W. 798; *Finley v. Finley* (Mo. App.) 6 S.W.(2d) 1006.

* * * * *

"And in this view of the case, not only had the particular students abandoned their former residences upon entering the seminary, as there was evidence to disclose, but they presented themselves as voters at the proper precinct in the city of Clayton, declaring to the election officials in charge thereof that they regarded the seminary as their place of residence. We grant that such statements on their part were not conclusive upon the question of their intention, but the evidence thereof, together with the other matters we have heretofore dwelt upon as significant, amply warranted the trial court in finding, as it did, that they were qualified to vote. If, as is said in *Goben v. Murrell*, supra, residence for voting purposes must have some connection or identification with the community, such connection or identification could not better be evidenced than by a participation in the community's public affairs by those who claim no other community as their residence."

CONCLUSION

In view of the foregoing, it is the opinion of this department that Edward John Jones did not lose his residence in the City of St. Louis by joining the Navy for the reason that it would have been impossible for him to declare his

intention of being a voter in another city or state, as in most states members of the Navy are prohibited from voting. It is also the opinion of this department that at no time did Edward John Jones abandon his home with the intention of not returning to the City of St. Louis, and for that reason, although a member of the Navy, his residence should be considered as in St. Louis and he should be entitled to register and vote.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

CITY TREASURER - Is a county or state officer in St.
Louis, Missouri

October 12, 1938

Board of Election Commissioners
City of St. Louis
208 South 12th Blvd.
St. Louis, Missouri



Gentlemen:

We are in receipt of your letter of October 7th wherein you inquire whether or not candidates for the office of City Treasurer of the City of St. Louis should be placed upon the official ballot to be voted at the November 1938 election.

From the information we have gained in our research on this question, we find that the present incumbent is the appointee of the Mayor of the City of St. Louis, appointed to fill a vacancy created by the death of the City Treasurer, Henry C. Menne, who was elected to that office at the general election in November of 1934.

The laws relating to the election of County Treasurers, as same was enacted by the 46th General Assembly found in the Laws of Missouri 1911, page 163 as follows:

"On the Tuesday after the first Monday in November, 1912, and every four years thereafter, there shall be elected by the qualified voters of the several counties in this state a county treasurer, who shall be commissioned by the county court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office; Provided, that in counties having adopted, or that may hereafter adopt

township organization, the term of office of said treasurer shall be extended to the first day of April next after the election of his successor."

This section continued in force as Section 12130, R. S. Mo. 1929 until the Session of 1933. At the Session of 1933 (pages 338 and 357), the office of County Treasurer was abolished in certain counties. In 1937, at pages 425, 427, the appointment of County Treasurers by the Governor in counties of under 40,000 and between 75,000 and 90,000, was provided for, and the election of a County Treasurer in all other counties was provided for. This is provided by Section 12130c (Laws of 1937, page 426).

"Section 12130c. Election of county treasurers in counties of less than 40,000 if under township organization, and in counties of 40,000 or more, except in counties of 75,000 to 90,000 - term. -

"On the Tuesday after the first Monday in November, 1940, and every four (4) years thereafter, there shall be elected by the qualified voters in all counties of this State, now or hereafter having a population of 40,000 or more inhabitants according to the last Decennial United States Census, (except in counties having 75,000 and not more than 90,000 inhabitants) and in all counties of less than 40,000 inhabitants if under township organization, a county treasurer, who shall be commissioned by the County Court of his County, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that in counties having adopted or that shall hereafter adopt township organization, the term of office of said treasurer shall be extended to the first day of April next after the election

of his successor. Provided further, that the present county treasurers shall remain in office until their successors are elected or appointed and qualified, unless sooner removed from office."

The section of the charter of the City of St. Louis pertaining to the office of City Treasurer is found in Section 1, Article 8 of the St. Louis Charter, which is as follows:

"The mayor shall appoint the following officers at his convenience, to hold for the term for which he was elected and until their successors qualify: assessor, collector, treasurer, supply commissioner, register, city counselor, city marshal, city court judges, clerk of city courts, president board of public service, director of public utilities, director of streets and sewers, director of public welfare, and director of public safety."

Your inquiry raises the question as to whether the office of City Treasurer of St. Louis is a municipal or county office. If a municipal office, then the provisions of Section 1 of Article 8 of the Charter, supra, apply, and if a county office, then the provisions of Section 12130c, Laws Mo. 1937, p. 426, supra, apply.

We find that the courts of this state have not passed on the precise question. However, in the case of *State ex inf. vs. Koeln*, 192 S. W. 748, 270 Mo. 174, 185, 186, the court en banc had before it the provisions of the above section of the City Charter as it related to the office of County Collector. In that case, the court held that the City Collector of the City of St. Louis is a county officer, one of the reasons therefor being that the Collector performed a governmental function of the State in the collection of State revenue. The court in its opinion said:

"The process of logic by which is determined whether the Collector of the city of St.

Louis is a city officer or a State officer is apt to become confused by reason of the singular and peculiar relationship which the city of St. Louis bears to the State. Loosely speaking any officer elected by the suffrage of the city of St. Louis might be termed a city officer, at least in the sense that he is elected by the vote of the city. The character of the electorate, however, should not necessarily determine the character of the office. The territory confined within the boundaries of the city of St. Louis forms a political subdivision of the State. This territory has no county organization in the ordinary use of that term, but by the Constitution the said city is to 'collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a county as in this Constitution defined.' If this political subdivision of the State were styled a county no confusion would arise in arriving at the conclusion that the person whose duty it was to collect the State taxes was an officer of the State and that his election would be a subject of legislative control.

"Why then should the election of the Collector of the Revenue of the City of St. Louis (a separate political subdivision of the State which, under the Constitution, bears the same relationship to the State as a county), who, at least so far as collecting the revenue ordinarily collected by a county collector is concerned, performs the same governmental function, be controlled by a law different from that which controls the election of collectors in the other political subdivisions (counties) of the State? No reason is apparent why the election of one should be controlled by a law different from that applying to other officers exercising a like governmental function, and none can be said to exist unless perchance the power of control over the election of this officer in the city of St. Louis was, by the Constitution, permanently transferred to the charter making power of said city."

The case of State ex rel. McAllister vs. Dunn, 277 Mo. 38, adopts the rule that general statutes referring to the office of Treasurer of any County in the State refer to the office of the Treasurer of the City of St. Louis by virtue of the 19th clause of what is now Section 655, R. S. 1929. The portion of the opinion so referring is found on page 41, as follows:

"This case involves a construction of Section 3765, Revised Statutes 1909, which reads thus: 'No sheriff, marshal, clerk or collector or the deputy of any such office, shall be eligible to the office of treasurer of any county.'

"It is conceded that under the 19th clause of Section 8057, Revised Statutes 1909, Section 3756 applies to the City of St. Louis.

"Relator's position is that under Section 3756 a deputy collector is incapable of being lawfully chosen treasurer. Respondent's contention is that a deputy collector may be elected while still such deputy and may take the office if he is not a deputy collector at the time he actually assumes the office."

The court then proceeded to hold that Mr. Dunn was disqualified from holding the office because he had been a deputy collector.

This case was decided by the Supreme Court en banc on February 15, 1919. That case was a quo warranto to oust John W. Dunn from the office of Treasurer of the City of St. Louis to which he had been elected at the election held in November 1918. The court ruled that Mr. Dunn should be ousted because he was ineligible to the office, but did not question in anywise the validity of the election of the Treasurer of the City of St. Louis at the general election as provided for County Treasurers. The court, and all the parties, assumed that the election was valid, that the only defect was Mr. Dunn's personal disqualification because he was a deputy collector.

At neither revision, Session of 1919, nor 1929, was any change made in this language of the statutes providing for the election of County Treasurers, to exclude the City of St. Louis from the definition of a County. Down to and including the election of Mr. Henry C. Menne, whose death has recently caused a vacancy in the office of the City Treasurer, no Mayor and no political party organization has brought any proceeding to determine whether or not the office of the City Treasurer of the City of St. Louis is an elective office under the general state law pertaining to County Treasurers, or is an appointive office under the charter. All have acquiesced in the construction that the state law provisions pertaining to the election of County Treasurers applied to the Treasurer of the City of St. Louis. In this situation the course of conduct by the acquiescence in the election of the City Treasurer, by city officials, political parties, the Supreme Court and the Legislature established precedents of construction that cannot be disregarded.

The court, in discussing the weight to be given to the construction of a statute by election officials, in the case of *In re Graves*, 30 S. W. (2d) 149 (Missouri Supreme Court en banc) said at l.c. 154:

" ** great weight should be given to the well-known 'practical construction' (25 R.C.L. Sec. 274, p. 1045) adopted by all persons charged with duties pertaining to general elections ** "

It is conceded that if the duties of the City Treasurer are only municipal, then he is a city officer and his appointment is controlled by the provisions of the city charter, *supra*. It should also be conceded that if his duties are governmental and municipal, then under the holding of the *Koeln* case, *supra*, he is a county or State officer and his election is controlled by Section 12130c, *supra*.

The various county treasurers of the State have governmental functions to perform by virtue of the provisions of the following sections of the Revised Statutes of Missouri of 1929.

Section 9243 provides in part as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect ** also, the clear proceeds of all penalties and forfeitures, and all fines collected in the several counties for any breach of the penal or military laws of this state, *** "

Section 9246 provides in part as follows:

"The county treasurer shall collect, or cause to be collected, all school moneys mentioned in Section 9243, and all other moneys for school purposes in his county, and shall give the party paying duplicate receipts therefor, and said party shall file one of said receipts with the county clerk, who shall file the same and charge the same to the county treasurer; *** "

Section 9255 pertaining to school funds provides as follows:

"When any portion of principal or interest, or both, may be collected, as provided in any of the foregoing sections, it shall be paid into the county treasury; and it shall be the duty of the treasurer to give the person making payment thereof duplicate receipts, specifying the sums paid and on what account. One of said receipts shall be given to the clerk of the county court, who shall file and preserve the same in his office, charge the treasurer with the amount, and credit the payment to the party on whose account it is made on his bond and mortgage."

On the question of the governmental duties of the County Treasurer relating to the payment of criminal costs

which are paid by the State, we find that Section 3853 provides as follows:

"All criminal cost fee bills shall be certified for payment as hereinbefore provided, and in addition thereto the circuit clerks of each county and clerks of all criminal courts shall make copies of all original fee bills certified to the state auditor for payment, and shall file the same with the treasurers of their respective counties, and the city of St. Louis, at the time of transmitting the original for payment, and when certified to the state auditor for payment, he shall draw his warrant on the state treasurer and transmit the same to the treasurer of the county from whence the bill originated, or the city of St. Louis, and when any criminal cost fee bill shall be certified to the county court, or the auditor of the city of St. Louis, for payment, the county clerk, or the auditor of the city of St. Louis, shall, when the same is allowed, draw a warrant on the county treasurer, or the treasurer of the city of St. Louis, in payment thereof, and deliver the same to the county treasurer, or to the treasurer of the city of St. Louis, together with a list of the names of the various parties to whom the fees are due, stating the amount due each person. The treasurers, on receipt of any such warrants and fee bills, shall record the fee bills in a well-bound book, arranged with appropriate headings, so that the same shall correspond, as near as may be, with the accounts required to be kept by other officers in section 11822, R. S. 1929."

Article 9, Section 20 of the State Constitution provides that the scheme and charter of the city of St. Louis "shall become the organic law of the county and city", as follows:

"The city of St. Louis may extend its limits so as to embrace the parks now without its boundaries, and other convenient and contiguous territory, and frame a charter for the government of the city thus enlarged, upon the following conditions, that is to say: The council of the city and county court of the county of St. Louis shall, at the request of the mayor of the city of St. Louis, meet in joint session and order an election, to be held as provided for general elections, by the qualified voters of the city and county, of a board of thirteen freeholders of such city or county, whose duty shall be to propose a scheme for the enlargement and definition of the boundaries of the city, the reorganization of the government of the county, the adjustment of the relations between the city thus enlarged and the residue of St. Louis county, and the government of the city thus enlarged, by a charter in harmony with and subject to the Constitution and laws of Missouri, which shall, among other things, provide for a chief executive and two houses of legislation, one of which shall be elected by general ticket, which scheme and charter shall be signed in duplicate by said board or a majority of them, and one of them returned to the mayor of the city and the other to the presiding justice of the county court within ninety days after the election of such board. Within thirty days thereafter the city council and county court shall submit such scheme to the qualified voters of the whole county, and such charter to the qualified voters of the city so enlarged, at an election to be held not less than twenty nor more than thirty days after the order therefor; and if a majority of such qualified voters, voting at such election, shall ratify such scheme and charter, then such scheme shall become

the organic law of the county and city, and such charter the organic law of the city, and at the end of sixty days thereafter shall take the place of and supersede the charter of St. Louis, and all amendments thereof, and all special laws relating to St. Louis county inconsistent with such scheme."

The scheme hereinabove referred to for the operation and reorganization of the governments of the city and county of St. Louis and the adjustment of their relations went into effect on October 22, 1876.

Section 32 of said scheme, in providing that in all cases where a public officer was required to pay any money into the county treasury of St. Louis County, such officer would be thereafter required to pay such money into the treasury of the City of St. Louis, including all fines, penalties and forfeitures, said:

✓
"In all cases, where, according to the laws in force up to the time when this scheme shall go into operation, any public officer or other person was required to pay any money coming into his hands from any source whatever into the county treasury of St. Louis county, and where it is not otherwise provided in this scheme or the charter framed under it, such officer or person shall, after the time aforesaid, pay all such money into the treasury of the city of St. Louis at or within such times as he was theretofore required to pay the same into the county treasury; and if no time shall be prescribed by law for any such payments, then he shall pay the same monthly on the first Monday of each month, into said city treasury, and shall take triplicate receipts therefor, stating the account on which such payment was made, one of which he shall file in the city auditor's office

and one with the comptroller, who shall charge the treasurer with the amount so paid; and the said auditor and treasurer shall keep accounts showing the account on which such payments were made and the source from which the money was derived. All such money shall be applied and used for the purposes for which it was collected or for which it was made applicable by law and in all cases where such money is not set apart or appropriated by law for specific purposes the municipal assembly of the city may appropriate it to such municipal uses as it may deem proper; provided, however, that all fines, penalties, and forfeitures collected or accruing in the county of St. Louis or an account of said county or the people thereof shall be paid in the manner and at times aforesaid into the county treasury of said county, and duplicate receipts shall be taken as aforesaid by the officer or person paying the same, one of which he shall file with the county clerk of said county, who shall charge the treasurer with the amount so paid, and such money shall be appropriated and used as it is or may be provided by law; and provided further that if any public officer or other person shall, at the time this scheme goes into operation, be in default in the payment of any such money into the said county treasury, he shall immediately pay the same into the said city treasury in the manner aforesaid, and the same shall be disposed of as herein provided."

From the foregoing, it is evident that the City Treasurer of St. Louis, Missouri is performing governmental functions and is therefore a County or State officer within the meaning of the law. It is the opinion of this department that candidates for the office should be placed upon the official ballot to be voted at the November 1938 general election.

Your next question is as to procedure - should we hold that the names of the candidates for City Treasurer be placed on the ballot.

We are of the opinion that the election of the successful candidate should be certified, and it be left to him to institute quo warranto against the incumbent appointed by the Mayor for the purpose of testing the title to the office. The successful candidate would thus not be harmed and the issue would be squarely between the successful candidate and the present incumbent.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting Attorney General)

MW:FE

CITIZEN: Person citizen of county in which he permanently resides.

October 20, 1938



Honorable Claude T. Wood
Prosecuting Attorney
Pulaski County
Richland, Missouri

Dear Sir:

This department wishes to acknowledge your request for an opinion under date of October 15, 1938, which reads as follows:

"I should like to have your official opinion upon the following matter, to-wit:

"Section 9454 R. S. Missouri, 1929, provides, among other qualifications of County school superintendents, that he must be 'a citizen of the county.' Now under the following state of facts will the individual referred to be 'a citizen of the county' within the purview of said section on the first Tuesday in April, 1939?

"Subject was born and raised in Pulaski County and taught in Pulaski County until the Spring of 1937. Owns a farm in Pulaski County on which he and his wife and children lived until the fall of 1937. At which latter date he obtained employment in Laclede County, rented a house in Laclede County and moved with his family to said house and where he has been employed to the present time and where he will be so employed until April 15, 1939, at which time he expects to return with his family to his farm in Pulaski County. During the summer of 1938 he closed the house in Laclede County and attended the State University for two months. He rents the house in Laclede County one year at a time. He has always voted in Pulaski

County, having never voted elsewhere and having voted in Pulaski County at the Primary Election 1938. He pays real and personal property taxes in Pulaski County and prior to the present time has not paid taxes in any other county. But was assessed for his household furniture in Laclede County during the summer of 1938. All of the household goods and furniture owned by subject is in Laclede County House. Subject has always claimed Pulaski County as his legal residence and has ever intended to return to Pulaski County to make his home on his farm at the conclusion of his employment in some other county."

Section 9454, R. S. Mo. 1929, which you refer to in your letter, provides in part as follows:

"There is hereby created the office of county superintendent of public schools in each and every county in the state; the qualified voters of the county shall elect said county superintendent at the annual district school meeting held on the first Tuesday in April, 1923, and every four years thereafter; said county school superintendent shall be at least twenty-four years old, a citizen of the county, shall have taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; or shall have spent the two years next preceding his election or appointment as a regular student in a state teachers' college or university, and shall at the time of his election hold a diploma from one of the state teachers' colleges or state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent; the person elected county school superintendent

at the annual school meeting held the first Tuesday in April, 1923, shall immediately upon his election, qualify under this article as county superintendent of public schools, and shall serve as such until the first Monday in July, 1927, or until his successor is elected and qualified. ***"

In the instant case, the subject has a temporary residence in Laclede County, but maintains his permanent residence in Pulaski County, where he was born, and to which he plans to return.

In the case of *Harding vs. Standard Oil Company*, 182 Fed. 421, 1. c. 424, the court points out that:

"The term 'residence' simply indicates the place of abode, whether permanent or temporary; 'domicile' denotes a fixed, permanent residence, to which, when absent, one has the intention of returning. *Corel vs. Chicago etc. Co. (C. C.)* 123 Fed. 452, 454."

It is apparent then that the domicile of the subject is Pulaski County. Can it be said that "citizenship" and "domicile" are synonymous?

The court, in the *Harding* case, supra, states (1. c. 423):

" 'Domicile' and 'citizenship' are substantially synonymous terms in most cases."

Did the subject, however, lose his domicile in 1937 by removing from Pulaski County and setting up a temporary residence in Laclede County?

In the case of *In re Ozias' Estate*, 29 S. W. (2d) 240, 1. c. 243, the court, in determining what constituted a change of domicile, said:

October 20, 1938

"To constitute a change of domicile three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicile; and (3) an intention of acquiring a new one."

And in holding that a person can have but one domicile which continues until he renounces it, said:

"A person can have but one domicile, which, when once established, continues until he renounces it and takes up another in its stead. It is not lost by temporary absence."

It is evident that the subject did not lose his domicile by setting up a temporary residence in Laclede County.

Citizenship and domicile being synonymous, we are of the opinion that your subject is a "citizen of the county" of Pulaski within the meaning of Section 9454, R. S. Mo. 1929, supra, although he is temporarily absent from said county until April 15, 1939.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:FE

COUNTIES: Disputed ownership and possession of swamp and overflow land is contested by suit to quiet title and ejectment proceedings.

November 1, 1938

Hon. Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri



Dear Sir:

We acknowledge receipt of your request for an opinion dated October 12, 1938, which reads as follows:

"There is and has been a dispute between the Counties of Osage and Cole over a parcel of land, situate at the junction of the Osage River with the Missouri River, commonly called Dodd's Island. Osage County has exercised jurisdiction over this parcel for some years. The contention of Cole County is that by the Constitution of 1875 the boundaries between the two Counties was determined as being the mid-channel of the Osage River and that the mid-channel lay to the East and South of said island, and not to the West as contended by Osage County. The island is now connected with Cole County as the old Slough dividing them has filled in.

"I filed an injunction suit against the Collector of Osage County, in the name of a resident living on said parcel, attempting to restrain the collection of personal taxes, in Osage County, but the suit was dismissed upon the sustaining of the demurrer filed.

"I would like to know whether or not the procedure attempted is the correct one to follow, or whether there is another more direct or effective one that may be pursued."

November 1, 1938

The Congress of the United States in 1850 by Title 43, Section 982, U.S. Code Annotated, donated its proprietary interest in all Federal swamp lands and overflow Federal lands located in the State of Missouri to the State of Missouri.

The State of Missouri in turn on March 27, 1868, donated its proprietary interest in said swamp and overflow lands to the counties in which said land was located, pursuant to the provisions of R.S. Missouri, 1929, Sections 11128, 11156, 11165 and 11168. Construing the above Missouri statutes, the Supreme Court said in *Phillips v. Butler County*, 187 Mo. 698, 1.c. 711, 86 S.W. 231:

"It may be conceded in the outset that the title to and control of all swamp and overflow lands are vested in the several counties in which located."

In the same act donating title to swamp and overflow lands to Missouri counties, the Legislature provided that county courts could employ surveyors and attorneys when necessary, and Section 11179, R.S. Missouri, 1929, provides:

"The county court may employ surveyors to survey said lands and islands, and attorneys to represent them in any suits pertaining thereto, and shall pay such surveyors and attorneys reasonable compensation for their services, to be paid out of any funds arising out of the sale of such lands and islands, or out of the general revenue fund of the county as may be agreed upon at the time such surveyors and attorneys are employed."

Said act donated title to swamp and overflow lands to counties sanctions ejectment (a legal remedy) where a county as proprietary owner wishes to recover possession of swamp and overflow lands from intruders, and Section 11170, R.S. Missouri, 1929, provides:

"In any action of ejectment brought by any county to recover possession of any of the lands or islands aforesaid upon which improvements have been made,

the owner of such improvements may, if the county be successful, recover compensation therefor in the manner provided for the recovery of compensation for improvements in other actions of ejectment: Provided, such improvements were made prior to the date of the passage of this article; and provided further, that such owner shall not be required to prove that such improvements were made in good faith, nor that they were made by such owner."

The legal representative of a county is also authorized by statute to protect the county's proprietary interest in swamp and overflow land by suit to quiet title (a legal remedy), and Section 11318, R.S. Missouri, 1929, provides:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

After giving title to swamp and overflow lands to the county wherein said land be located, another Legislature by subsequent act bounded Cole and Osage Counties under provisions of R.S. Missouri, 1929, Sections 11946 and 11978. By these sections, the territorial boundary line between Cole and Osage Counties was fixed before 1865 at a point in the middle of the main channel of the Missouri River, thence down the main channel of the Osage River intersecting the main channel of the Missouri River.

The above legislative boundary separating the land in Cole County from the land in Osage County was in effect when the Missouri Constitution was adopted on November 30, 1875. Article IX, Section 1 of said Missouri Constitution provides:

"The several counties of this State, as they now exist, are hereby recognized as legal subdivisions of the State."

The Missouri Supreme Court construed the above constitutional provision determining disputed territorial boundaries of counties, where title to land was involved, in *Akers v. Stoner*, 7 S.W. (2nd) 695, 319 Mo. 1085, 1.c. 1088. The plaintiff in said suit claimed title by proprietary ownership in Ray County, Missouri, while defendants claimed title by proprietary ownership in Livingston County, Missouri. We quote from the opinion of said case to show that the nature of plaintiff's petition in the trial court was a law suit and not an equity suit, and the appellate court said:

"This land controversy grows out of a sudden shifting of the channel of the Missouri River between Ray and Lafayette counties in one night, in July, 1915. The plaintiffs, named Akers, sue at law in two counts. The first count is to quiet title under Section 1970, Revised Statutes 1919, against a number of named and unknown defendants; the second count is in ejectment against three of the same defendants."

In all of the following cases the plaintiff in the trial court asserted proprietary ownership in land supposedly located in two different Missouri counties and the issue as to which county had jurisdiction over said land for governmental purposes was finally decided pursuant to plaintiff's petitions praying the court to quiet title, and most of said petitions had a second count in ejectment; Jacobs v. Stoner, 319 Mo. 1093, 7 S.W. (2nd) 698; Randolph v. Fricke, 35 S.W. (2nd) 912, 327 Mo. 130; Randolph v. Moberly Hunting and Fishing Club, 15 S.W. (2nd) 834; Alluvial Realty Co. v. Lumber Co., 229 S.W. 757, 287 Mo. 299; Pemiscot County v. Lumber Co., 144 S.W. 857, 240 Mo. 377.

We have found no cases on appeal deciding boundaries between counties pursuant to an injunction suit.

32 Corpus Juris, Page 124, Section 161, reads in part as follows:

"A court of chancery is not the appropriate tribunal for the trial of title to land, and where the main object of a suit asking for relief by injunction is to determine the legal title to property, or to fix the boundaries of land, equity will not interfere by injunction, but will remit the parties to a court of law."

Section 722, R. S. Missouri, 1929, provides:

"Suits for the possession of real estate, or whereby the title thereto may be affected, or for the enforcement of the lien of any special tax bill thereon, shall be brought in the county where such real estate, or some part thereof, is situated."

CONCLUSION

We are of the opinion that the suit fixing county boundaries which you suggest involves the title to real estate and it is jurisdictional that it must be brought in the county where said real estate or some part thereof is situated.

November 1, 1938

We are of the further opinion that Cole County's right to exercise governmental control over this disputed land in lieu of the governmental control admittedly now exercised by Osage County depends upon Cole County's proprietary ownership of said land after asserting her title to said land as swamp and overflow land in Cole County and before the Circuit Court of Cole County.

In such disputes involving the title and possession of swamp and overflow lands, the Legislature has expressly sanctioned ejectment and suit to quiet title, both legal remedies according to *Akers v. Stoner*, supra. In our opinion, ejectment and suit to quiet title are adequate and complete legal remedies to determine the disputed boundary between Cole and Osage Counties involving swamp and overflow lands. Injunction being an equitable remedy, is not available as a remedy in your problem.

All of the cases reaching the appellate courts of Missouri which we have been able to discover, wherein county boundaries were an issue in dispute or wherein title to overflow and swamp lands was in dispute, were tried in the lower court pursuant to a petition of plaintiff alleging proprietary ownership. All of said suits were to quiet title and usually had a second count asking ejectment of intruders in possession of said land.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED By:

J.W. BUFFINGTON
(Acting) Attorney General

WOS:VAL

ANIMALS: County dog law is constitutional in that it does
DOG LAW: not violate Section 3, Article X of the Constitution.

November 17, 1938

Mr. Claude T. Wood
Prosecuting Attorney
Waynesville, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"I should like to know whether or not sections 12872 to 12874C, inclusive, pages 225 and 226 of the Laws of Missouri for 1937, violate Section 3 of Article X of the Missouri Constitution, particular reference being had to sections 12874A, 12874B and 12874C, supra. If unconstitutional, what is the status of Article 12, Chapter 88, R.S. 1929?"

Section 12872, Laws of Missouri 1937, page 225, provides that no dog shall be permitted in the state unless a tax has been paid upon it.

Section 12873, Laws of Missouri 1937, page 225, provides that the tax on each male dog or spayed female dog is one dollar (\$1.00) per year and on all other dogs shall be three dollars (\$3.00) per year.

Section 12874, Laws of Missouri 1937, page 225, provides for the issuance of a license and a certificate by the county clerk and that all moneys less the cost of license tags and other costs including a fee to the clerk shall be sent to the treasurer who shall set up what is known as "county dog

license fund" which fund shall be used only for "the purpose of compensating persons who have suffered loss or damage through injury or killing by dogs of any live stock or poultry owned by them.* * *"

Section 12874A, Laws of Missouri, 1937, page 226, provides that the owner of livestock or poultry injured or killed by dogs may, upon making a written application, a form of which is set forth in the statute, receive a portion of the license fund.

Section 12874B, Laws of Missouri 1937, page 226, provides that the county court shall each year examine such applications and pass judgment upon them.

Section 12874C, Laws of Missouri 1937, page 226, provides that the county court shall keep a record and after deciding the person is entitled to be compensated for injury or death of livestock or poultry by dogs shall draw warrants upon the fund. If there is not sufficient money in the fund then all claims shall be allowed pro rata.

We call your attention to Section 12881, R. S. Missouri 1929, which provides that the provisions of these statutes are not effective until voted by the people.

Section 3, Article X of the Constitution of Missouri, provides as follows:

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

The purpose and object of the statutes is not to impose a tax but to license dogs and regulate the manner in which they may be kept within the state. It is not a revenue measure but

is a method adopted by the Legislature of regulating the keeping of dogs and to discourage persons from keeping or harboring worthless dogs with vicious tendencies. This is valid exercise of the police power of the state. There is a marked distinction between taxation for revenue and the imposition of a license fee for the purpose of regulation in the exercise of the police power. As was said in City of Carthage vs. Phodes, 101 Mo. 175, 1. c. 178, 14 S.W. 181, 9 L.R.A. 352, 177-178:

"Taxation may be for the purpose of raising revenue, or for the purpose of regulation; where the purpose of regulation it is an exercise of the police power of the state. They are both distinct, co-existent powers in the state and either or both may be exercised through a municipal corporation. In this case, by the terms of the charter, both powers are granted to the city of Carthage as to the dogs of that city. The dog-license tax required by its ordinances is easily referable to the exercise of the police power granted. While, in a sense, dogs are property, and the power may invoke the aid of the law for their protection as property by civil action, and by statute they have been made the subject of larceny, yet, they are a base sort of property, having no market or assessable value, do not enter into the estimate of the appreciable wealth of the state, and never have been considered proper subjects of taxation for revenue. On the other hand their almost utter worthlessness in a crowded city for any purpose except to please the whim or caprice of their owners, the half savage nature and predatory disposition of so many of them, rendering them destructive of animals

of real value, and their liability to the fatal malady of hydrophobia which in so many instances has sent them abroad as messengers of death to man and beast, point them out as subjects peculiarly fit for police regulation.

"The ordinances in question being an exercise of the police power granted by the state are not obnoxious to the constitutional provision quoted, which is not a limitation upon the police power, but upon the taxing power of the state. * * * * *"

In Van Horn vs. People, 46 Mich. 183, 9 N.W. 246, a statute identical with that in Missouri was under consideration. The Court said:

"The enactment does not appear to be for revenue or to raise money by way of tax, as that expression is there made use of * * * *. It is a species of legislation which pertains to another department of power, and where the state, in pursuing its duty to accommodate as far as practicable the desire and the right to keep dogs to the more beneficial right of breeding and keeping sheep, has seen fit to apply the method marked out in this statute. The act is an exertion of the police power, and no reason is perceived for denying its validity. In consequence of the acknowledges excellence of some of their traits and their remarkable attachment to mankind, and on account, at the same time, of their liability to break through all discipline and act according to their original savage nature, and because also of their liability

to madness, it has been customary always to make dogs the subject of special and peculiar regulations."

In that case the court further said:

"As the charge laid on the owners of dogs is a pecuniary burden imposed by public authority, it partakes, no doubt, of the character of a tax, and for many purposes might be so spoken of without harm. But no accession of public revenue, either general or local, is authorized or aimed at. The end sought is different. The purpose is to prescribe a regulation under which dogs, as animals dangerous to sheep, and of far less public utility, can alone be held, and which, if carried out, will tend to discourage an undue increase of dogs, and at the same time will afford new protection against the effects of the mischief to which they are most given."

In *Hofer vs. Carson*, 203 Pac. 323 (Or.), a dog license act similar to the Missouri Act was attacked on the grounds that it contravened a constitutional provision declaring that:

"all taxes shall be levied and collected under general laws operating uniformly throughout the state,"

The Court said:

"The purpose of the act under consideration is not to impose a tax, but to license dogs and to regulate the manner in which they may be kept within the state. This is a matter entirely within the police power of the state, and is a valid exercise of that power."

November 17, 1938

In *McGlone vs. Womack*, 129 Ky. 274, 111 S.W. 688, the court held that a tax on dogs to provide funds to make good losses of sheep caused by dogs is not within the constitutional provision requiring taxes to be for public purposes nor did it violate a constitutional provision prohibiting the granting of exclusive or express public emoluments or privileges.

Moreover, as was said in *State vs. Anderson*, 114 Tenn. 564, 234 S.W. 768:

"That female dogs are charged a higher license fee than male dogs does not make the ordinance invalid."

Other jurisdictions which have declared dog license laws, proceeds of which are to go to owners of stock who have suffered loss, to be constitutional are *Cole vs. Hall*, 103 Ill. 30; *State vs. Cornnall*, 27 Ind. 120; *Holst vs. Roe*, 39 Ohio St. 340; *Stokes County vs. George*, 182 N.C. 414, 109 S.E. 77; *McQueen vs. Kittitas County*, 198 Pac. 394 (Wash.); *People ex rel. Dawley vs. Wilson*, 232 N.Y. 12, 133 N.E. 45; *State vs. Anderson*, 144 Tenn. 564, 234 S.W. 768.

The only case that we can find which has held such a law unconstitutional is *Bowen vs. Tioga County Ct.* 613, but in view of the authorities set forth above we believe that such a case is of little authority.

CONCLUSION

It is, therefore, the opinion of this Department that a license fee imposed on dogs to provide funds to make good losses of livestock or poultry injured or killed by dogs as is provided for in Article 12, chapter 88 of the Statutes of Missouri, sections 12872 to 12881, inclusive does not contravene section 3, Article X of the Constitution of Missouri which provides that all taxes must be uniform and for a public purpose and must be levied and collected by general laws because such a license fee is imposed under the police power of the state and is not a tax.

APPROVED:

Respectfully submitted

J. E. TAYLOR
(Acting) Attorney General

ARTHUR O'KEEFE
Assistant Attorney General

AO:MM

OFFICERS: County court cannot convene on Sunday,
January 1, 1939, and administer oaths of
ELECTIONS: office to newly elected officers whose terms
are to commence as of that date.

December 22, 1938

Honorable Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri



Dear Sir:

We have received your letter of December 14,
1938, which reads as follows:

"I would like to have an opinion on
the following question:

"The law provides that all officers
elected this last election shall assume
office the first of January, 1939. Since
the first falls on Sunday, the Judges of
the County Court want to know whether or
not they can administer the oaths of of-
fice on that day, or whether they should
administer them the day before or the day
after."

Section 1826, R. S. Mo. 1929, provides that county
courts are courts of record. This statute reads as follows:

"The supreme court of the state of Mis-
souri, the courts of appeals, the circuit
courts, the county courts and the probate
courts in this state shall be courts of
record, and shall keep just and faithful
records of their proceedings."

Section 1863, R. S. Mo. 1929, contained in the same
article and dealing with courts of record, provides that
no court shall transact any business on Sunday except for
certain designated purposes. This section is as follows:

"No court shall be open or transact business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury; and every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been committed to a jury; but this section shall not prevent the exercise of the jurisdiction of any magistrate, when it shall be necessary in criminal cases, to preserve the peace or arrest the offender, nor shall it prevent the issuing and service of any attachment in a case where a debtor is about fraudulently to secrete or remove his effects."

The Supreme Court of Missouri in the case of Thompson v. Sanders, 70 S. W. (2d) 1051, held that a judgment rendered on Sunday was void and of no effect. In this connection the court said, l. c. 1054:

"There is another reason why the judgment under which petitioner is imprisoned is absolutely void. It was rendered on Sunday. Our statute, section 1863, R. S. 1929 (Mo. St. Ann. sec. 1863, p. 2571), provides that no court shall transact any business on Sunday except to receive a verdict or discharge a jury."

The language of the statute that "no court shall be open or transact business on Sunday," except for certain purposes, applies with equal force to all courts, in our opinion. It is not limited by its terms to circuit courts only. Section 1863 is contained in Article 1, Chapter 9, R. S. Mo. 1929, as is Section 1826, which recites what courts are courts of record. Consequently, the statutory prohibition against courts setting or transacting any business on Sunday would apply with equal force to the Supreme Court of the State of Missouri, the courts of appeals, the circuit courts, the county courts, and the probate courts.

It is our opinion, therefore, that the terms of Section 1863 would be violated if the county court convened on Sunday, January 1, 1939, for the transaction of any business, including the administering of the oaths of office to newly elected officials who are then to assume office.

Article XIV, Section 6, of the Constitution of Missouri requires all officers under the authority of this State to take an oath of office before entering upon their duties. This section reads as follows:

"All officers, both civil and military, under the authority of this State, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

It is to be noted that the above constitutional provision requires only that officers shall take the oath "before entering on the duties of their respective offices." Nowhere in the Constitution does it provide the particular time the oath is to be subscribed. Likewise, we have found no statute which prescribes the time when the oath shall be taken. Consequently, since the only requirement relative to the oath is that the same shall be subscribed to before entering on the duties of the office, we can see nothing to prevent the oath being taken and subscribed to the day before any such officer is to assume his duties.

Likewise, we can see no objection to the taking of the oath on a day after Sunday, January 1, 1939. Article XIV, Section 5, of the Constitution of Missouri provides:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Dec. 22, 1938

The framers of the Constitution apparently had in mind that situations might often occur making it impossible for every officer-elect to "qualify" on or before the day the office is to be assumed, hence this provision that the predecessor officer should hold the office until his successor should be duly "qualified." If the oath of office should be taken on the day following January 1st, the predecessor would, of course, hold over until such time, but this does not alter the fact that the oath can be taken and subscribed to on a date subsequent to January 1st.

CONCLUSION

Our conclusion is that the county court would violate the provisions of Section 1863, R. S. Mo. 1929, if it convened on Sunday, January 1, 1939, for the transaction of any business, including the administering of the oaths of office to the newly elected officials who are authorized by law to assume office as of that date. Such acts, if then undertaken by the county court, would be void and of no effect. The oath of office can be administered either immediately before or after Sunday, January 1, 1939.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA:HR

ELECTIONS: Names of candidates on primary ballot must be alternated. Cost of such printing is matter of contract.

November 4, 1938

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Honorable Ben Zener
Presiding Judge, County Court
St. Clair County
Tiffin, Missouri



Dear Sir:

We have your request for an opinion, the pertinent part of which reads as follows:

"Will your office please render us an opinion in regard to the printing of ballots for Primary Election.

The conditions are these, in printing of ballots for late Primary, the printer charged us \$334.00 for printing ballots and more than \$700.00 for the alternating of names on ballots or .35¢ for each alternation.

Is above alternating charge allowable. Is there any section of law definitely stating price which may be paid for above work?"

Section 10267, R. S. Mo. 1929, requires that the names of candidates appearing on the primary ballots shall be alternated thereon in order that each name shall appear substantially an equal number of times at the top of the list, at the bottom and in each intermediate place. The pertinent part of the section reads as follows:

"The names of all candidates shall be

arranged under the appropriate title of the respective offices, and under the proper party designation upon the party ticket, and upon the non-partisan ticket, as the case may be; and the names of the candidates for each office shall be so alternated on the ballots used in the several election districts or precincts, that each name shall appear thereon substantially an equal number of times at the top, at the bottom, and in each intermediate place, if any, of the lists or group of names in which such candidate's name belongs, and all officers charged with the preparation and distribution of such ballots shall cause the printer's forms to be so transposed and the ballots so made up as to carry out the intent of this provision."

In order to comply with the law, it is necessary that the names of the candidates for each office be alternated on the ballots used in the several election districts and precincts in compliance with the terms of Section 10267, supra.

Section 10299, R. S. Mo. 1929, provides:

" * * * it shall be the duty of the clerk of the county court of each county to provide printed ballots for every election for public officers in which the electors or any of the electors within his county participate, and to cause to be printed in the appropriate ballot the name of every candidate whose name has been certified to or filed with him in the manner provided for in this article. * * *"

Section 10298, R. S. Mo. 1929, provides as follows:

"All ballots cast in elections for public officers within this state shall be printed and distributed at public expense, as hereinafter provided. The printing of the ballots and of the cards of instruction for the electors in each county, and the delivery of the same to the election officers, as provided in section 10305, shall be a county charge, except where the officers to be voted for are exclusively city officers, in which case such printing and delivery shall be a city charge, the payment of which shall be provided for in the same manner as the payment of other county or city expenses."

It will be observed, therefore, that the clerk of the county court is required to provide printed ballots, and the cost of the same "shall be a county charge," except in the case of exclusively city elections.

There is no statute in this state which sets the price the printer shall charge, or the county court shall pay for the printing of primary or election ballots.

CONCLUSION

The names of the candidates for each office must be alternated on the primary election ballots used in the several election districts and precincts in order that each name shall appear thereon substantially an equal number of times at the top, at the bottom, and in each intermediate place in the list of names in which the candidate's name

Hon. Ben Zener

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belongs. The officer, or officers, responsible for the preparation and distribution of the primary ballots are charged with the duty of causing the printer's forms to be so transposed and causing the ballots to be so made up as to accomplish this result. The clerk of the county court is required to provide printed ballots, and the cost is a county charge, except in the case of city elections. The cost of such printing is not set by law.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

JFA:HR